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The WADA Code: Optimal on Paper

DANIEL JOSÉ GANDERT[†]

INTRODUCTION

The story of how Russia allegedly engaged in doping during the 2014 Winter Olympic Games in Sochi, Russia reads like something out of a spy novel.¹ Usually late at night, urine samples of Russian athletes who were likely to test positive were passed through a hole in the wall at the doping control laboratory and into an operations room, which was not a part of the secured area.² An agent for the country's Federal Security Service ("FSB") dressed in sewer engineer attire would discard the sample and replace it with a clean urine sample, which was often altered with the addition of salt or water to balance inconsistencies that may have been present between the samples.³

This practice was uncovered by an independent investigation

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1. See Agence France-Presse, *A 'mouse hole' and FSB agents in disguise: The Cold War thriller of Russia's doping scandal*, THE NAT'L (July 19, 2016), <http://www.thenational.ae/sport/olympics/a-mouse-hole-and-fsb-agents-in-disguise-the-cold-war-thriller-of-russias-doping-scandal> (describing the incident as like a "thriller"). See generally Rebecca A. Ruiz et al., *Even With Confession of Cheating, World's Doping Watchdog Did Nothing*, N.Y. TIMES (June 15, 2016), https://www.nytimes.com/2016/06/16/sports/olympics/world-anti-doping-agency-russia-cheating.html?action=click&contentCollection=Olympics&module=RelatedCoverage®ion=EndOfArticle&pgtype=article&_r=0_

2. France-Presse, *supra* note 1; RICHARD H. MCLAREN, THE INDEPENDENT PERSON REPORT 14, 62 (2016) [hereinafter MCLAREN REPORT I]; Rebecca R. Ruiz et al., *Russian Doctor Explains How He Helped Beat Doping Tests at the Sochi Olympics*, N.Y. TIMES (May 13, 2016), <https://www.nytimes.com/interactive/2016/05/13/sports/russia-doping-sochi-olympics-2014.html>.

3. MCLAREN REPORT I, *supra* note 2, at 70; France-Presse, *supra* note 1.

commissioned by the World Anti-Doping Agency (“WADA”) and led by Professor Richard McLaren.⁴ In addition to bringing about questions regarding whether Russian athletes should be able to compete in the Olympics,⁵ allegations of this cover-up, as well as reports of widespread doping in other contexts, have indicated that the current anti-doping system is in serious need of repair. This is the case regardless of the fact that the current anti-doping system appears excellent on paper with comprehensive regulations that have never been fairer to athletes.⁶

The current anti-doping system in Olympic sports has tough penalties for guilty athletes, safeguards to help prevent athletes engaged in inadvertent doping offences from receiving unfair penalties, and a comprehensive list of prohibited substances to make it difficult for athletes to receive an unfair advantage.⁷ Although the Olympic system appears to be the optimal system on paper, the recent allegations of widespread doping has indicated that the system is not working as well as it could and that improvements are needed in order to keep sport clean.

This article will first describe the history of the WADA regime. It will then describe the current setup of the regime, as well as the ways that the regime transformed into one that looks ideal on paper. The article will then describe the recent Russian doping scandal, which broke out despite the current system. The article will then describe the issues with the current anti-doping system and the ways that it can be

4. See, e.g., MCLAREN REPORT I, *supra* note 2; RICHARD H. MCLAREN, THE INDEPENDENT PERSON 2ND REPORT (2016) [hereinafter MCLAREN REPORT II]. Robert H. McLaren is a professor at Western Law in Ontario, Canada. RICHARD MCLAREN, ABOUT US: WESTERN LAW, http://law.uwo.ca/about_us/our_people/faculty/richard_mclaren.html (last visited May 31, 2017).

5. See INT’L OLYMPIC COMM., DECISION OF THE IOC EXECUTIVE BOARD CONCERNING THE PARTICIPATION OF RUSSIAN ATHLETES IN THE OLYMPIC GAMES RIO 2016 (2016) [hereinafter DECISION OF THE IOC EXECUTIVE BOARD].

6. For a picture of how the WADA Code is fairer to athletes and provides stronger penalties for those with intentional doping offenses than past versions of the code see WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE (2015), [hereinafter WADA CODE], WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE (2009), and WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE (2003). Looking at the current version of the WADA Code, one can see how the regulations look great on paper.

7. *Id.* The system is superior to that of U.S. professional sports, where lax penalties allow athletes guilty of doping offences to return to the game soon enough that it can be argued that they do not provide an incentive for clean competition. Daniel Gandert & Fabian Ronisky, *American Professional Sports is a Doper’s Paradise: It’s Time We Make a Change*, 86 N.D. L. REV. 813, 815-16 (2010).

improved.

I. THE HISTORY OF WADA DOPING CONTROL

A. A Brief History of Doping and Early Regulations

Doping in sport has occurred at least as far back as the time of the ancient Greeks.⁸ It is believed by historians that Greek athletes used rubs, oils, and teas in their attempt to gain an advantage.⁹ Fast forwarding to modern times, many athletes used stimulants during the late 1800s.¹⁰ This was done openly, without an attempt for concealment, while some trainers had their own proprietary “doping recipes.”¹¹ Boxers used strychnine tablets along with cocaine and brandy mixtures.¹² Doping was also prevalent in cycling, where the first doping-attributed death was reported as occurring in 1886 when the English cyclist Arthur Linton passed away following an overdose of “tri-methyl.”¹³

In the 1930s, the psychostimulant effect of amphetamines, which were originally used as a decongestant, became realized and they were utilized by the military during World War II.¹⁴ Use of the substance spread to professional baseball following the war.¹⁵ In 1935, anabolic steroids were developed by German scientists as a treatment for hypogonadism.¹⁶ Following this, they were tested by the Nazis and possibly utilized by German soldiers.¹⁷ In the 1950s, anabolic steroids

8. *Id.*, at 816-17.

9. *Id.*

10. Charles E. Yesalis & Michael S. Bahrke, *History of Doping in Sport*, 24 INT’L SPORTS STUDIES 43, 46 (2002).

11. *Id.*

12. *Id.* It should be noted that currently cocaine is prohibited in-competition. Alcohol is only prohibited in-competition for a limited number of sports. See THE WORLD ANTI-DOPING CODE INTERNATIONAL STANDARD, PROHIBITED LIST 6, 8 (2017) [hereinafter PROHIBITED LIST].

13. Yesalis & Bahrke, *supra* note 10, at 47.

14. Irene Tracey & Rod Flower, *The Warrior in the Machine: Neuroscience Goes to War*, 15 NATURE 825, 826 (2014).

15. Patrick Hruby, *The Drugs Won: The Case for Ending the Sports War on Doping*, VICE SPORTS (Aug. 1, 2016), https://sports.vice.com/en_us/article/the-drugs-won-the-case-for-ending-the-sports-war-on-doping.

16. Eberhard Nieschlag & Susan Nieschlag, *Testosterone Deficiency: A Historical Perspective*, 16 ASIAN J. ANDROLOGY 161, 161, 168 (2014). Hypogonadism is a medical “condition in which the body does not produce enough testosterone.” Peeyush Kumar et al., *Male Hypogonadism: Symptoms and Treatment*, 1 J. ADVANCED PHARMACEUTICAL TECH. & RES., 297, 297 (2010).

17. Yesalis & Bahrke, *supra* note 10, at 48.

were utilized by weightlifters in both the U.S. and Soviet Union.¹⁸ It is likely that Soviet weightlifters used steroids in the 1952 Olympic Games in Helsinki, Finland.¹⁹ In the U.S., many credit steroid use to Dr. John Ziegler, the physician for the U.S. weightlifting team in the 1954 World Powerlifting Championships in Vienna, Austria.²⁰ Ziegler started experimenting with steroid use on U.S. weightlifters after being informed that they were used by the Soviet weightlifting team.²¹ Steroid usage spread to professional and collegiate football by the 1960s.²²

In 1960, International Olympic Committee (“IOC”) President Avery Brundage became concerned that athletes were receiving a competitive advantage from taking pep pills.²³ No coordinated action was taken at that time.²⁴ However, later that year, Danish cyclist Knut Jensen died during the 1960 Olympic Games in Rome, Italy, which was blamed on amphetamines although there were questions regarding whether he was actually using them.²⁵ This incident increased the pressure on officials to examine the dangers of doping.²⁶ This led to the IOC Medical Commission being established, which was responsible for doping prevention.²⁷ Drug testing was subsequently introduced at the 1968 Olympic Games in Mexico City, Mexico and the 1968 Winter Olympic Games in Grenoble, France.²⁸ Additionally, the IOC developed the Olympic Movement Anti-Doping Code (“OMADC”) which applied during the Olympic Games as well as to the various Olympic Movement sports, their competitions, and “pre-competition

18. Hruby, *supra* note 15.

19. Jim Thurston, *Chemical Warfare: Battling Steroids in Athletics*, 1 MARQ. SPORTS L. REV. 93, 98 (1990).

20. *Id.*; KATHRYN E. HENNE, TESTING FOR ATHLETE CITIZENSHIP: REGULATING DOPING AND SEX IN SPORT 33 (2015).

21. *Id.*

22. Hruby, *supra* note 15.

23. Henne, *supra* note 20.

24. *Id.*

25. *Id.*

26. James E. Coleman, Jr. & Joshua M. Levine, *The Burden of Proof in Endogenous Substance Cases: A Masking Agent for Junk Science*, in DOPING AND ANTI-DOPING POLICY IN SPORT: ETHICAL, LEGAL AND SOCIAL PERSPECTIVES 30 (Mike McNamee & Verner Moller eds., 2011).

27. *Id.*

28. BARRIE HOULIHAN, DYING TO WIN: DOPING IN SPORT AND THE DEVELOPMENT OF ANTI-DOPING POLICY 153 (2d Ed. 2002). Note that steroids were not initially included on the list of prohibited substances because the laboratory technology was not sophisticated enough at the time to test for their presence. Thurston, *supra* note 19, at 99. Steroids were detectable through urine tests during the 1976 Olympic Games in Montreal. *Id.*

preparation periods.”²⁹

In addition to the IOC response, various sports institutions and countries developed their own anti-doping regulations that were inconsistent with each other in terms of prohibited substances, penalties, and procedures.³⁰ Additionally, many sports institutions had their own panels for hearing doping cases and their own rules regarding appeals.³¹ This brought about a troubling environment as the institutions for different sports and countries had different penalties for positive tests and in some instances, the National Governing Body (“NGB”) of a sport would have different rules from the sport’s International Federation (“IF”).³² These inconsistencies were problematic.

First, it was difficult for athletes to determine which rules applied to them. Athletes competing in international competitions could face trouble if they learned that the regulations enforced by their IF were different from those of their NGB. While one could argue that the athlete should always take a safer course of action, it is problematic for an athlete if he or she believes that a competitor is gaining an advantage by taking a substance when the legality of the substance is questionable. There were also complaints during the time that the rules were difficult to understand.³³

The second problem was that inconsistencies between the rules of various countries potentially brought about an unfair advantage for the athletes of some countries. A country having lesser doping penalties and less frequent out-of-competition testing benefits a country’s athletes who engage in doping. As will be discussed later in Parts IV, V, and VI, this relates to some of the issues that come about with doping control being handled at a national level.

29. OLYMPIC MOVEMENT, OLYMPIC MOVEMENT ANTI-DOPING CODE 3 (1999) [hereinafter OMADC 1999].

30. Gandert & Ronisky, *supra* note 7, at 818. Note that Olympic sports were supposed to use the rules and penalties from the OMADC. *See Id.*, at 3-4.

31. Lorenzo Casini, *The Making of a ‘Lex Sportiva’ by the Court of Arbitration for Sport*, 12 GERMAN L.J. 1317, 1321-22 (2011).

32. *See generally* Daniel Gandert, Gasquet and the Career-Killing Kiss: A Precedent for No Fault or Negligence, Presentation, XXVI IASL WORLD CONGRESS 2010 PROCEEDINGS: SPORTS LAW: LEX SPORTIVA, NATIONAL SPORTS LAW, AND INTERNATIONAL SPORTS LAW 379, 382 (2010) (on file with author).

33. *See Nat’l Wheelchair Basketball Ass’n (NWBA) v. Int’l Paralympic Comm. (IPC)*, CAS 95/122 6, 8 (1996) (“Indeed, the Panel has seen ample evidence of the fact that the ICC authorities themselves had an imperfect understanding of their Rules.”).

In addition to problems from inconsistencies, there were other issues during this period. It was found that East Germany was involved in state-sponsored doping, including banned substances being involuntarily administered to children.³⁴ Skepticism came about over whether the IOC was incentivized to ensure clean competition.³⁵ However, the straw that brought about change was widespread findings of doping at the 1998 Tour de France which demonstrated that an independent agency was needed.³⁶

B. Establishment of WADA

In 1999, the IOC convened the World Conference on Doping in Sport in Lausanne, Switzerland.³⁷ The original idea at the conference was for a new anti-doping agency to be controlled by six groups: (1) the IOC, (2) IFs, (3) nations, (4) NGBs, (5) one group that includes a sponsor, and (6) perhaps a group with a pharmaceutical industry representative.³⁸ However, Barry McCaffrey from the U.S. Office of Drug Control Policy took issue with this and believed that both independence and government support were necessary for the agency to function.³⁹ This conference led to the World Anti-Doping Agency (“WADA”) being established and brought about the current setup of the agency’s governance and funding.⁴⁰ WADA was founded in 1999 and operational during the 2000 Olympic Games in Sydney, Australia.⁴¹

34. Nikki Dryden, *For Power and Glory: State-Sponsored Doping and Athletes’ Human Rights*, 13 SPORTS LAW. J. 1, 16 (2006).

35. Ryan Connolly, Note, *Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. the Protection of Rights of Accused Athletes*, 5 VA. SPORTS & ENT. L.J. 161, 165 (2006).

36. Gandert & Ronisky, *supra* note 7, at 818; Jin-Kyung Park, *Governing Doped Bodies: The World Anti-Doping Agency and the Global Culture of Surveillance*, 5 CULTURAL STUD. CRITICAL METHODOLOGIES 174, 178 (2005).

37. WORLD ANTI-DOPING AGENCY, WHO WE ARE, <https://www.wada-ama.org/en/who-we-are> (last visited May 31, 2017).

38. Charles Pelkey, *VeloNews Interview: WADA’s Dick Pound*, VELONEWS (Dec. 24, 2004, updated Jan. 20, 2010), http://www.velonews.com/2004/12/news/velonews-interview-wadas-dick-pound-2_7332.

39. Dag Vidar Hanstad et al., *The Establishment of the World Anti-Doping Agency: A Study of the Management of Organizational Change and Unplanned Outcomes*, 43 INT’L REV. FOR SOC. SPORT 227, 238 (2008); Tony Harper, *McCaffery to Call for Pound’s Removal at IOC Meeting*, THE INDEP. (Nov. 17, 1999), <http://www.independent.co.uk/sport/general/mccaffery-to-call-for-pounds-removal-at-ioc-meeting-741695.html>.

40. Park, *supra* note 36, at 178-79.

41. *Id.* at 178; Pelkey, *supra* note 38.

One of WADA's first major tasks was standardizing the anti-doping policies within the Olympic Movement.⁴² This consisted of creating the World Anti-Doping Code ("WADC"), which "is the fundamental and universal document upon which the World Anti-Doping Program in sport is based."⁴³ The WADC includes uniform penalties that must be enforced by all code signatories.⁴⁴ The code is very comprehensive, including instructions for how the code is to be implemented, how doping control is to be conducted, how testing and investigations should take place, and how results are to be analyzed and managed.⁴⁵ It also describes other parts of the anti-doping program, such as what constitutes a violation of an anti-doping rule, the burden of proof for doping offences, and how hearings are to be held.⁴⁶ It describes the importance of anti-doping education as well as the roles and responsibilities of the various actors in the Olympic Movement which will be described in the next section.⁴⁷

The first version of the WADC came out in 2003.⁴⁸ With the creation of the code, WADA took action to get it ratified by various actors in the sports world.⁴⁹ Also, in 2003 the Olympic Charter was amended to require implementation of the WADC by all members of the Olympic Movement.⁵⁰ The code went into force on January 1, 2004, with the 2004 Olympic Games in Athens, Greece being the first Olympic Games that fell under the code.⁵¹ The code has been subsequently revised twice, with the second version going into effect

42. WHO WE ARE, *supra* note 37. The Olympic Movement is "[u]nder the supreme authority and leadership of the International Olympic Committee, [and] encompasses organisations, athletes and other persons who agree to be guided by the Olympic Charter." INT'L OLYMPIC COMM., FACTSHEET: THE OLYMPIC MOVEMENT (2015). The Olympic Movement "includes the International Sports Federations (IFs), the National Olympic Committees (NOCs), the Organising Committees of the Olympic Games (OCOGs), all other recognized federations, institutions and organisations, judges/referees, coaches and other sports technicians." *Id.*

43. WADA CODE, *supra* note 6, at 11.

44. *See* WADA CODE, *supra* note 6. Note that the current code provides ranges of penalties for many offences that arbitrators can choose from, instead of specific penalties. *Id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. *See* WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE (2003) [hereinafter 2003 WADA CODE].

49. *See* WORLD ANTI-DOPING AGENCY, WHAT WE DO: THE CODE, <https://www.wada-ama.org/en/what-we-do/the-code> (last visited May 7, 2017).

50. INT'L OLYMPIC COMM., OLYMPIC CHARTER 51, 71, 74 (July 4, 2003).

51. *See* WHAT WE DO: THE CODE, *supra* note 49; R.W. Pound, *Editorial: A Symbolic Return to Athens*, 2 PLAY TRUE 1, 1 (2004).

in 2009 and the third version going into effect in 2015.⁵²

II. THE CURRENT STRUCTURE OF ANTI-DOPING INSTITUTIONS

A. *The WADA Setup*

At the World Conference on Doping in Sport held in 1999, it was determined that governments would control half of WADA while Olympic institutions would control the other half.⁵³ It was also determined that governments would have to pay half of the cost, with the other half coming from within the Olympic Movement.⁵⁴ WADA is governed by a Foundation Board consisting of thirty-eight members.⁵⁵ Half of the members represent national governments, while the other half represent the Olympic Movement.⁵⁶

Of the appointments from within the Olympic Movement, three are from IFs for Summer Olympic sports, one comes from an IF for a Winter Olympic Sport, one comes from the International Paralympic Committee, four come from IOC appointments, and the other four come from Olympic athletes.⁵⁷ The government representatives on the Foundation Board come from different regions of the world; five representatives are from Europe, three representatives are from Africa, four representatives are from Asia, two representative are from Oceania, and four representatives are from the Americas.⁵⁸ Additionally, there is a president and a vice president, each coming from the opposite sphere, with it rotating where they come from the spheres of sports organizations and national governments.⁵⁹ WADA has an Executive Committee which handles the organization's administration.⁶⁰ The twelve-member committee is also composed

52. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE (2009) [hereinafter 2009 WADA CODE]; WADA CODE, *supra* note 6.

53. Pelkey, *supra* note 38.

54. WORLD ANTI-DOPING AGENCY, WHO WE ARE: FUNDING, <https://www.wada-ama.org/en/funding> (last visited May 31, 2017).

55. See FOUNDATION BOARD, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/foundation-board> (last visited May 7, 2017).

56. *See id.*

57. *See id.*

58. *See id.*

59. WORLD ANTI-DOPING AGENCY, WHO WE ARE: GOVERNANCE, <https://www.wada-ama.org/en/governance> (last visited May 7, 2017); Liam Morgan, *Reedie Re-elected WADA President, Norwegian Sports Minister Chosen as Vice-President* (Nov. 22, 2016), <http://thesportdigest.com/2016/11/reedie-re-elected-wada-president-norwegian-sports-minister-chosen-as-vice-president/>.

60. WORLD ANTI-DOPING AGENCY, WHO WE ARE: EXECUTIVE COMMITTEE,

equally of representatives from governments and from within the Olympic Movement.⁶¹ The Executive Committee appoints WADA's Director General.⁶² WADA also has other committees, such as the Health, Medical and Research, Ethics and Education, and Finance and Administration committees.⁶³

In addition to the WADC, the WADA regime's anti-doping policies are governed by five other international standards.⁶⁴ The first standard is the *Prohibited List*, which is updated annually and describes all prohibited substances and methods.⁶⁵ The second standard is the *International Standard for Testing and Investigations* ("ISTI").⁶⁶ This document describes standards for conducting investigations and tests and how results are to be managed.⁶⁷ The third standard is the *International Standard for Therapeutic Use Exemptions* ("ISTUE").⁶⁸ This standard explains the rules for determining whether an athlete qualifies for a therapeutic use exemption ("TUE").⁶⁹ A TUE authorizes an athlete to take a medication or implement a method that falls on the *Prohibited List* for instances where illness or other medical conditions require this.⁷⁰ There are four criterion that have to be satisfied in order for an athlete to get a TUE: (1) the method or substance must be needed in order to treat a medical condition where the athlete would have a significant health impairment if he or she was not able to take the substance;⁷¹ (2) it must be unlikely that the athlete's performance would be aided by taking the substance or using the method "beyond what might be anticipated by a return to the *Athlete's* normal state of health following the treatment of the acute or chronic medical

<https://www.wada-ama.org/en/executive-committee> (last visited May 7, 2017).

61. *Id.*

62. See Nick Butler, *Olivier Niggli Appointed New Director General of World Anti-Doping Agency*, INSIDE THE GAMES (Nov. 17, 2015), <http://www.insidethegames.biz/articles/1031767/olivier-niggli-appointed-as-new-director-general-of-world-anti-doping-agency>.

63. See WORLD ANTI-DOPING AGENCY, 2017 WADA STANDING COMMITTEES (2017).

64. WORLD ANTI-DOPING AGENCY, WHAT WE DO: INTERNATIONAL STANDARDS, <https://www.wada-ama.org/en/international-standards> (last visited May 7, 2017).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. WORLD ANTI-DOPING AGENCY, THERAPEUTIC USE EXEMPTIONS, <https://www.wada-ama.org/en/what-we-do/science-medical/therapeutic-use-exemptions> (last visited May 7, 2017).

71. *Id.* at 10.

condition;⁷² and (3) the need for a TUE must not be because of the prior use of a prohibited substance or method;⁷³ The final standard is the *International Standard for the Protection of Privacy and Personal Information* (“ISPI”).⁷⁴ This describes the policies regarding the protection of data and privacy for athletes.⁷⁵

B. The Structure of Olympic Institutions

It may surprise many readers to learn that most of the work regarding doping control in the Olympic Movement is done by institutions other than WADA. For example, it is typical for out-of-competition testing to be conducted by National Anti-Doping Organizations (“NADOs”).⁷⁶ In addition to handling testing, NADOs handle results management as well as serve the prosecutorial role of charging athletes for their doping offenses.⁷⁷ The NADO for the United States is the United States Anti-Doping Agency (“USADA.”).⁷⁸ NADOs also take care of doping controls at many of the events within a country.⁷⁹ For example, at the USA Track & Field national championships, USADA tests the athletes. NADOs are required by the WADC to be independent.⁸⁰

For regions such as parts of Africa and islands in the Pacific, anti-doping resources are pooled together.⁸¹ Regional Anti-Doping Organizations (“RADOs”) ensure that their countries are compliant with the WADC.⁸² RADOs came about in 2004 to address the issue that countries with limited resources, capacities, and funding, would find it difficult to develop anti-doping programs compliant with the

72. *Id.* (emphasis in original).

73. *Id.*

74. WORLD ANTI-DOPING AGENCY, *supra* note 64..

75. *Id.*

76. *See* MEMBERS, INADO, <http://www.inado.org/members.html> (last visited May 8, 2017).

77. WORLD ANTI-DOPING AGENCY, WHO WE ARE: NATIONAL ANTI-DOPING ORGANIZATIONS (NADO), <https://www.wada-ama.org/en/who-we-are/anti-doping-community/national-anti-doping-organizations-nado> (last visited May 7, 2017); INSTITUTE OF NATIONAL ANTI-DOPING ORGANISATIONS, <http://inado.org/home.html> (last visited May 7, 2017).

78. *See* MEMBERS, INADO, *supra* note 76.

79. INSTITUTE OF NATIONAL ANTI-DOPING ORGANISATIONS, *supra* note 77.

80. WADA Code, *supra* note 6, at 109.

81. *See* WORLD ANTI-DOPING AGENCY, WHO WE ARE: REGIONAL ANTI-DOPING 8, 2017).

81. *Id.*

82. *Id.* at 51. ORGANIZATIONS (RADO), <https://www.wada-ama.org/en/who-we-are/anti-doping-community/regional-anti-doping-organizations-rado> (last visited May 8, 2017).

WADC.⁸³ There are currently fifteen RADOs.⁸⁴ In addition to their other functions, RADOs aid countries in setting up new NADOs.⁸⁵ Thus, there can be NADOs that are members of RADOs.⁸⁶

The other actors in the Olympic Movement also play a role in doping control. The institutions of the Olympic Movement fall into a pyramid structure, which is in line with the general structure of European sports institutions.⁸⁷ At the top of the pyramid sits the IOC.⁸⁸ The IOC is the “Supreme Authority of the Movement.”⁸⁹ While the organization makes many decisions ranging from which city gets to host the Olympic Games to which sports are part of the Olympic Games and which organizations are recognized as part of the Movement, directly related to doping, the IOC makes the determination regarding who can participate in the Olympic Games.⁹⁰

Under the IOC are the National Olympic Committees (“NOCs”) for countries with Olympic participation and the IFs for sports within the Olympic Movement.⁹¹ NOCs manage the Olympic Movement within their country.⁹² Examples of NOCs are the United States Olympic Committee (“USOC”) and the National Olympic Committee

83. FOCUS ON RADOS: REGIONAL ANTI-DOPING ORGANIZATIONS, 3 ISSF NEWS: BULL’S EYE THE ISF IPOD ON DOPING 50, 50 (2012).

84. *Id.* at 51.

85. *See, e.g.*, OCEANIA REGIONAL ANTI-DOPING ORGANIZATION, TO SET UP A NADO, http://www.foxsportspulse.com/assoc_page.cgi?c=2-3612-0-0-0&sID=109072 (last visited May 8, 2017).

86. *See, e.g., id.*

87. EUROPEAN COMMISSION, THE EUROPEAN MODEL OF SPORT 2-3 (1999).

88. *See* INT’L OLYMPIC COMM., THE ORGANISATION, <https://www.olympic.org/about-ioc-institution> (last visited May 9, 2017).

89. *Id.*

90. *See* INT’L OLYMPIC COMM., OLYMPIC CHARTER (Aug. 2, 2015) (describing the IOC’s role and mission in Chapter 1 and describing how the IOC has the authority to determine who is able to compete in the Olympic Games in Rule 45) [hereinafter OLYMPIC CHARTER]; DECISION OF THE IOC EXECUTIVE BOARD, *supra* note 5 (illustrating how the IOC determined what Russia was able to participate in the 2016 Olympic Games in Rio despite a recent doping scandal). Note that IOC decisions can be reviewed by the Court of Arbitration for Sport and that the IOC’s decision relating to participation has been overturned in the past. *See USOC v./IOC* (CAS 2011/0/2422) (demonstrating an instance where the IOC attempted to prevent an athlete from participating in the Olympics because of a past doping offence but CAS determined that this would not be consistent with the WADC, thus allowing the athlete to participate).

91. Daniel Gandert & Harry Epstein, *The Court’s Yellow Card for the United States Soccer Federation: A Case for Implied Antitrust Immunity*, 11 VA. SPORTS & ENT. L.J. 1, 3 (2011).

92. *See* Gandert & Epstein, *supra* note 91; OLYMPIC CHARTER, *supra* note 90, at 61-70.

and Sports Confederation of Denmark.⁹³ IFs govern their sport internationally, which includes determining rules for their sport and oversight of the sport's international competitions.⁹⁴ An example of an IF is the International Skating Union ("ISU") which serves as the IF for figure skating and speed skating.⁹⁵

National Governing Bodies ("NGBs"), which are also known as National Sports Organizations ("NSOs") for the various sports, sit under both their corresponding IF and NOC.⁹⁶ For example, USA Track & Field is the NGB for the race walking, running, and track and field disciplines within the United States.⁹⁷ It falls under both the USOC and the International Association of Athletics Federations ("IAAF").⁹⁸ Organizing Committees for the Olympic Games fall under a country's NOC as well as separately under the IOC.⁹⁹

C. The Court of Arbitration for Sport

Disputes within the Olympic Movement are resolved by the Court of Arbitration for Sport ("CAS").¹⁰⁰ This is important as it means

93. ASS'N OF NAT'L OLYMPIC COMM., NOCS DIRECTORY, <http://www.acnolympic.org/nocs/nocs-directory/> (last visited May 9, 2017).

94. Gandert & Epstein, *supra* note 91, at 3. See James A. R. Nafziger, INTERNATIONAL SPORTS LAW 21-23 (2d ed. 2004) and Lisa P. Masteralexis, Carol A. Barr, & Mary A. Hums, PRINCIPLES AND PRACTICE OF SPORT MANAGEMENT 210 (5th ed. 2015).

95. See INT'L SKATING UNION, ABOUT ISU, <http://www.isu.org/en/about-isu> (last visited May 9, 2017).

96. See generally INT'L OLYMPIC COMM., INT'L SPORTS FED'N, <https://www.olympic.org/ioc-governance-international-sports-federations> (last visited May 31, 2017).

97. USA TRACK & FIELD, ABOUT USATF, <http://www.usatf.org/About.aspx> (last visited May 9, 2017).

98. See USA TRACK & FIELD, DRUG TESTING, <http://www.usatf.org/usatf/files/23/2338762b-cec9-45c4-8611-c530e906e9ce.pdf> (last visited May 9, 2017).

99. According to the IOC, "the organization of the Olympic Games is entrusted by the International Olympic Committee to the National Olympic Committee (NOC) of the country of the host city as well as the host city itself. INT'L OLYMPIC COMM., ORGANISING COMMITTEES FOR THE OLYMPIC GAMES, <https://www.olympic.org/ioc-governance-organising-committees> (last visited May 9, 2017). The NOC forms, for that purpose, an OCOG which, from the time it is constituted, communicates directly with the IOC, from which it receives instructions." *Id.* Thus, the committee can be viewed as falling under the NOC as well as directly under the IOC since it receives direct instructions from the IOC. USA TRACK & FIELD, DRUG TESTING, <http://www.usatf.org/usatf/files/23/2338762b-cec9-45c4-8611-c530e906e9ce.pdf> (last visited May 9, 2017).

100. See Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515, 516 (2001) ("The Olympic Movement decided to create a final and binding court of arbitration for all sports related disputes, including doping cases.").

disputes can be appealed to an institution that is officially independent. The CAS has its origins in 1981, when the newly elected IOC President, Juan Antonio Samaranch, thought of the idea for a tribunal that specialized in hearing disputes related to sports.¹⁰¹ CAS will hear any case that is deemed to be related to sport as long as the parties agree to submit to its jurisdiction.¹⁰²

CAS has two divisions, the Ordinary Arbitration Division and the Appeals Arbitration Division.¹⁰³ The Ordinary Arbitration Division hears cases of first impression.¹⁰⁴ The Appeals Arbitration Division hears appeals, which could originate in the Ordinary Arbitration Division, but could also originate in other sports tribunals such as the International Tennis Federation (“ITF”) Anti-Doping Tribunal.¹⁰⁵

There is also an ad-hoc division held on-site during each Olympic Games, as well as off-site during other major sporting events.¹⁰⁶ This allows cases to be heard quickly, with only twenty-four hours often being given before a case needs to be decided and prevents the issue of cases being considered moot because they are decided after an athlete’s event. An example of such a case would be where a gymnast contesting a determination that she is ineligible to compete learns that she was eligible weeks after the Olympic Games are completed.

CAS is a private law foundation with a legal seat in Lausanne, Switzerland. As such, decisions must be “compatible with the fundamental rights and general principles recognized by the Swiss legal system” and can only be appealed to the Swiss Federal Tribunal (“SFT”).¹⁰⁷ CAS decisions are recognized by courts around the world under the New York Convention for the Enforcement of Foreign Arbitral Awards.¹⁰⁸ There are also two decentralized offices of CAS, one located in Sydney, Australia and another one located in New

101. Matthieu Reeb, *The Court of Arbitration for Sport*, TAS-CAS, <http://web.archive.org/web/20070521193655/http://www.tas-cas.org/en/histoire/frmhist.htm>].

102. *See* COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION (Jan. 1, 2017) [hereinafter CODE OF SPORTS-RELATED ARBITRATION].

103. *Id.* at 2.

104. *Id.* at 8.

105. *Id.*

106. COURT OF ARBITRATION FOR SPORT, AD HOC DIVISIONS: ARBITRATION RULES APPLICABLE TO THE CAS AD HOC DIVISION FOR THE OLYMPIC GAMES, <http://www.tas-cas.org/en/arbitration/ad-hoc-division.html> (last visited May 9, 2017).

107. CODE OF SPORTS-RELATED ARBITRATION, *supra* note 102; Claude Rouiller, *Legal Opinion About WADC* (2005), at 9, 16.

108. *Id.*

York.¹⁰⁹ Cases appealed to CAS are heard *de novo*.¹¹⁰ There has been criticism that this makes the hearing at the decentralized office like a “dress rehearsal.”¹¹¹ The 2015 WADC allows parties to agree to only have one hearing without appeals, but everyone involved has to be in agreement with this.¹¹²

Through documents such as the Olympic Charter and WADC, doping disputes in sports are required to go through CAS and its affiliated tribunals instead of through the domestic courts.¹¹³ This is one of the reasons that the current anti-doping system is optimal in theory. Athletes being able to challenge their cases in domestic courts would bring about a lot of issues. First, the courts of various countries have major differences in procedure. This would make things difficult when attorneys need to represent an athlete competing at an international competition in another country. This would also bring about licensing issues as athletes would generally need to have representation of a local attorney.

Another reason why it would be troubling for cases to use a country’s court system is the strong potential for bias. Even in cases where courts act in an unbiased manner, it is likely that the public, or at least fans of an athlete’s competitor when a home country court issues a favorable ruling for the athlete, will perceive it to be biased. This would likely be similar to the way fans are more likely to agree with a call when it benefits the home team.¹¹⁴

While courts would likely attempt to maintain an image of neutrality, it is not unforeseeable that courts might be more lenient to their own athletes if they are involved in doping cases for international competitions. Nationalism is still prevalent in sports, and courts can be

109. *Id.* The New York office is administered by the American Arbitration Association. AM. ARB. ASS’N, PRACTICE AREAS, <https://www.adr.org/Government> (last visited May 9, 2017).

110. CODE OF SPORTS-RELATED ARBITRATION, *supra* note 102, at 25.

111. Maureen A. Weston, *Simply a Dress Rehearsal? U.S. Olympic Sports Arbitration and De Novo Review at the Court of Arbitration for Sport*, 38 GA. J. INT’L & COMP. L 97, 97 (2009).

112. WADA CODE, *supra* note 6, at 59. CAS also has a mediation division, but the division does not hear doping cases. Frequently Asked Questions, Court of Arbitration for Sport, <http://www.tas-cas.org/en/general-information/frequently-asked-questions.html> (accessed Jan. 24, 2017).

113. See WADA CODE, *supra* note 6; OLYMPIC CHARTER, *supra* note 90.

114. Samuel McNerney, *Cognitive Biases in Sports: The Irrationality of Coaches, Commentators and Fans*, SCI. AM. (Sept. 22, 2011), <https://blogs.scientificamerican.com/guest-blog/cognitive-biases-in-sports-the-irrationality-of-coaches-commentators-and-fans/>.

considered institutions of a country's government. For an example of a government intentionally giving a rival sports team a difficult time, one can look to the actions of the Costa Rican government refusing to let the rival team from the U.S. receive expedited customs clearance which had the effect of causing the team to be subject to jeers from Costa Rican fans.¹¹⁵

One can imagine that a country determined to win could take much more drastic actions with its courts if it has the chance to either help its home team or hurt its competitor. Past instances of state-sponsored doping and recent allegations that governments, NGBs, and sports organizations may have been involved in doping illustrate that there is a strong potential for institutions to break rules in order to help their own athletes in doping cases. It is not unforeseeable that courts would act the same way.

Another reason why cases going to CAS helps the WADC appear to be an ideal system is that using CAS can greatly increase the speed of outcomes being determined. The courts for many countries take a long time to hear a case.¹¹⁶ For doping cases, it is in everyone's advantage to know an outcome as soon as possible. This allows athletes to start their suspension right away, both allowing the athlete to finish it earlier and preventing the athlete from engaging in other competitions in the meantime.¹¹⁷ Additionally, in court systems, it can take a lot longer for final appeals to be heard.¹¹⁸

When the CAS started hearing cases in 1984, all appointments came from within the Olympic Movement.¹¹⁹ This changed in 1992 when the equestrian athlete Elmar Gundel appealed a case to CAS challenging his federation's ruling against him in a horse doping

115. Jeff Carlisle, *Costa Rica Remembers: U.S. Gets Frosty Reception*, ESPN FC (Sept. 4, 2013), <http://www.espnfc.com/blogs/64/post/1849415/us-soccer-team-gets-frosty-reception-in-costa-rica-ahead-of-rematch>.

116. Maria Dakolias, *Court Performance Around the World: A Comparative Perspective*, 2 YALE HUM. RTS. & DEV. L.J. 87, 103-04 (1999).

117. The WADC includes provisional suspensions that athletes can serve prior to their final hearings. However, it would not be good for athletes to have to remain in a provisional suspension for a long period before a hearing. See WADA CODE, *supra* note 6, at 54.

118. For an example of how it can generally take longer for a case to go through the appeal process than for a case to be completely resolved through an arbitration, it was found that in the U.S., "district and circuit court cases required at least 21 months longer than arbitration to resolve when the case went through appeal." *Measuring the Costs of Delay in Dispute Resolution*, AMERICAN ARBITRATION ASSOCIATION, <http://go.adr.org/impactsofdelay.html> (accessed Jul. 15, 2017).

119. Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 LOY. U. CHICAGO L.J., 1203, 1208 (2005).

case.¹²⁰ When Gundel lost at CAS, he took his case to the SFT, challenging CAS's independence.¹²¹ Although the SFT ruled in CAS's favor, it raised concern of CAS's affiliation with the Olympic Movement. Thus, the International Council for Arbitration in Sport ("ICAS") was established, with the mission of ensuring the tribunal's independence.¹²²

ICAS appoints the pool of arbitrators that parties choose from to hear their case.¹²³ ICAS making the appointments instead of the IOC helps prevent a potential conflict of interest and ensures that the tribunal is independent. While three-fifths of those in the arbitrator nominations come from within the Olympic Movement, one fifth is nominated by ICAS with the intent of safeguarding athletes' interests.¹²⁴ Additionally, another fifth is nominated by ICAS specifically to remain independent.¹²⁵

Similarly, the composition of ICAS is such that the organization can be deemed independent. While twelve of the twenty ICAS members come from within the Olympic Movement, four are chosen by the other members with the interest of safeguarding the views of the athletes, and four are chosen specifically to be independent of the Olympic Movement organizations.¹²⁶

Despite this setup, a recent case challenges the independence of CAS and ICAS. For this case, the German speed skater Claudia Pechstein was found guilty of a doping violation because of her athlete biological passport.¹²⁷ She claimed that she was not involved in doping and that the biological passport reading was a result of a genetic

120. COURT OF ARBITRATION FOR SPORT, THE HISTORY OF THE CAS, <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> (last visited May 9, 2017).

121. *Id.*

122. *Id.*

123. *See id.*

124. *Id.* One fifth of the nominations come from the IOC, one fifth comes from the IFs, and one Fifth comes from the NOCs. *Id.*

125. *Id.*

126. CODE OF SPORTS-RELATED ARBITRATION, *supra* note 102, at 2-3. Four of the ICAS members come from the IFs, four come from the Association of National Olympic Committees, and four come from the IOC. *Id.*

127. Pechstein v./ Int'l Skating Union, CAS 2009/A/1912; Deutsche Eisschnelllauf Gemeinschaft e. V. v./ Int'l Skating Union, CAS 2009/A/1913. An athlete's biological passport is an individual record for professional athletes that "monitor[s] selected biological variables over time that indirectly reveal the effects of doping rather than attempting to detect doping substance or method itself." COURT OF ARBITRATION FOR SPORT, ATHLETE BIOLOGICAL PASSPORT, <https://www.wada-ama.org/en/athlete-biological-passport> (last visited May 10, 2017).

condition.¹²⁸ Pechstein lost at CAS and subsequently took her case to the SFT.¹²⁹ She lost again, leading her to go to the German Court of first impression, Landgericht München, challenging that the arbitration clause sending her case to CAS was invalid.¹³⁰ This court found “a structural imbalance” between Pechstein and the sports federations, which formed a monopoly.¹³¹ The “structural imbalance” meant Pechstein had no choice but to agree to arbitration if she wanted to continue competing in her sport.¹³² While the court decided that Pechstein’s arbitration clause was invalid, it was not willing to grant her relief since she did not raise this issue at her initial CAS hearing.¹³³ The German higher court, Oberlandesgericht München, that heard Pechstein’s appeal also determined that Pechstein’s arbitration agreement was invalid.¹³⁴ However, a higher German court, the Bundesgerichtshof, determined that the arbitration agreement could be enforced since Pechstein voluntarily accepted it as part of her contract.¹³⁵ At the time of this article going to press, the issue has yet to be completely resolved.

Regardless of the outcome of the Pechstein case, it is conceivable that this will not be the last case to challenge the current CAS setup. There has been speculation that perhaps the CAS setup, at least in some instances, might not fall precisely within the text of the New York Convention for the Enforcement of Foreign Arbitral Awards.¹³⁶ Also,

128. Pechstein, *supra* note 131, at 47.

129. See CT. OF ARB. FOR SPORT, *Statement of the Court of Arbitration For Sport (CAS) on the Decision Made by the Oberlandesgericht Munchen in the Case Between Claudia Pechstein and the International Skating Union (ISU)* (Mar. 27, 2015), http://www.tas-cas.org/fileadmin/user_upload/CAS_statement_ENGLISH.pdf.

130. Despina Mavromati, *The Legality of the Arbitration Agreements in Favour of CAS (Pechstein) Part 1*, L. IN SPORT (July 6, 2016), <http://www.lawinsport.com/articles/item/the-legality-of-the-arbitration-agreements-in-favour-of-cas-pechstein-part-1>.

131. *Id.*; Peter Bert, *Sports Arbitration: Munich Court Finds Arbitration Clause Invalid in Pechstein Case*, DISP. RESOL. IN GER. (Sept. 2, 2014), <http://www.disputeresolutiongermany.com/2014/02/sports-arbitration-munich-court-finds-arbitration-clause-invalid-in-pechstein-case/>.

132. Mavromati, *supra* note 130; Bert, *supra* note 131.

133. See Bert, *supra* note 131.

134. *Id.*

135. Rebecca Ruiz, *Sports Arbitration Court Ruling Against German Speedskater Claudia Pechstein is Upheld*, N.Y. TIMES (June 7, 2016), <http://www.nytimes.com/2016/06/08/sports/sports-arbitration-court-ruling-against-german-speedskater-claudia-pechstein-is-upheld.html>.

136. See Roger Alford (ed.), *Are CAS Arbitrations Governed by the New York Convention?*, KLUWER ARBITRATION BLOG, <http://kluwerarbitrationblog.com/2009/03/08/are-cas-arbitrations-governed-by-the-new-york-convention/>, for speculation about CAS cases not falling under the New York Convention for the Enforcement of Foreign Arbitral Awards when

it is likely that an athlete could raise similar challenges to those that were raised in Germany in other European countries. Specifically, the Pechstein case has brought about speculation that the setup may not be completely compliant with European Union regulations.¹³⁷

Any domestic court deciding to hear an athlete's case as opposed to requiring the athlete to have the case resolved in CAS could bring about an extremely chaotic situation. This would likely bring about confusion similar to what existed in the early days of the Olympic Movement, where different organizations had different tribunals that acted differently.¹³⁸ Depending upon the country and situation, it is anyone's guess whether an IF or other sports institution would listen to a domestic court.

Issues with an IF refusing to listen to a domestic court happened prior to the IAAF agreed to CAS jurisdiction.¹³⁹ In this case, the U.S. runner, Butch Reynolds, tested positive for a banned substance which brought about a two-year suspension.¹⁴⁰ Reynolds challenged the suspension, stating that his sample was assigned as H5 while the paperwork stated H6; however, the lab director claimed that he meant to mark H5 although he marked H6 twice.¹⁴¹ Reynolds initially tried to take his case to a U.S. court but was informed that he needed to first use the administrative process within the athletic system.¹⁴² Reynolds then brought his case to an arbitration proceeding using the arbitration remedy in the Amateur Sports Act of 1978 and the USOC Constitution.¹⁴³ The arbitrator for the case exonerated Reynolds, claiming that there was "clear and convincing evidence that the 'A' sample and the 'B' sample did not emanate from the same person" and

they involve amateur athletes because the convention is supposed to only apply to commercial relationships. *See generally* N.Y. ARB. CONVENTION, THE N.Y. CONVENTION, <http://www.newyorkconvention.org/> (last visited May 10, 2017).

137. *See* Lucian W. Valloni, *The Pechstein Decision – The End of Sports Jurisdiction As We Know It?*, SPORTSANDTAXATION.COM (Apr. 9, 2015), <http://www.sportsandtaxation.com/2015/04/the-pechstein-decision-the-end-of-sports-jurisdiction-as-we-know-it/>.

138. *See supra* Part II.B.

139. *See, e.g.*, Reynolds v. Int'l Amateur Athletic Fed'n, 841 F. Supp. 1444 (S.D. Ohio 1992).

140. Bill Livingston, *Olympic Sprinter Butch Reynolds Still Stands Tall*, CLEVELAND.COM (July 31, 2010), http://www.cleveland.com/livingston/index.ssf/2010/07/post_5.html.

141. *Id.*

142. Reynolds v. Int'l Amateur Athletic Fed'n, 841 F. Supp. 1444, 1448 (S.D. Ohio 1992).

143. *Id.*

that neither sample had come from Reynolds.¹⁴⁴

Neither the Athletic Congress (“TAC”), the previous name for USATF, nor the IAAF was willing to accept the decision.¹⁴⁵ Upon Reynolds’ request, TAC conducted a hearing at which the panel also ruled in Reynolds’ favor.¹⁴⁶ The IAAF refused to accept this decision and conducted another hearing where the panel found that there was “no doubt” regarding Reynolds being guilty.¹⁴⁷

Following this, Reynolds sued in a U.S. District Court.¹⁴⁸ The IAAF claimed that it was not subject to the court’s jurisdiction but the court stated that “as the IAAF acts through its member organizations, it is reasonable to subject the IAAF to jurisdiction anywhere its member organizations may be subject to suit.”¹⁴⁹ The court issued an injunction allowing Reynolds to compete.¹⁵⁰ However, TAC filed an emergency motion causing the Sixth Circuit to stay the injunction.¹⁵¹ One of the issues TAC had was known as the “contamination rule,” which could have resulted in ineligibility for all athletes who competed against Reynolds.¹⁵² The Sixth Circuit ruled against Reynolds and concluded that “we do not believe that holding the IAAF amenable to suit in an Ohio court under the facts of this case comports with ‘traditional notions of fair play or substantive justice.’”¹⁵³ Reynolds appealed and Supreme Court Justice John Paul Stevens, as Circuit Justice, ruled in Reynolds’ favor, granting a stay of the Court of

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1453. The court’s action seemed to be based upon its finding “that the IAAF’s failure to enter a timely objection to personal jurisdiction, which failure resulted in the inability of the Plaintiff to obtain the necessary discovery to establish the facts upon which he asserts the jurisdiction of this court rests, results in the waiver of the IAAF’s right to contest the personal jurisdiction of this Court.” *Id.* at 1454.

150. *Id.* at 1456.

151. David B. Mack, Note, *Reynolds v. International Amateur Athletic Federation: The Need for an Independent Tribunal in International Athletic Disputes*, 10 CONN. J. INT’L L. 653, 677 (1994-1995).

152. *Id.*

153. *Reynolds v. Int’l Amateur Athletic Fed’n*, 23 F.3d 1110 (6th Cir. 1994). The “contamination rule” “allows IAAF to discipline any athlete who competes in the same event, or meet with someone under suspension.” Michael Janofsky, *OLYMPICS; Solution Offered in Reynolds Dispute*, N.Y. TIMES (June 22, 1992), <http://www.nytimes.com/1992/06/22/sports/olympics-solution-offered-in-reynolds-dispute.html>.

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Appeals' order.¹⁵⁴
Justice Stevens was unwilling to consider the "contamination rule" and granted Reynolds' motion to allow him to compete.¹⁵⁵

Following Justice Stevens' ruling, the IAAF officials restated that even if Reynolds won the Olympic Trials, they would not let him compete at the Olympic Games in Barcelona, Spain and athletes who competed with him would also be ineligible.¹⁵⁶ This put TAC in a difficult situation where its athletes would be ineligible to compete if it obeyed the U.S. Supreme Court Justice.¹⁵⁷ NBC, who owned rights to the Olympics, and the IOC put pressure on IAAF and the IAAF backed off from enforcing the "contamination rule."¹⁵⁸ Following the Reynolds' case, the IAAF moved its headquarters to Monte Carlo, Monaco after acknowledging their vulnerability in London to lawsuits.¹⁵⁹

With the Reynolds dispute indicative of the type of problems that could come about if domestic courts interfere with CAS proceedings, it is important to look at what could be done to prevent courts from finding the mandatory CAS arbitration clause to be invalid. The best way to accomplish this would likely be to have athlete representatives on ICAS and to have part of the ICAS selection come from athletes. This way, athletes would not be able to raise the argument that the arbitration is problematic because they do not have representation in determining the pool of arbitrators.

Most likely the largest issue with this would be determining how athletes are to be represented. Athletes from different sports have different interests and athletes come from different countries around the world. As such, there is no uniform organization such as the players

154. Reynolds v. Int'l Amateur Athletic Fed'n, 112 S. Ct. 2512, 2513 (1992).

155. *Id.*; Mack, *supra* note 151, at 678.

156. Mack, *supra* note 151, at 678.

157. The IAAF acted as though the U.S. Court did not have jurisdiction. Beginning in 1948 and ending in 1993, the IAAF headquarters were located in London. Kevin Nutley, *New IAAF Home Up and Running in Monaco*, AROUND THE RINGS (May 12, 2015), http://aroundtherings.com/site/A_51299/Title_New-IAAF-Home-Up-and-Running-in-Monaco/292/Articles.

158. Mack, *supra* note 151, at 678.

159. IOC General Secretary Istvan Gyulai stated that the Reynolds case was "the most important reason" for moving to Monaco. Randy Harvey, *IAAF's Move Keeps It Step Ahead of Reynolds*, L.A. TIMES (Aug. 12, 1993), http://aroundtherings.com/site/A_51299/Title_New-IAAF-Home-Up-and-Running-in-Monaco/292/Articles. However, upon realizing that too much significance was attached to the case, he stated, "[i]f you conclude we're leaving because of Reynolds, I did not say that." *Id.*

associations for U.S. professional sports, like the National Football League Players Association for players in the National Football League, to provide uniform representation. However, Uni World Athletes has brought together athlete organizations across various sports disciplines around the world.¹⁶⁰ As such, Uni World Athletes could perhaps represent athletes in all disciplines and countries, or a new organization could be formed with the sole purpose of representing athletes at the CAS. The IOC has already moved in this direction as there are now IOC athlete members.¹⁶¹ If the IOC can do this, it seems that CAS should be able to do the same thing. While some may have an issue with this, it would make CAS appear to be even more legitimate and independent. Any increase in this perception can only help the tribunal maintain its position as the premiere arbitrator of sports disputes.

III. AN OPTIMAL SYSTEM IN THEORY

Although recent issues have shown that many changes are needed to the WADA system, at least in theory, it functions much better than the doping control systems of both U.S. professional and collegiate sports. One of the reasons that the WADA system is superior is because it falls under the auspices of an independent agency.¹⁶² When the same organization that sets policy wants to sell tickets, it has the incentive to look the other way in instances where it is beneficial for athletes to cheat. At least in theory, WADA's sole mission is prohibiting doping. Because of this, it does not have to worry about decisions that may ruin viewership interest in a sport by suspending top athletes or exposing that an athlete's strong performance was because of cheating.

One tenet that makes the WADA system strong, in theory, is that it includes a strong out-of-competition testing system. Under the "whereabouts rule," some athletes are required to log their whereabouts "so [the athlete] can be located for testing at anytime and

160. See generally UNI GLOBAL UNION, WORLD PLAYERS, <http://www.uniglobalunion.org/sectors/world-players> (last visited May 10, 2017); *Brendan Schwab Appointed New Head of UNI World Athletes*, UNI GLOBAL UNION (Aug. 8, 2015), <http://www.uniglobalunion.org/news/brendan-schwab-appointed-new-head-uni-world-athletes>.

161. See INT'L OLYMPIC COMM., ATHLETES' COMMISSION, <https://www.olympic.org/athletes-commission> (last visited May 10, 2017).

162. Gandert & Ronisky, *supra* note 7, at 818, 829,

anywhere, without advance notice.”¹⁶³ Not being where an athlete says that he or she will be can lead to a doping violation.¹⁶⁴ Unannounced testing is important as it makes it more difficult for athletes to take a prohibited substance and then flush it out of their system prior to being tested.¹⁶⁵

Under the WADC, three whereabouts violations within a rolling year is a doping violation with a penalty of a one to two-year suspension.¹⁶⁶ An athlete must receive a full two-year suspension for violations pointing to an athlete trying to get around the “whereabouts rule,” such as many last-minute whereabouts information changes.¹⁶⁷

Athletes are not always fond of this type of testing. For example, tennis player Rafael Nadal complained that “players feel they are being treated like ‘criminals.’”¹⁶⁸ Athletes do not have any say regarding this, however, because of another reason the WADA system is theoretically superior to other systems: rules are imposed unilaterally on athletes and other actors in the Olympic Movement.¹⁶⁹ It is easy to see why

163. See U.K. ANTI-DOPING, WHEREABOUTS, <http://www.ukad.org.uk/education/athletes/elite/whereabouts> (last visited May 10, 2017). Athletes can text their whereabouts and use the ADAMS system (which stands for Anti-Doping Administration & Management System) to update and store data. WORLD ANTI-DOPING AGENCY, ADAMS, <https://www.wada-ama.org/en/adams> (last visited May 10, 2017); U.S. ANTI-DOPING AGENCY, 2015 WORLD ANTI-DOPING CODE CHANGES, <http://www.usada.org/resources/2015code/#codewhereabouts> (last visited May 10, 2017).

164. WADA CODE, *supra* note 6, at 21.

165. See Jer. . . Longman, *High Schools Take on Doping With No Consensus on Strategy*, N.Y. TIMES (Nov. 27, 2008), <http://www.nytimes.com/2008/11/28/sports/28doping.html> (“[W]hen athletes know they will be tested, antidoping experts say, a screening becomes more of an I.Q. test than a drug test. Even at the high school level, athletes are sophisticated enough to know when to stop taking a cycle of steroids and how to quickly flush the drugs from their system or mask them, experts say.”).

166. 2015 WORLD ANTI-DOPING CODE CHANGES, *supra* note 163.

167. WADA CODE, *supra* note 6, at 62.

168. Stephen Wilson, *WADA Willing to Listen On Drug-Testing Complaints*, USA TODAY (Feb. 17, 2009) http://usatoday30.usatoday.com/sports/olympics/2009-02-17-4089252519_x.htm.

169. See Gandert & Ronisky, *supra* note 7, at 813, 829. The WADC applies to more than just the Olympic Movement. Many non-Olympic sports and competitions, such as chess and rock climbing have ratified the WADC. See WORLD CHESS FED’N, CHESS WADA – ANTI-DOPING POLICY, NUTRITION AND HEALTH, <https://www.fide.com/component/content/article/1-fide-news/7189-chess-wada-anti-doping-policy-nutrition-and-health.html> (last visited May 10, 2017); INT’L CLIMBING & MOUNTAINEERING FED’N, UIAA/ANTI-DOPING/CLEAN CLIMBING, <http://theuiaa.org/anti-doping/> (last visited May 10, 2017). Athletes competing in the 2003 World Ice Fishing Championship were surprised following their competition when they learned that USADA was requiring them to be drug tested. James Card, *Dope Tests in Ice Fishing? No, Beer Doesn’t Count*, N.Y. TIMES (Feb. 23, 2013), <http://www.nytimes.com/2013/02/24/sports/ice-fishermen-not-immune-to-dopings->

athletes and their representatives might dislike this element of the system. Most people would not be happy if a new procedure that they view to be intrusive was introduced to their life and they had no say over it. For professional athletes, this could be viewed in a labor perspective. In most industries, if a requirement of employment includes entering one's whereabouts for every day so that an unannounced drug test could occur at any point from early in the morning until late at night, it is expected that the employees would have an issue with this.

Nonetheless, the unilateral implementation of the rules prevents those with a major incentive to make the rules laxer from easily acting on their interests. For an illustration of why the rule being unilaterally imposed is so important, one can look to U.S. professional sports leagues.¹⁷⁰ In the U.S., drug testing is a mandatory subject of collective bargaining.¹⁷¹ As the doping rules are part of the collective bargaining agreements, the players and owners are both involved in negotiations to determine the drug rules. Both the players and the owners have an incentive to keep doping control to a minimum.¹⁷² Players engage in doping in order to better their performance.¹⁷³ Athletes performing better generally brings about an increase in revenue to the team owners.¹⁷⁴ This makes players more valuable, and thus helps players gain higher salaries.¹⁷⁵ Players that dope are motivated to avoid financial penalties related to cheating, as well as to avoid the embarrassment that results from being caught.¹⁷⁶

Unions are supposed to represent athletes as a whole. It could be argued that strong doping controls benefit clean athletes, thus athletes should be supportive of strict anti-doping measures. However, even athletes who support the concept of doping testing may not support all the measures which are needed in order to make sure that the testing is thorough. For example, Nadal has stated that he supports anti-doping

reach.html.

170. This refers to Major League Baseball ("MLB"), the National Football League ("NFL") the National Basketball Association ("NBA"), and the National Hockey League ("NHL").

171. Mark M. Rabuano, Comment, *An Examination of Drug-Testing as a Mandatory Subject of Collective Bargaining in Major League Baseball*, 4 U. PA. J. LAB. & EMP. L. 439, 446-47 (2002).

172. Gandert & Ronisky, *supra* note 7, at 834.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 834-35.

testing, “but they make us go through some unpleasant situations that I can’t agree with or support.”¹⁷⁷ Anyone who believes that these measures are too invasive can clearly look at the way Lance Armstrong and his team were previously able to thwart the anti-doping system to see why they are needed.¹⁷⁸

It is important that doping controls are unilaterally imposed not only on athletes, but also on institutions within the Olympic Movement. Just as league owners have an incentive to allow cheating, sports organizations share the same incentive to bring in an increase in revenues based upon better performance by athletes. Looking to the Lance Armstrong scandal, one can see that Union Cycliste Internationale (“UCI”) officials were alleged to be involved in hiding the doping that occurred at the Tour de France.¹⁷⁹ Similarly, NOCs have an incentive to do what they can to help the performance of their own country’s athletes. This is one reason it is important that anti-doping regulations be imposed unilaterally on both NOCs and NGBS and that at least in theory, it works best for NADOs to be separate organizations from a country’s NOC.

Some may think that it is inconsistent to argue it is beneficial that athletes do not have representation in forming the doping rules but that they should have greater representation in determining the arbitrator pool for CAS. However, CAS functions as an arbitration body. Arbitrations are supposed to be completely fair to each side and the process can be viewed as unfair if parties feel that the arbitrators are selected from a pool that is selected by the other side.¹⁸⁰ WADA has a different type of mission, which is fighting doping. While it is important for athletes to be onboard with the fight and to support the general mission, it is better that athletes are not involved in the

177. MIRI, *Interview: On Injury, Recovery, Returns and Doping Controls*, NADAL NEWS (Dec. 12, 2012), <http://www.nadalnews.com/2012/12/12/interview-on-injury-recovery-returns-and-doping-controls/>.

178. See generally William Fotheringham, *Timeline: Lance Armstrong’s Journey From Deity to Disgrace*, THE GUARDIAN (Mar. 8, 2015), <https://www.theguardian.com/sport/2015/mar/09/lance-armstrong-cycling-doping-scandal>; Travis T. Tygart, *Statement from USADA CEO Travis T. Tygart Regarding the U.S. Postal Service Pro Cycling Team Doping Conspiracy*, USADA (Oct. 10, 2012), <http://cyclinginvestigation.usada.org/>.

179. William Fotheringham, *Lance Armstrong and UCI ‘Colluded to Bypass Doping Accusations’*, THE GUARDIAN (Mar. 8, 2015), <https://www.theguardian.com/sport/2015/mar/09/lance-armstrong-uci-colluded-circ-report-cycling>.

180. This article is not saying that this is the case. However, some athletes and athlete representatives may believe that this is the case.

negotiations that take place to form the anti-doping rules because of the potential conflicts of interest that may be involved.

Along with the unilateral implementation of the WADC, WADA is given an automatic appeal for all doping cases.¹⁸¹ It is foreseeable that athlete representatives may not like this as it can seem unfair to have a favorable decision appealed by a third party. However, it should be understood that WADA is rarely a party to the initial proceedings. As athletes are often charged by their IF or NADO, WADA does not have a role in the process. WADA may be perceived as more neutral than IFs or NADOs, since WADA has no allegiance to any particular country or the athletes competing in any particular sport. Giving WADA the grounds to appeal ensures that the organization is able to contest cases where it believes that an athlete received a penalty that is lower than what is prescribed by the WADC.

Another important concept of the WADC is strict liability. This concept dates back to the earlier versions of the OMADC, as well as past anti-doping rules from other sports organizations.¹⁸² Athletes are responsible for monitoring everything that they eat or drink in order to ensure that they do not accidentally ingest something that may contain a prohibited substance.¹⁸³ Athletes whose blood or urine specimen is found to contain a prohibited substance are considered liable regardless of whether they intended to cheat.¹⁸⁴ Athletes who have medical reasons for which they need to take a substance can request a TUE, but TUEs must be approved in advance and requesting a TUE does not guarantee that it will be granted.¹⁸⁵

Some may take issue with the strict liability of the WADC and believe that the code is too harsh. Specifically, it is a significant burden to ask someone to monitor their food and beverage intake in all situations. However, if this concept was nonexistent, it is foreseeable that athletes could make up excuses for their positive tests and have their doping charges dismissed. This rule also likely causes athletes to act more cautiously than they would if the rule did not exist, thus causing fewer issues to occur.

181. WORLD ANTI-DOPING AGENCY, CASE LAW, <https://www.wada-ama.org/en/what-we-do/legal/case-law> (last visited May 10, 2017).

182. See OMADC 1999, *supra* note 29, at 3-4.

183. See, e.g., BADMINTON WORLD FED'N, ANTI-DOPING, <http://bwfcorporate.com/integrity/anti-doping/> (last visited May 10, 2017).

184. WADA CODE, *supra* note 6, at 18-20.

185. *Id.* at 31-35.

The penalties for athletes who commit doping offences are severe. The penalty for a first standard doping violation is two-years of ineligibility if the violation is deemed to be unintentional and four-years of ineligibility if it is determined to be intentional.¹⁸⁶ While some athlete representatives find this unfair, the strong penalties are an asset of the system, helping to keep cheaters out and providing strong disincentives to cheat.

For example, Alex Rodriguez, who was involved in a major doping scandal in U.S. Major League Baseball and eventually admitted to using steroids, received a suspension, after it was reduced, of 162 games, the length of one season of ineligibility.¹⁸⁷ Only one season of ineligibility for such a severe infraction sends the message that it may be worthwhile to cheat as the penalty is not that bad for one who gets caught. Athletes in leagues that have weak doping rules may find that it is worth doping at some point, even with the brief period of ineligibility for being caught, if the doping would provide a major advantage. For example, the standard penalty for a first doping offence in Major League Baseball is only eighty games of ineligibility.¹⁸⁸ This is less than one season of ineligibility even for cases where the athlete's offence is considered intentional.

While the penalties for doping offences prescribed by the WADC may appear to be harsh on their face, the 2015 version of the code provides arbitrators with a lot of discretion to reduce penalties to make them proportionate to the athlete's offence.¹⁸⁹ This was not always the case. Under the original 2003 code, there were many instances for which the penalty, as applied to an athlete's case, was too harsh. It is likely that had this article been written back in 2004, the tone would be different, stating that the WADC is too harsh and that many athletes

186. *Id.* at 60-61.

187. Wallace Matthews, *A-Rod to Miss All of 2014 Season*, ESPN (Jan. 12, 2014), http://espn.go.com/new-york/mlb/story/_/id/10278277/alex-rodriguez-suspension-reduced-162-games; Jay Weaver, *Alex Rodriguez's DEA Confession: Yes, I Used Steroids from Fake Miami Doctor*, MIAMI HERALD (Nov. 5, 2014), <http://www.miamiherald.com/sports/mlb/article3578762.html>.

188. It should be noted that this ineligibility period is without pay, so the athlete can also be considered penalized financially. *MLB Ups Length of Drug-Use Bans*, ESPN (Mar. 31, 2014), http://www.espn.com/mlb/story/_/id/10690127/major-league-baseball-union-toughen-drug-agreement-provisions; *A Timeline of MLB's Drug-Testing Rules*, FOX SPORTS (Mar. 28, 2014), <http://www.foxsports.com/mlb/story/a-timeline-of-mlbs-drug-testing-rules-032814>; Jay Jaffe, *Explaining MLB's Recent Wave of PED Bans, and What League Can Do*, SPORTS ILLUSTRATED (May 5, 2016), <http://www.si.com/mlb/2016/05/05/ped-suspensions-steroids-dee-gordon-turinabol>.

189. See WADA CODE, *supra* note 6, at 60-78.

with inadvertent doping offences are likely to get swept into the hunt for cheaters. However, changes following initial implementation of the WADC have brought about the discretion needed to make the code fair.

One example of this is the case *Puerta v. ITF*.¹⁹⁰ In this case, the tennis player Mariano Puerta accidentally drank from his wife's water cup, which contained trace amounts of efitiline, a medicine she took for menstrual pain.¹⁹¹ This was Puerta's second doping offence as he was previously suspended for taking clenbuterol following an asthma attack without previously receiving a TUE.¹⁹² Under ITF rules in place prior to ITF's ratification of the WADC, Puerta was able to have his penalty for taking clenbuterol reduced to nine months of ineligibility by establishing that it was not intentional. However, this still counted as a first offence, thus making Puerta's accidental drinking from his wife's water cup his second doping offence. The standard penalty for second offences at the time was a lifetime ban.¹⁹³

Under the code at the time of Puerta's offense and under the current WADC, if an athlete can establish that he or she is completely free from blame, the arbitrators may determine that the athlete's case falls into the category of *No Significant Fault or Negligence*.¹⁹⁴ An athlete whose case falls into this category does not receive any period of ineligibility for an offence.¹⁹⁵ Cases are required to be "exceptional" to fall into this category and as such, there are few cases that meet the burden.¹⁹⁶

Puerta's case was initially heard by the ITF Anti-Doping Tribunal which determined that it did not fall into the *No Fault or Negligence*

190. *Mariano Puerta v./ International Tennis Federation (CAS 2006/A/1025)*.

191. *Id.* at 8-9.

192. *Id.* at 15.

193. *Id.* at 15, 21.

194. WADA CODE, *supra* note 6, at 64; 2003 WADA CODE, *supra* note 48, at 29.

195. WADA CODE, *supra* note 6, at 64. Note that athletes whose case fell into this category under the 2003 WADC were treated as though their offence did not occur. The 2015 WADC does not include this provision; however, *No Fault or Negligence* offences are not counted when determining how many prior offences are in an athlete's record, so for practical purposes, both codes have the same result for this. 2003 WADA CODE, *supra* note 48, at 29.

196. An example of a case that falls into this category is *Pobyedonostev v. IIHF*, in which a hockey player received a prohibited substance while unconscious in the hospital. The athlete was admitted for emergency treatment and was unaware beforehand that he would also be receiving heart treatment. *Pobyedonostev v./ IIHF (CAS 2005/A/990)*. The WADC also gives the example of sabotage even though the athlete has exercised "due care" as an instance where an athlete's case would fall into this category. WADA CODE, *supra* note 6, at 63-64.

category, but allowed it to fall into the category of *No Significant Fault or Negligence*.¹⁹⁷ Athletes can have their case fall into this category when they are deemed to be not significantly at fault. At the time of Puerta's offence, *No Significant Fault or Negligence* allowed an athlete's penalty to be reduced to no less than half the period for which the athlete would otherwise be ineligible, with lifetime bans capable of being reduced to no less than eight-years of ineligibility.¹⁹⁸ Thus, for an athlete's first doping offence, the penalty could be reduced to one year of ineligibility. Since the penalty for a second offence was a lifetime ban, Puerta received an eight-year suspension.¹⁹⁹

Puerta subsequently appealed his suspension to CAS. The CAS panel agreed that Puerta's case did not fall into *No Fault or Negligence* since Puerta did not exercise extreme caution when he drank from his wife's water glass and that it constituted *No Significant Fault or Negligence*.²⁰⁰ However, the panel refused to give Puerta the eight-year suspension warranted by strictly following the WADC, reasoning that an eight-year suspension would function like a lifetime ban for his case as he was twenty-six years old and would likely be too old to play tennis professionally once the suspension was completed.²⁰¹ The panel determined that Puerta's case fell into a lacuna between the categories of *No Significant Fault or Negligence* and *No Fault or Negligence* and that it was to be filled using the "principle of justice and proportionality on which all systems of law, and the WADC itself, is based."²⁰² In applying this principle, the panel changed Puerta's penalty to a two-year suspension beginning the day that his specimen was collected for testing.²⁰³

197. Mariano Puerta v./ International Tennis Federation 2 (CAS 2006/A/1025).

198. *Id.* at 3.

199. *Id.*

200. *Id.* at 43.

201. *Id.* at 43.

202. *Id.* at 39.

203. *Id.* at 41, 43. As proportionality is one of the main Swiss administrative law principles and is guaranteed by the Swiss Constitution, panels could be concerned that decisions resulting in disproportionate outcomes, even when consistent with the WADC, could be overturned. During the early days of the code, it was believed by some that the code incorporated the principle of proportionality. At the time, Professor Richard McLaren wrote that the code would eliminate the doctrine being applied in the future, except for where it was already in the code. Thus, *Puerta* is important as it set precedent for the principle being applied outside of the code while the code was in effect. See Bundesverfassung [BV] [Constitution] Apr. 18, 1999, SR 101, art. 5, 36 (demonstrating the importance of proportionality in Swiss Law); Richard McLaren, *CAS Doping Jurisprudence: What Can We Learn*, 1 INT'L SPORTS L. REV. 4 (2006).

Arbitrators began applying proportionality to CAS decisions during the tribunal's early years, before the WADC.²⁰⁴ Specifically, the use of proportionality to reduce an athlete's suspension came about in the case *C. v. Federation Internationale de Nation Amateur*.²⁰⁵ In this case the arbitrators felt that a swimmer's two-year penalty was too harsh after her coach admitted to accidentally giving her a capsule which contained a prohibited substance.²⁰⁶ The panel subsequently reduced her penalty to one year of ineligibility.²⁰⁷

Changes were made to the next version of the WADC in 2009. Among them was the introduction of a chart that took into account the type of offence for each of an athlete's offences for determining the penalty for an athlete's offence.²⁰⁸ This chart meant that an athlete with two *No Significant Fault or Negligence* offences would receive a lesser penalty than an athlete with two standard offences.²⁰⁹ Additionally, the definition of a *Specified Substance* was changed. In all three versions of the WADC, *Specified Substances* are "substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents."²¹⁰ In the 2003 version of the WADC, items needed to be specifically identified as *Specified Substances* to fall into the category.²¹¹ The language of the 2009 version of the code was changed to classify all prohibited substances as *Specified Substances* unless the prohibited substances list states otherwise.²¹² Under the 2003 and 2009 versions of the code, athletes whose case falls into this category could have their penalty reduced, at an arbitrator's discretion, down to a reprimand and no period of ineligibility.²¹³ The change in the language thus had the impact of changing the default penalty for a first doping offence

204. The first case in which the proportionality principle was applied was *National Wheelchair Basketball Association v. International Paralympic Committee*; however, this case did not set any major precedents because the case did not involve an athlete's suspension. The case involved the loss of a gold medal for taking a drug which contained a prohibited substance. *Wheelchair Basketball Ass'n v. Int'l Paralympic Comm.* (CAS 95/122).

205. *C. v. Federation Internationale de Nation Amateur (FINA)* (CAS 95/141).

206. *Id.*

207. *Id.* at 8.

208. 2009 WADA CODE, *supra* note 52, at 66-67.

209. *Id.*

210. WADA CODE, *supra* note 6, at 29; 2009 WADA CODE, *supra* note 52, at 31; 2003 WADA CODE, *supra* note 48, at 27-28.

211. 2003 WADA CODE, *supra* note 48, at 27-28.

212. 2009 WADA CODE, *supra* note 52, at 53.

213. *Id.*; 2003 WADA CODE, *supra* note 48, at 27.

resulting from a prohibited substance being present in an athlete's body from two years of ineligibility to between a reprimand and two years of ineligibility at an arbitrator's discretion.

This change is important because it gave greater discretion and flexibility to arbitrators when dealing with offences resulting from inadvertent doping. Of notice is that this change did not lower the penalty that an athlete would receive for doping offences that arbitrators believed to be intentional and that doping offences were required to not be "intended to enhance sport performance."²¹⁴ Giving arbitrators this level of flexibility is important to legitimizing the anti-doping system, as it is important that intentional dopers receive lengthy sentences while inadvertent dopers do not receive the same level of penalty, which would make the rules overly harsh. This could be considered an area where proportionality was appropriated into the 2009 WADC.

Even with these changes, the 2009 WADC was not perfect. Arbitrators followed the direction to apply proportionality outside of the WADC, as illustrated *In the Matter of Richard Gasquet*.²¹⁵ In this case, the tennis player Richard Gasquet tested positive for a trace amount of a cocaine metabolite at an in-competition test at the 2009 Sony Erikson Open tennis tournament.²¹⁶ It was established that the reason for his positive test was that he had kissed a woman who had used cocaine.²¹⁷ The ITF Anti-Doping Tribunal panel that initially heard this case determined Gasquet's offence fell into the *No Significant Fault or Negligence* category, which had normally brought about one year of ineligibility.²¹⁸ However, following the direction of the Puerta case, the panel determined that it would not have been proportionate and reduced Gasquet's penalty to six months of ineligibility which he had already served.²¹⁹ This set a precedent for the

214. 2003 WADA CODE, *supra* note 48, at 27.

215. See *Int'l Tennis Fed'n v./Richard Gasquet* (CAS 2009/A/1926); *WADA v. ITF & Richard Gasquet* (CAS 2009/A/1930); *CAS Decision in the Case of Richard Gasquet*, INT'L TENNIS FED'N (Dec. 17, 2009), <http://www.itftennis.com/antidoping/news/decisions/cas-decision-in-the-case-of-richard-gasquet.aspx>.

216. The test was given after Gasquet pulled out of the tournament due to a shoulder injury. *Gasquet Cleared to Resume Playing*, ESPN (Jul. 15, 2017), <http://www.espn.com/sports/tennis/news/story?id=4329491>.

217. Sachin Nakrani, *Richard Gasquet Escapes Ban After CAS Clears Him Over Positive Cocaine Test*, THE GUARDIAN (Dec. 17, 2009), <https://www.theguardian.com/sport/2009/dec/17/richard-gasquet-cocaine-cas-ban>.

218. *CAS Decision in the Case of Richard Gasquet*, *supra* note 215.

219. *Id.*

continued use of the principle of proportionality outside of the WADC when arbitrators believe that it is warranted, even following the 2009 changes to the WADC.

WADA appealed Gasquet's case to CAS. CAS determined that as experts were needed for the panel to even understand that this form of cocaine contamination was even possible, an athlete could not be expected to be on notice for this.²²⁰ Thus, the panel determined that Gasquet's case fell into the *No Fault or Negligence* category but did not overturn the ITF Anti-Doping Tribunal case.²²¹ Because of this, it remains valid case law illustrating that even with a new version of the WADC, arbitrators can apply the principle of proportionality outside of the code when they believe it is warranted.

Unfortunately, having a uniform code did not prevent doping and many started to believe that even the two-year mandatory penalties for a first doping offence was not a large enough of a deterrent. During the 2007 IAAF World Championships in Osaka, Japan, the IOC brought about the "Osaka Rule."²²² This rule prohibited any athlete with a past doping offence and a suspension of longer than six months from participating in the next Olympic Games, whether or not the athlete had already completed the suspension.²²³ This brought about concerns about proportionality.

This rule was struck down in the case *USOC v. IOC*. For this case, a CAS panel chaired by Professor Richard McLaren determined that the IOC was mandated by the Olympic Charter to follow the WADC.²²⁴ As the WADC disallowed penalties that were greater or less than what was prescribed by the WADC, the "Osaka Rule" was determined to be invalid because it constituted an additional penalty.²²⁵

The "Osaka Rule" was then included in an early draft of the next version of the WADC, the 2015 WADC.²²⁶ As this would have made

220. *Id.*

221. *Id.*

222. See *IOC's 'Osaka Rule' Thrown Out*, UPI (Oct. 6, 2011), <http://www.upi.com/IOCs-Osaka-Rule-thrown-out/39291317899157/>; *Media Release: Arbitration USOC/IOC: The "Osaka Rule" Declared Invalid & Unenforceable by the Court of Arbitration for Sport (CAS)*, CT. ARB. FOR SPORT (Oct. 6, 2011) [hereinafter *The "Osaka Rule" Declared Invalid*].

223. *The "Osaka Rule" Declared Invalid*, *supra* note 222.

224. U.S. Olympic Comm. v. Int'l Olympic Comm. (CAS 2011/O/2422);

225. *Id.* at 19-20.

226. WORLD ANTI-DOPING AGENCY, NEWS: WADA FOUNDATION BOARD PRESENTED WITH NEW DRAFT CODE (NOV. 18, 2012), <https://www.wada-ama.org/en/media/news/2012->

the rule a part of the code, it would have become valid despite the prior case, although in certain instances, athletes could still likely raise issues related to proportionality. Following comments from IFs, the rule was taken out of the final draft and was replaced with a mandatory penalty of four years of ineligibility for an athlete's first intentional doping offence.²²⁷ This rule serves the same purpose as the "Osaka Rule" would have as it causes intentional dopers to miss the next Olympic Games. However, the time being limited to intentional offences makes the rule fair and does not provide the same lengthy penalties to inadvertent dopers. This makes the penalties of the current code optimal, as it provides lengthy penalties for those who intentionally dope and lesser penalties for those who inadvertently commit a doping offence.²²⁸

The 2015 WADC also changed the way that the *Specified Substances* category functions. Instead of automatically reducing the minimum penalty down to a reprimand, it shifts the burden of proof for determining whether a case is intentional from the athlete to the doping prosecutor.²²⁹ For doping offences that do not fall into the *Specified Substances* category, athletes have the burden of proving that their offence was unintentional.²³⁰ For offences that fall into the category, doping prosecutors must prove that the athlete acted with intent.²³¹ This is fair and understandable. It means that when an athlete is charged because of the presence of a substance that is considered more likely to be deemed unintentional, the default is that the offence is treated as being unintentional but for other substances and methods, the athlete must prove that the offence was unintentional. For athletes engaged in unintentional offences, athletes receive the same two-year penalty that they would have under past editions of the WADC, so it does not bring about any extra increase. However, an increase is brought in cases where there is intent, which hopefully answers the concerns that two years of ineligibility was not a strong enough deterrent.

One may consider it a step backwards that the 2015 WADC no longer automatically lowers the minimum penalty that arbitrators can give athletes with inadvertent offences to a reprimand with no

11/wada-foundation-board-presented-with-new-draft-code (last visited May 11, 2017).

227. *Id.*

228. *See* WADA CODE, *supra* note 6.

229. WADA CODE, *supra* note 6, at 25.

230. *Id.*

231. *Id.*

ineligibility period. However, drafters of the code have made it clear that doping using a substance that is considered a *Specified Substance* does not necessarily make the athlete's offence less severe than an offence using another substance.²³² The change in the rule is consistent with this point. This makes sense as an athlete could theoretically receive a significant advantage using a *Specified Substance* that may be just as large as what the athlete would receive from using another, non-*Specified Substance*.²³³

The 2015 WADC includes a new category for athletes whose case is considered *No Significant Fault or Negligence* and involves a contaminated product.²³⁴ This provides a major increase to the fairness of the WADC and eliminates the circumstances of many of the past cases where athletes could argue that their penalty was unfair. Under all versions of the WADC, athletes are warned about the danger of taking nutritional supplements.²³⁵ While there is no prohibition of taking these supplements, there is a possibility that they may be mislabeled and thus contain something on the *Prohibited List* or that they may be contaminated with a prohibited substance. Unfortunately, this puts athletes in a difficult situation. In the competition world where hundredths of a second matter, if one knows that one's competitor is taking a supplement that is not prohibited and believes that the competitor may be aided by taking the supplement, it is reasonable to believe that one is at a disadvantage by not taking the supplement. Yet taking the supplement puts the athlete at risk for testing positive in the future. The WADC has specifically stated that contamination of a supplement does not fall into the *No Fault or Negligence* category.²³⁶

Unfortunately, there is nothing that an athlete taking supplements can do to remain safe. For example, U.S. swimmer Jessica Hardy contacted the distributor of her supplement, Advocare, the

232. See *Significant Changes Between the 2009 Code and the 2015 Code, Version 4.0*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/sites/default/files/wadc-2015-draft-version-4.0-significant-changes-to-2009-en.pdf> (last visited May 11, 2017).

233. *Id.* Athletes can still have their suspension reduced down to a reprimand for using a *Specified Substance* if their case also falls into the *No Significant Fault or Negligence* category. *Id.* at 2.

234. *Id.*; WADA CODE, *supra* note 6, at 64 – 65.

235. WADA CODE, *supra* note 6, at 97; 2009 WADA CODE, *supra* note 52, at 98; 2003 WADA CODE, *supra* note 48, at 59.

236. WADA CODE, *supra* note 6, at 63. See Philippe Fuchs, *The Sanctioning Process for Specified Substances in the 2015 World Anti-Doping Code – A Fresh Start?*, 8 AUSTL. & N.Z. SPORTS L.J. 127 (2013).

manufacturer, athletes that had taken the supplement, and the USOC.²³⁷ While receiving no information indicating that the supplement would be unsafe, she tested positive from the supplement and missed the 2008 Olympic Games in Beijing, China.²³⁸

Under the new *Contaminated Substances* category, athletes who can show that they test positive as a result of taking a supplement through which a reasonable search on the Internet would not reveal any likelihood to cause contamination can have their suspension reduced to a reprimand if they establish that the contamination is a result of the contaminated substance and if their case falls into the *No Significant Fault or Negligence* category.²³⁹ It is difficult to imagine a case where an athlete, when exercising the utmost caution while taking a supplement, including researching the prohibited product, would not have his or her case fall into the *No Significant Fault or Negligence* category. This category removes the largest way that prior versions of the WADC might have been overly harsh to a class of athletes sanctioned for an inadvertent doping offence. As a significant number of the inadvertent doping cases involve contaminated supplements, this category will likely prevent many of these athletes from receiving penalties that are perceived as harsh and thus is a major reason that the current WADC is fairer to athletes with inadvertent doping offences than past versions of the code.

It is important to understand that under the WADC, the burden of proof standard is “to a comfortable satisfaction.”²⁴⁰ This is between the “beyond a reasonable doubt” standard of criminal law and a “balance of probability.”²⁴¹ However, in instances where an athlete rebuts a presumption, the athlete must only establish his or her argument using the “balance of probability” standard.²⁴² This lower standard is another area in which the WADC is fair to athletes.

Finally, the WADC is extremely beneficial because it applies to

237. WADA v./ Jessica Hardy & USADA 5 -6 (CAS 2009/A/1870); Fuchs, *supra* note 241, at 137-38.

238. WADA v./ Jessica Hardy & USADA 3 (CAS 2009/A/1870); Alan Abrahamson, *Jessica Hardy, AdvoCare File Suit Against Each Other*, SWIMMING WORLD (Jan. 30, 2009), <https://www.swimmingworldmagazine.com/news/jessica-hardy-advocare-file-suit-against-each-other/>.

239. WADA CODE, *supra* note 51, at 6-65.

240. *Id.* at 25.

241. *Id.*

242. *Id.*

the entire Olympic Movement.²⁴³ This means athletes cannot escape the doping rules, or suspensions, by competing for other countries, other leagues, or in other organizations. Additionally, the WADC applies across all sports disciplines. For example, it has been speculated that one reason Lance Armstrong eventually admitted to doping during his cycling career was that he hoped to compete in triathlons in the future.²⁴⁴

This uniformity only applies to the Olympic Movement and other sports organizations that have ratified the WADC. Unfortunately, this does not include U.S. professional and collegiate sports. Because they have not ratified the WADC, athletes who are suspended from sports in the WADC system are not prohibited from competing on a U.S. professional or collegiate team.²⁴⁵ Despite this, the universal enforcement of the WADC within the Olympic Movement is one of its strengths. In addition to preventing athletes from being able to move to other sports or organizations, it ensures that all sports within the Olympic Movement have the same high anti-doping standards.

To summarize, the WADC's strong penalties coupled with room for arbitrator flexibility where warranted because of an athlete's circumstances, along with the universality of the code, make it the optimal anti-doping system in theory. The comprehensive system involves many actors but provides uniform standards that all actors must follow. In the next section, this article will discuss a scandal illustrating how the system does not work as well in practice, a description of why it is not working as well in these cases, and ideas for how the system could be improved.

243. WORLD ANTI-DOPING AGENCY, WHAT WE DO: CODE SIGNATORIES, <https://www.wada-ama.org/en/code-signatories> (last visited May 11, 2017). In fact, it also applies to many non-Olympic sports as well, such as ice fishing and Australian Rules football. *Id.*

244. Liz Hichens, *Is Lance Armstrong Trying to Return to Triathlon?*, TRIATHLON, Dec. 18, 2014, http://triathlon.competitor.com/2013/01/news/is-lance-armstrong-trying-to-return-to-triathlon_69406.

245. See Matthew J. Mitten, *Athletic Governing Bodies Should Administer Drug Testing Programs*, in PERFORMANCE ENHANCING DRUGS (Louise Gerdes ed., 2008); Dionne Koller, *All U.S. Sports Need An Anti-Doping Agency*, BALTIMORE SUN (Jan. 20, 2013), <http://www.baltimoresun.com/news/opinion/bs-ed-doping-armstrong-20130120-story.html>.

IV. ALLEGATIONS OF RUSSIAN DOPING TAINT THE OLYMPICS

A. Allegations of Russian Doping Comes to Light

Despite the well-written WADC, doping allegations have continued to occur. While doping offences occurred around the world and were in the news during the last decade relating to Jamaica and Kenya,²⁴⁶ the most notable allegations were those relating to Russia. According to these allegations, over one thousand Olympic and Paralympic athletes participating in thirty sports benefitted from the Russian cheating conspiracy, which dated back to 2011.²⁴⁷

The allegations against Russia initially came about in the December 2014 German ARD television documentary “Top Secret Doping: How Russia Makes its Winners.”²⁴⁸ The documentary described how the Russian Anti-Doping Agency (“RUSADA”), coaches, athletes, NGBs, IFs, and Moscow’s WADA-accredited laboratory were involved in doping.²⁴⁹ It also alleged that the IAAF failed to follow up regarding suspicious blood test results for over 150 Russian athletes.²⁵⁰ Close in time to the ARD documentary coming out, the French newspaper *L’Equipe* reported that the Russian marathon runner Liliya Shobukhova was victimized by an extortion attempt from the All-Russia Athletics Federation (“ARAF”) to cover up a positive

²⁴⁶ See Thomas Jivanda, *Entire Jamaican Anti-Doping Board Resigns Amid Controversy Over Failed Drug Tests*, INDEPENDENT, Nov. 23, 2013, <http://www.independent.co.uk/sport/general/athletics/entire-jamaican-anti-doping-board-resigns-amid-controversy-over-failed-drug-tests-8959186.html>, *Rio Olympics 2016: Kenyan Coach ‘Posed as Athlete’ & IAAF Suspends Official*, BBC, Aug. 12, 2016, <http://www.bbc.com/sport/olympics/37053928>, and Idil Abshir, *Kenya’s Gold Medal For Corruption*, NY TIMES, Aug. 23, 2016, for a description of the doping issues relating to Jamaica and Kenya.

²⁴⁷ Rebecca R. Ruiz, *Report Shows Vast Reach of Russian Doping: 1,000 Athletes, 30 Sports*, N.Y. TIMES (Dec. 9, 2016), https://www.nytimes.com/2016/12/09/sports/russia-doping-mclaren-report.html?_r=0; *WADA Report Shows Over 1,000 Russians Involved in Organized Doping*, ESPN (Dec. 9, 2016), http://www.espn.com/olympics/story/_/id/18241269/wada-report-shows-1000-russian-athletes-involved-doping-conspiracy-four-year-period; Rachel Axon, *More Than 1000 Russian Athletes Involved in Doping, McLaren Report Says*, USA TODAY (Dec. 9, 2016), <http://www.usatoday.com/story/sports/olympics/2016/12/09/more-than-1000-russian-athletes-involved-doping-mclaren-report-says/95187710/>.

²⁴⁸ THE INDEPENDENT COMMISSION REP. #1, FINAL REP. (Nov. 9, 2015) [hereinafter INDEPENDENT COMMISSION REP. #1].

²⁴⁹ *Id.*

²⁵⁰ *Former Wada president Dick Pound to investigate Russian doping allegations*, THE GUARDIAN (Dec. 16, 2014), <https://www.theguardian.com/sport/2014/dec/16/wada-dick-pound-investigate-russia-doping>.

drug test, which was used to pay off another IAAF official.²⁵¹

According to a *New York Times* expose, Craig Reedie, the president of WADA, at first “told his fellow WADA officials to stand back and see if the global media picked up the story...but during that delay, antidoping officials spoke out, urging WADA to investigate ARD’s claims.”²⁵² Travis Tygart, the chief executive of USADA, wrote to Reedie and David Howman, the Director General of WADA at the time, claiming that WADA had the power needed to investigate Russian doping allegations and that this power needed to be used.²⁵³ According to Tygart, since multiple disciplines were involved and since a former IAAF official was involved in the allegations, it would not work for the agency to just let the IAAF deal with the allegations.²⁵⁴

A few days following Tygart’s requests, WADA created the Independent Commission (the “Commission”) to investigate Russian doping allegations.²⁵⁵ The Commission was chaired by Richard Pound, the first WADA president, with the other members being Professor Richard McLaren and Gunter Younger, the former head of the Bavarian Landeskriminalamt Cybercrime Division and WADA’s new Director of Intelligence and Investigations.²⁵⁶

The Commission’s report described a “deeply rooted culture of cheating” with the recommendation of suspending Russia from all competitions including the 2016 Olympic Games in Rio de Janeiro, Brazil.²⁵⁷ The report was critical of the IAAF, alleging bribery and corruptions at its highest levels.²⁵⁸ Additionally, it described how the French police had accused IAAF president Lamine Diack of accepting over one million euros for covering up positive drug tests.²⁵⁹

Nine days after the report was released, WADA suspended

251. Owen Gibson, *IAAF braced for hammer blow of Dick Pound report with athletics in crisis*, THE GUARDIAN (Nov. 7, 2015), <https://www.theguardian.com/sport/2015/nov/07/iaaf-dick-pound-sebastian-coe-lamine-diack>.

252. Rebecca R. Ruiz et al., *supra* note 1.

253. *Id.*

254. *Id.*

255. *Id.*

256. See INDEPENDENT COMMISSION REP. #1, *supra* note 248; WORLD ANTI-DOPING AGENCY, NEWS: WADA APPOINTS GÜNTER YOUNGER AS NEW DIRECTOR OF INTELLIGENCE & INVESTIGATIONS, <https://www.wada-ama.org/en/media/news/2016-06/wada-appoints-gunter-younger-as-new-director-of-intelligence-and-investigations> (last visited May 11, 2017).

257. INDEPENDENT COMMISSION REP. #1, *supra* note 247, at 10.

258. *Id.* at 12.

259. *Id.* at 60, 62.

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RUSADA.²⁶⁰ WADA's action was sensible since the report described RUSADA's involvement in doping; however, it left Russia without a functioning NADO. The following February, two former RUSADA officials, Vyacheslav Sinyev and Nikita Kamaev died.²⁶¹ Officials have stated that their deaths resulted from health reasons.²⁶²

The Independent Commission report did not put an end to media and public attention to allegations of Russian doping. Specifically, in March 2016, ARD produced a new documentary alleging that RUSADA would alert athletes about upcoming tests and that the institution would offer athletes prohibited substances.²⁶³ The following June, ARD produced another documentary alleging that a former Russian sports minister, Vitaly Mutko, was involved in covering up a soccer player's doping.²⁶⁴

Allegations of Russians cheating during the 2014 Winter Olympic Games in Sochi, Russia were brought to light by the American media in May 2016.²⁶⁵ An episode of *60 Minutes* featured interviews with Yuliya Stepanova, a Russian athlete, and Vitaly Stepanov,²⁶⁶ a low level employee who collected blood and urine samples for

260. Sean Ingle, *Russian Anti-Doping Agency Suspended by WADA for Non-Compliance*, THE GUARDIAN (Nov. 18, 2015), <https://www.theguardian.com/sport/2015/nov/18/russian-anti-doping-agency-suspended-wada>. This suspension led to the IAAF council voting twenty-two to one to ban Russia from competing in international track and field events. Russia's NGB for track and field, the All-Russia Athletic Federation ("ARAF"), accepted the indefinite suspension. In January of 2016, the IAAF issued lifetime bans to Valentin Balakhnichev, the former head of ARAF and Aleksey Melnikov, the former head distance running coach. *Id.*; Mitch Phillips, *Former Top Officials Get Life Bans for Doping Blackmail*, REUTERS (Jan. 7, 2016), <http://www.reuters.com/article/us-athletics-corruption-idUSKBN0UL1E120160107>

261. James Ellingworth, *Nikita Kamaev, Leading Russian Anti-Doping Official, was Planning on Writing a Book Before Sudden Death*, CBC SPORTS (Feb. 21, 2016), <http://www.cbc.ca/sports/nikita-kamaev-leading-russian-anti-doping-official-was-planning-on-writing-a-book-before-sudden-death-1.3457433>

262. *Id.*

263. Dan Palmer, *ARD to Screen Third Documentary on Doping in Russian Athletics*, INSIDE THE GAMES (Mar. 4, 2016), <http://www.insidethegames.biz/articles/1035027/ard-to-screen-third-documentary-on-doping-in-russian-athletics>.

264. Owen Gibson, *Russian Sports Minister Vitaly Mutko Implicated in Latest Doping Allegations*, THE GUARDIAN (June 7, 2016), <https://www.theguardian.com/sport/2016/jun/07/russia-sports-minister-vitaly-mutko-doping>.

265. See Armen Keteyian, *Russian Doping at Sochi Winter Olympics Exposed*, 60 MINUTES (May 8, 2016), <http://www.cbsnews.com/news/60-minutes-russian-doping-at-sochi-winter-olympics-exposed/>.

266. Yuliya and Vitaly are husband and wife. John Brant, *Marriage that Led to the Russian Track Team's Olympic Ban*, N.Y. TIMES MAG (June 22, 2016), <https://www.nytimes.com/2016/06/22/magazine/the-marriage-that-led-to-the-russian-track-teams-olympic-ban.html>.

RUSADA.²⁶⁷ According to Stepanova, she took EPO and anabolic steroids at the direction of her medical staff and coaches.²⁶⁸ Stepanova claimed she was part of a group of elite athletes who were able to take prohibited substances without having to worry about being caught.²⁶⁹ Stepanov claimed RUSADA conducted fake testing on athletes and his attempt to report corruption did not go anywhere.²⁷⁰ Stepanov reached out to WADA, sending two-hundred emails and fifty letters explaining what happened, but that WADA claimed that it did not have the power to investigate the allegations.²⁷¹ Stepanov alleged that WADA's chief investigator, Jack Robertson, told him to contact the reporter Hajo Seppelt, which resulted in the December 2014 ARD documentary.²⁷² Changes in the rules governing WADA with the introduction of the 2015 WADC in January 2015 gave the agency investigatory authority which led to the initial Independent Commission investigation.²⁷³

Close in time to the *60 Minutes* story, the *New York Times* published an article with the allegations of Dr. Grigory Rodchenkov who worked in a Russian drug testing laboratory.²⁷⁴ Dr. Rodchenkov alleged that he aided in the development of a mixture of prohibited substances with liquor that assisted many athletes, including two gold medal Russian bobsleigh athletes and fourteen members of the Russian cross-country ski team.²⁷⁵ His allegations described the story, referenced in the Introduction, of urine samples being replaced with clean samples.²⁷⁶

267. *Id.*

268. *Id.*; Keteyian, *supra* note 265.

269. Keteyian, *supra* note 265.

270. *Id.*

271. *Id.*

272. Will Hobson, *WADA Heard of Russian Doping in 2010, Didn't Investigate Until Media Reports*, WASH. POST (June 2, 2016), https://www.washingtonpost.com/sports/olympics/wada-heard-of-russian-doping-in-2010-didnt-investigate-until-media-reports/2016/06/02/9ec77acc-28e7-11e6-b989-4e5479715b54_story.html?utm_term=.58516fcb13ed.

273. *Id.*; Ruiz et al., *supra* note 1.

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

275. *Id.*

276. *Id.*

B. The McLaren Reports

WADA appointed Professor Richard McLaren to head a team investigating Dr. Rodchenkov's allegations as an Independent Person ("IP").²⁷⁷ The first IP Report, the McLaren Report I, was published on July 18, 2016, shortly before the 2016 Olympic Games in Rio de Janeiro, Brazil.²⁷⁸ This gave the IOC a brief period of time to determine whether to allow Russia to compete in the 2016 Olympic Games.²⁷⁹ The report included allegations that the analytical process at the laboratory was altered in order to change positive results from drug tests into negative results.²⁸⁰ Additionally, it described the sample swapping that took place and alleged that the Russian Ministry of Sport was involved in the sample swapping.²⁸¹

The McLaren Report I described evidence used in reaching its findings. For example, the report described a set of bottles, randomly chosen to be examined, which had marks and scratches indicative that a tool was used to open the allegedly tamper-proof cap.²⁸² Additionally, bottles were selected for urine analysis. Some of the samples included quantities of salt that were higher than what the human body would naturally produce "absent a serious life threatening medical condition."²⁸³ Further, samples that were supposed to be from the same athlete were found to have DNA from different athletes.²⁸⁴

The McLaren Report I did not include recommendations

277. WORLD ANTI-DOPING AGENCY, NEWS:WADA PUBLISHES INDEPENDENT MCLAREN INVESTIGATION REPORT PART II (Dec. 9, 2016), <https://www.wada-ama.org/en/media/news/2016-12/wada-publishes-independent-mclaren-investigation-report-part-ii> (last visited May 12, 2017).

278. *Id.*

279. *Russia Should be Banned from Rio Olympics, WADA Says*, NBC SPORTS (June 18, 2016), <http://olympics.nbcsports.com/2016/07/18/russia-doping-mclaren-report-olympics/>. The official start date of the 2016 Olympic Games in Rio de Janeiro was on August 5, 2016, so the decision had to be made by then. However, the first event occurred two days earlier on August 3, 2016. *Rio 2016 Olympics Schedule: Day-By-Day Planner, Key Highlights and Guide to the Big Events*, THE TELEGRAPH (July 27, 2016), <http://www.telegraph.co.uk/sport/2016/04/14/rio-2016-olympics-schedule-day-by-day-highlights-and-events-guid/>.

280. MCLAREN REPORT I, *supra* note 2, at 7.

281. *Id.* at 61-75.

282. *Id.* at 15, 17, 45-48, 72.

283. *Id.* at 74.

284. *Id.* at 89.

concerning whether allegations should prevent Russia from competing in the Olympic Games. McLaren described this as being a decision for others, such as the IOC.²⁸⁵ However, WADA urged the IOC to prohibit Russia from participating in the next Olympics following the report.²⁸⁶ USADA and the Canadian Centre for Ethics in Sport, the NADO for Canada, also called for the ban even prior to the publication of the report.²⁸⁷ IOC member Patrick Hickley criticized this early request, stating the “attempt to agree on an outcome before any evidence has been presented” compromised McLaren’s independence and that it was “clear that only athletes and organisations known to support a ban of the Russian Olympic team [had] been contacted.”²⁸⁸

The IOC issued its decision on July 24, 2016 against completely prohibiting Russians from competing in the Rio de Janeiro Olympic Games.²⁸⁹ Instead, the IOC set forth a number of conditions that Russian athletes needed to meet in order to compete, leading athletes and Tygart to complain about the decision, which has been referred to as a “confusing mess.”²⁹⁰ The decision was left to the IFs of the various Olympic sports.²⁹¹ It requested that IFs “carry out an individual analysis of each athlete’s anti-doping record, taking into account only reliable adequate international tests, and the specifics of the athlete’s sport and its rules, in order to ensure a level playing field.”²⁹² Additionally, it requested IFs to apply their rules regarding sanctioning

285. *Russia Should be Banned from Rio Olympics, WADA Says*, *supra* note 278.

286. WORLD ANTI-DOPING AGENCY, NEWS:WADA STATEMENT: INDEPENDENT INVESTIGATION CONFIRMS RUSSIAN STATE MANIPULATION OF THE DOPING CONTROL PROCESS, <https://www.wada-ama.org/en/media/news/2016-07/wada-statement-independent-investigation-confirms-russian-state-manipulation-of> (last visited May 12, 2017).

287. Liam Morgan, *IOC Executive Board Member Blasts USADA and CCES for Calling for Blanket Rio 2016 Ban on Russian Athletes in Leaked Letter*, INSIDE THE GAMES (July 16, 2016), <http://www.insidethegames.biz/articles/1039690/ioc-executive-board-member-blasts-usada-and-cces-for-calling-for-blanket-rio-2016-ban-in-leaked-letter-ahead-of-mclaren-report>.

288. *Id.* It should be noted that during the 2016 Olympic Games in Rio de Janeiro, Hickley was arrested by the Brazilian police for illegally scalping tickets that were meant to go to the Irish delegation. Matt Bonesteel, *Rio Police Arrest Irish IOC Member Pay Hickey Over Ties to Alleged Ticket-Scalping Scheme*, WASH. POST (Aug. 17, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/08/17/irish-ioc-member-arrested-over-ticket-selling-scheme/?utm_term=.db3273ca62f2.

289. DECISION OF THE IOC EXECUTIVE BOARD, *supra* note 5.

290. *Rio 2016: Russia Ruling a ‘Confusing Mess’, Say Athletes and US Anti-Dopers as IOC Avoids Blanket Doping Ban*, ABC NEWS AUSTL. (July 24, 2016, 8:58 PM), <http://www.abc.net.au/news/2016-07-25/us-anti-dopers-slam-ioc-decision-on-russia/7656850>.

291. DECISION OF THE IOC EXECUTIVE BOARD, *supra* note 5.

292. *Id.*

NGBs and required Russian athletes to be subjected to “a rigorous additional out-of-competition testing programme.”²⁹³

It should be understood that while the McLaren Report I implicated the Russian government and RUSADA, it did not describe anything to indicate that the Russian Olympic Committee (“ROC”) participated in the scandal.²⁹⁴ The IOC used this distinction in its decision not to completely prohibit participation in the Rio de Janeiro Olympic Games.²⁹⁵ This makes sense since the organizations are technically separate entities.

With these rules in place, the IFs for the sports of track and field and weightlifting brought about complete bans.²⁹⁶ Seven sports, including rowing and wrestling brought about partial bans.²⁹⁷ All other sports did not bring about any prohibition on Russian participation.²⁹⁸

The IOC had another requirement, which was that Russian athletes could not have any past doping offences.²⁹⁹ While this sounds fair on its face, this portion of the rule was problematic for the same reason that the “Osaka Rule” was deemed problematic. For Russian athletes, this rule had the effect of providing additional penalties beyond what was prescribed in the WADC for athletes who had already served their

293. *Id.*

294. Ruiz, *supra* note 247.

295. *Id.*

296. *Rio Olympics 2016: Which Russian Athletes Have Been Cleared to Compete?*, BBC (Aug. 6, 2016), <http://www.bbc.com/sport/olympics/36881326>. One Russian long jumper, Darya Klishina, was allowed to compete because “[t]he IAAF came up with criteria which shows that as long as an athlete has not been in the system for a long period of time and was subjected to the same rigours (of testing) that all of the other athletes were in the world relative to WADA or IAAF testing (they could compete.” Klishina met this criteria because she was based out of the IMG Academy in Florida with the Australian team. She had initially prepared to compete as an independent when it was thought that her country might be prohibited from competing, which brought about controversy in Russia. Michael Gleeson, *Rio Olympics 2016: Exempt Russian Darya Klishina Training at Australian Base*, SYDNEY MORNING HERALD (Aug. 1, 2016), <http://www.smh.com.au/sport/olympics/rio-2016/russian-darya-klishina-training-where-australians-train-ahead-of-2016-rio-olympics-20160731-gqhx0g.html>.

297. *Id.*

298. *Id.* While Russia was able to compete in the Rio Olympic Games, it was prohibited from competing in the Paralympic Games. This prohibition was appealed to CAS, but the panel determined that the International Paralympic Committee (“IPC”) did not violate any rules in making its determination. Rebecca R. Ruiz, *Russia Not Allowed to Compete in Paralympics*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/08/sports/olympics/russia-not-allowed-to-compete-in-paralympics.html>.

299. DECISION OF THE IOC EXECUTIVE BOARD, *supra* note 5.

suspension.³⁰⁰

This requirement was challenged by Russian rowers, Anastasia Karabelshikova and Ivan Podshivalov, both of which received two-year suspensions for doping offences in 2008.³⁰¹ While allowing the other parts of the IOC's decision to be enforced, the CAS determined the part prohibiting Russian athletes with past doping offences from competing to be unenforceable.³⁰² The panel also found that this requirement denied "natural justice" to the athletes.³⁰³ The panel described how the IOC decision acted to establish a rebuttable presumption of guilt for the athletes; however, the IOC decision did not include any recourse for athletes to rebut this presumption.³⁰⁴

A similar challenge came about from the Russian swimmer Yulia Efimova. In 2013, she failed to properly read the ingredients of a nutritional supplement at a GNC store in Los Angeles, California due to her poor English.³⁰⁵ Her case was found to constitute *No Significant Fault or Negligence* and her suspension was reduced from two years to sixteen months.³⁰⁶ Early in 2016, Efimova ran into another issue relating to the drug Meldonium. This substance generally treats ischemia but has been used by athletes to increase blood flow.³⁰⁷ After monitoring the substance and finding "evidence of its use by athletes with the intention of enhancing performance," Meldonium was added

300. *Background: What is the 'Osaka Rule' in Relation to Anti-Doping?*, EUROPE ONLINE MAG., http://en.europeonline-magazine.eu/backgroundwhat-is-the-osaka-rule-in-relation-to-anti-doping_474861.html.

301. Anastasia Karabelshikova and Ivan Podshivalov v. FISA and IOC (CAS OG 16/13).

302. *Id.* at 10-11.

303. *Id.*

304. *Id.*

305. Sally Jenkins, *In Vilifying Russian Swimmer Yulia Efimova, Americans are Splashing Murky Waters*, WASH. POST (Aug. 10, 2016), https://www.washingtonpost.com/sports/olympics/in-vilifying-russian-swimmer-yulia-efimova-americans-are-splashing-murky-waters/2016/08/10/0ccdba8a-5eef-11e6-8e45-477372e89d78_story.html?tid=ss_tw-amp&utm_term=.bf2c18a4fb54.

306. In the Proceeding Against Yulia Efimova, FINA Doping Panel 03/14 (May 12, 2014); Braden Keith, *Yulia Efimova Suspended for 16 Months, Stripped of Medals and World Record*, SWIM SWAM (May 13, 2014), <https://swimswam.com/yulia-efimova-suspended-16-months-stripped-medals-world-record/>.

307. The use of the substance was common among Eastern European athletes, including the tennis player Maria Sharapova. See *What is Meldonium and Why Did Maria Sharapova Take It?*, THE GUARDIAN (June 8, 2016), <https://www.theguardian.com/sport/2016/mar/08/meldonium-maria-sharapova-failed-drugs-test>.

to the *Prohibited Substances* list at the start of 2016.³⁰⁸ Following the start of the ban, WADA decided not to ban Efimova and many other athletes from competition because of the likelihood of the substance remaining in the athletes' system from when it was legal.³⁰⁹

Efimova was initially prohibited from competing in the Rio Olympic Games because of her prior doping offence. Upon taking her case to the CAS Ad Hoc Division, it was determined that this prohibition was also unenforceable, which allowed her to compete.³¹⁰ Although U.S. swimmer Lilly King spoke out about the problems of allowing Efimova to compete,³¹¹ not allowing Efimova to compete would have gone against past CAS case law and would have brought a system that was unjust to athletes in certain circumstances.

Richard McLaren published the second part of his investigation in December 2016.³¹² The new report, the McLaren Report II, included 1166 "pieces of proof," including forensic analysis of doping samples and emails, as well as a searchable archive of this evidence.³¹³ One can describe this as a more comprehensive version of the previous report, which was prepared in a quick amount of time prior to the Rio Olympic Games. According to the McLaren Report II, over one thousand Russian athletes either received benefit from or had involvement with the manipulations that took place to conceal positive tests.³¹⁴ The conspiracy was described as going back to 2011 and implicated fifteen Russian medalists from the London 2012 Olympic Games, ten of whom lost their medals after retesting took place in 2016.³¹⁵ Further, it was found that tampering occurred relating to twelve samples from

308. *Id.* (citing WADA CODE).

309. *Yulia Efimova's Meldonium Suspension Lifted by Fina*, BBC (May 22, 2016), <http://www.bbc.com/sport/swimming/36354552>.

310. *See Yulia Efimova v./ ROC, ICO & FINA* (CAS OG 16/04).

311. Martin Rogers, *Russian Yulia Efimova Breaks Down in Tears After Losing to Lilly King*, USA TODAY (Aug. 9, 2016), <http://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/08/yulia-efimova-russia-doping-breaks-down-in-tears/88438980/>.

312. McLAREN REPORT II, *supra* note 4.

313. Ruiz, *supra* note 264. *See generally* THE IP EVIDENCE DISCLOSURE PACKAGE, <https://www.ipevidencedisclosurepackage.net/> (allowing for a search of the 1166 documents used in the investigation).

314. McLAREN REPORT II, *supra* note 4, at 2, 5; Ruiz, *supra* note 246.

315. McLAREN REPORT II, *supra* note 4, at 2. The IOC has found it difficult to get athletes who have lost their medals to return them. Some athletes have described their desire to keep them while waiting for an appeal, while others have refused the requests for their medals. It is unknown what can be done if the athletes fail to comply. *See Russian Athletes Refuse to Return Stripped Olympic Medals*, NBC SPORTS (Feb. 2, 2017), <http://olympics.nbcsports.com/2017/02/02/russia-olympic-doping-medals-stripped-returned/>.

Russian Olympic medalists and six samples from Russian Paralympic medalists.³¹⁶ Other competitions were also implicated in the findings, such as the 2013 IAAF World Championships and the 2013 Universiade Games.³¹⁷

Evidence in the McLaren Report II included urine samples with “physiologically impossible salt readings” and urine with male DNA being found in female Russian hockey players.³¹⁸ The report described the Moscow laboratory as disguising performance enhancing drugs against athletes’ natural baselines over a lengthy period, and false reports being filed into the ADAMS reporting system.³¹⁹ The report described what was known as the “Sochi Duchess List,” which consisted of thirty-seven athletes that were protected by the Russian system.³²⁰ The list was named after a cocktail created by laboratory director Dr. Rodchenkov to improve athletic performance. This cocktail had a short window for detection, thus helping athletes evade doping detection.³²¹

The McLaren Report II also described how Russia’s visa issuance process was utilized to aid doping. Prior to the arrival of WADA inspectors making surprise visits to the Moscow laboratory, personnel from the Ministry of Sport let the laboratory know that inspectors were coming upon learning about their visa applications.³²² Thus, the surprise visit was no longer a surprise.

Following publication of the McLaren Report II, the IOC stated that it would reexamine all samples from Russian athletes that took part in the 2014 Sochi, Russia Olympic Games as well as those that had yet to be examined for the London 2012 Olympic Games.³²³ The sixty-three blood testing samples from the Sochi Olympic Games were retested and did not indicate any evidence of doping.³²⁴ Because there

316. MCLAREN REPORT II, *supra* note 4, at 3.

317. *Id.* at 3, 16, 26-27, 79, 81-82, 88.

318. *Id.* at 93; Ruiz, *supra* note 226.

319. MCLAREN REPORT II, *supra* note 4, at 17, 180, 183, 195, 199–201, 202.

320. Axon, *supra* note 247.

321. *Id.*; *Russian Doping: McLaren Report Says More Than 1,000 Athletes Implicated*, BBC (Dec. 9, 2016), <http://www.bbc.com/sport/38261608>.

322. Ruiz, *supra* note 247.

323. Sean Ingle, *Second McLaren Report: Five Questions on the Russian Doping Scandal*, THE GUARDIAN (Dec. 10, 2016), <https://www.theguardian.com/sport/2016/dec/10/second-mclaren-report-questions-russian-doping>.

324. *All 63 Russian Blood Samples from Sochi 2014 Were Re-analyzed as Negative – IOC*, RT (Dec. 9, 2016), <https://www.rt.com/sport/369800-russian-samples-sochi-2014-ioc/>.

was no evidence that the ROC was directly involved in this doping, the IOC decided to focus on individual athlete suspensions instead of targeting Russia as a whole.³²⁵ While McLaren's investigation found evidence of individual athletes that were alleged to be involved in cheating, he did not name them in the report and WADA does not plan to name them.³²⁶ Instead, the information was given to the IFs and it is up to them to handle the disclosure.³²⁷ In response to the McLaren Report II, the IOC appointed two new commissions: (1) the Inquiry Commission and (2) the Disciplinary Commission.³²⁸ The Inquiry Commission, which is chaired by Samuel Schmid, the former President of Switzerland, will address the "institutional conspiracy across summer and winter sports athletes."³²⁹ The Disciplinary Commission, which is chaired by IOC Member Denis Oswald, will address the doping and sample manipulation which the report claimed occurred concerning Russian athletes that took part in the Sochi 2014 Olympic Games.³³⁰

Initially, Russia did not respond positively to the McLaren Reports. Parliament member and head of the Russian Curling Federation, Dmitry Svishchev, stated:

Just what we expected. We didn't hear anything new. Unfounded accusations against us all. If you're Russian, you are demonized. However, I can't grasp what WADA wants to achieve. Either they want Russia to be excluded from the world sports family, or they want to really put things right [everywhere], Russia included. To do that, they should start with themselves.³³¹

325. See Ingle, *supra* note 328; *WADA Admits McLaren's 'Doping' Evidence Against Russian Athletes Insufficient*, RT (Feb. 25, 2017), <https://www.rt.com/sport/378572-mclaren-wada-russia-evidence-insufficient/>.

326. See MCLAREN REPORT II, *supra* note 4; *All 63 Russian Blood Samples from Sochi 2014 Were Re-analyzed as Negative*, *supra* note 324.

327. *All 63 Russian Blood Samples from Sochi 2014 Were Re-analyzed as Negative*, *supra* note 323; *McLaren Report Claims 1,000 Russian Athletes Benefited From 'Doping Conspiracy,' Gives No Names*, RT (Dec. 9, 2016), <https://www.rt.com/sport/369761-mclaren-russia-doping-report/>.

328. *Statement of the IOC Regarding the "Independent Person" Report*, INT'L OLYMPIC COMM. (Dec. 9, 2016), <https://www.olympic.org/news/statement-of-the-ioc-regarding-the-independent-person-report>; Ruiz, *supra* note 246.

329. *Statement of the IOC Regarding the "Independent Person" Report*, *supra* note 328.

330. *Id.*

331. *McLaren Report Claims 1,000 Russian Athletes Benefited From 'Doping*

Further, the Deputy Speaker of the Russian Parliament, Igor Lebedev, called the reports “another torrent of lies, disinformation, rumours, and fables.”³³² A Russian investigations committee was established which questioned sixty athletes as well as senior officials from RUSADA and the country’s sports ministry.³³³ Vitaly Smirnov, who was hired by Russian President Vladimir Putin to fix the country’s anti-doping system, was reported as stating that the individuals who were implicated in the McLaren Reports were dismissed as a result of it.³³⁴

Statements made by Russian officials later in December 2016 were initially interpreted as Russia no longer disputing the doping allegations. Smirnov was reported as stating that he believed his country had made many mistakes.³³⁵ The acting director for RUSADA, Anna Antseliovich, was reported in the *New York Times* as stating that “[i]t was an institutional conspiracy,” but also stated that there was no involvement from top government officials.³³⁶ It was speculated that the motivation for the admission might have been a desire to appease administrators who found Russia’s accepting the report’s findings necessary to recertify the country to conduct drug testing and host future Olympic competitions.³³⁷

However, shortly afterward, it appears that Russia went in the direction of denying the offences. For example, Kremlin spokesman Dmitry Peskov stated that “we are not inclined to consider this information as first hand” and that “the accuracy of these words need to be checked.”³³⁸ RUSADA stated that as reported, Antseliovich’s words were “distorted” as well as “taken out of context.”³³⁹ Further,

Conspiracy, *supra* note 327 (quoting Dmitry Svishchev).

332. *Russian Doping: McLaren Report Says More Than 1,000 Athletes Implicated*, *supra* note 320.

333. *Id.*

334. Rebecca R. Ruiz, *Russians No Longer Dispute Olympic Doping Operation*, N.Y. TIMES (Dec. 27, 2016), https://www.nytimes.com/2016/12/27/sports/olympics/russia-doping.html?_r=0.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*; Tom Lutz, *Russian Official Admits to ‘Institutional Conspiracy’ of Doping Olympic Athletes*, THE GUARDIAN (Dec. 28, 2016), <https://www.theguardian.com/sport/2016/dec/27/russian-officials-admit-athletes-doping-olympics>.

339. *Russia’s Anti-Doping Body Says Did Not Admit to Sports Dope Conspiracy*, REUTERS (Dec. 28, 2016), <http://www.reuters.com/article/us-doping-russia-idUSKBN14H0KW>. The

President Putin stated that while the country had some problems with doping, there was not a system of state-sponsored doping.³⁴⁰ Other statements by Russian officials seem to fall into the line of stating that everyone else is doping and that they should be caught as well. For example, ROC attorney Victor Berezov was reported as stating “[i]t’s lucky that the WADA had Rodchenkov...[m]aybe in China, London and everywhere—maybe the same thing could happen. Because the system is broken.”³⁴¹

C. The Fancy Bears Incident and TUEs

Smirnov further implied other countries were doping specifically referencing the “Fancy Bears” incident. This “Fancy Bears” incident occurred on September 13, 2016, when a group of Russian hackers known as “The Fancy Bears” hacked the WADA database by phishing IOC emails.³⁴² Private information of tennis player Serena Williams, gymnast Simone Biles, and sixty-four other athletes was released describing the athletes’ TUEs.³⁴³ For example, the leak described how Biles took a prohibited medicine for her ADHD condition.³⁴⁴ According to “The Fancy Bears,” this system brings about “licenses for doping.”³⁴⁵

With this framing, there was an implication that American tennis player Serena Williams, who received a TUE for a prohibited substance, was just as culpable as Russian tennis player Maria

writer of the *New York Times* article, Rebecca Ruiz, defended her article tweeting that “Russian officials told me they are no longer disputing the existence of doping schemes, only that those were state-sponsored.” Additionally, she stated that she asked Smirnov regarding whether this was correct and that he subsequently said “yes.” Nonetheless, regardless of what Ruiz was told when she wrote her article, it appears that this is not the official Russian perspective. Rebecca R. Ruiz (@RebeccaRuiz), TWITTER (Dec 28, 2016, 7:26 AM), <https://twitter.com/RebeccaRuiz/status/814130450524471296>.

340. *Russia’s Anti-Doping Body Says Did Not Admit to Sports Dope Conspiracy*, *supra* note 339.

341. Ruiz, *Russians No Longer Dispute Olympic Doping Operation*, *supra* note 334. This statement should not be interpreted as meaning that Berezov admitted to the doping, but rather, that he implied belief that others are engaged in the practice who are not getting caught for it.

342. Thomas Fox-Brewster, *Venus and Serena Williams’ Private Info Leaked in World Doping Agency Hack*, FORBES (Sept. 13, 2016), <https://www.forbes.com/sites/thomasbrewster/2016/09/13/fancy-bear-hackers-anti-doping-agency-breach/#6cee7539dd73>; H.G., *A Doper’s Dupe? How Athletes Can Use Medical Exemptions to Beat Drug Testers*, THE ECONOMIST: GAME THEORY (Sept. 19, 2016), <http://www.economist.com/blogs/gametheory/2016/09/doper-s-dupe>.

343. Fox-Brewster, *supra* note 342.

344. H.G., *supra* note 342.

345. *Id.*

Sharapova, who was suspended for taking the substance meladonium without a TUE.³⁴⁶ From this, one can see the argument that athletes taking a TUE are engaged in doping, but just that they have permission to do so. Additionally, this fits the Russian argument that everyone else is engaged in doping, but it is unfair that only Russia is getting in trouble.

A more recent leak, which was announced by the Russian news agency *Sputnik* in February 2017, described swimmer Michael Phelps taking a medicine that was banned for horses.³⁴⁷ It would not be surprising if the debate regarding whether TUEs provide some athletes with an unfair advantage continues and perhaps is even debated prior to the publication of the next version of the WADC. While it is important that athletes get the medicines they need, it is easy to understand the viewpoints of critics of the system. Indeed, Richard McLaren has stated that a review of the TUE system may be needed and that it is “open to abuse” while Sebastian Coe, the head of the IAAF, stated that TUEs can be exploited, even while he defended the practice.³⁴⁸

According to another “Fancy Bears” leak that was revealed by Russian news agency *RT*, following release of the McLaren Report II, the IOC wrote to McLaren requesting he describe the direct links between Russian sport authority members and FSB officers named in the report and the doping scandal.³⁴⁹ Thus, it appears that the IOC may be interested in more information, but it can only be speculated what the motive is. It is likely that the IOC just needed additional evidence in order to act. Further, the IOC sent a letter to presidents of IFs and NOCs, as well as all IOC members, describing how it is taking “firm action” in response to the McLaren Reports findings.³⁵⁰

346. *Id.*

347. *Fancy Bear Revelations: Michael Phelps Used Meds Banned for Horses*, SPUTNIK (Feb. 14, 2017), <https://sputniknews.com/sport/201702141050683066-usada-declaration-medication/>.

348. *TUE System can be Abused by Athletes – Dr. Richard McLaren*, BBC (Sept. 16, 2016), <http://www.bbc.com/sport/37382825>; *Lord Sebastian Coe: Therapeutic Use Exemptions ‘Good System’*, BBC (Sept. 18, 2016), <http://www.bbc.com/sport/athletics/37400986>.

349. *Fresh ‘Fancy Bears’ Hacks Show McLaren Report Lacked Evidence, Prompted IOC Questions*, RT (Feb. 3, 2017), <https://www.rt.com/news/376153-doping-mclaren-fancy-fancy/>.

350. LETTER FROM CHRISTOPHE DE KEPPEL, INT’L OLYMPIC COMM. (Feb. 25, 2017), <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/News/2017/02/2017->

Meanwhile, WADA's legal team has admitted that the McLaren Reports included some discrepancies, such as misattribution of athlete codes to the wrong athlete in the wrong sport.³⁵¹ They described these as "minor logistical discrepancies" and typos that were resolved quickly upon discovery.³⁵² The agency stated that it retained complete confidence in the findings of the report.³⁵³

V. DISAGREEMENT WITHIN THE OLYMPIC MOVEMENT

The first McLaren Report brought about a lot of discussion within the Olympic Movement about how things could be improved. It also brought about a discussion of who to blame. During the 2016 IOC General Assembly, IOC president Thomas Bach stated his belief that WADA had not acted early enough to investigate the alleged Russian doping.³⁵⁴ This, he claimed, created a chaotic atmosphere, and he was concerned about this overshadowing the Olympic Games which were about to start.³⁵⁵ Bach attempted to shift the blame to WADA, stating "[i]t is not the IOC that is responsible for the accreditation and supervision of anti-doping laboratories."³⁵⁶ Bach also held an informal vote of the IOC membership, with only one member voting against his position.³⁵⁷

Regarding the IOC's decision about Russian participation in the 2016 Olympic Games, Richard Pound, the first WADA president and former IOC board member, said that the IOC was attempting to deflect the blame by passing it onto WADA.³⁵⁸ For instance, the chaos

02-24-IOC-Letter-On-the-Current-Situation-of-Anti-Doping-System-Reforms-English.pdf.

351. Ben Rumsby, *McLaren Report Into Russian State-Sponsored Doping Contains 'Discrepancies', Admits WADA*, THE TELEGRAPH (Feb. 3, 2017), <http://www.telegraph.co.uk/olympics/2017/02/03/mclaren-report-russian-state-sponsored-doping-contains-discrepancies/>.

352. *Id.*

353. *Id.*

354. Dave Sheinin, *Olympic Blame Games: IOC Pins Russian Doping Scandal Mess on WADA*, WASH. POST (Aug. 2, 2016), https://www.washingtonpost.com/sports/olympics/olympic-blame-games-ioc-pins-russian-doping-scandal-mess-on-wada/2016/08/02/55083a82-58f0-11e6-831d-0324760ca856_story.html?utm_term=.d8d7e4cde48e.

355. *Id.*

356. *Id.*

357. *Id.*

358. Rebecca R. Ruiz, *Rare Show of Discord Between I.O.C. and World Anti-Doping Agency Over Russian Scandal*, N.Y. TIMES (Aug. 1, 2016), <https://www.nytimes.com/2016/08/02/sports/olympics/rare-show-of-discord-between-ioc->

concerning Russian athletes' participation in the 2016 Olympic Games "could have easily been avoided if the IOC had followed WADA's recommendation to bar Russia."³⁵⁹ WADA also criticized an IOC decision to prevent Russian athlete Yuliya Stepanova, mentioned earlier in this article as one of the people to expose the allegations of Russian doping, from competing in the Rio Olympic Games, stating that it was bad for whistleblowers.³⁶⁰

Stepanova had served a two-year suspension for abnormalities in her blood passport.³⁶¹ She had hoped to compete under a neutral flag, but the IOC denied her opportunity to do so.³⁶² The IOC Ethics Commission praised Stepanova for her actions against doping; however, they looked at the "timing of her whistleblowing, which came after the system did not protect her any longer following a positive test for which she was sanctioned for doping for the first time" and her implication of time in the doping system in deciding that she was ineligible to compete.³⁶³ It was also decided that the rules "run counter to the recognition of the status of neutral athlete."³⁶⁴ Despite the CAS decision that prohibited factoring past doping offences, Stepanova decided not to contest the decision which disallowed her to compete.³⁶⁵

WADA held a think tank with representatives from the Association of Summer Olympic International Federations ("ASOIF"), NADOs, and the IOC.³⁶⁶ At the think tank, Reddie explained that despite the tension that was growing between WADA and the IOC, the organization did not need to be replaced.³⁶⁷ There was concern

and-world-anti-doping-agency-over-russian-sccandal.html?_r=0.

359. *Id.*

360. WORLD ANTI-DOPING AGENCY, NEWS:WADA ACKNOWLEDGES IOC DECISION ON RUSSIA, STANDS BY AGENCY'S EXECUTIVE COMMITTEE RECOMMENDATIONS (July 24, 2016), <https://www.wada-ama.org/en/media/news/2016-07/wada-acknowledges-ioc-decision-on-russia-stands-by-agencys-executive-committee> (last visited May 13, 2017).

361. *Rio 2016: Russian Whistleblower Yuliya Stepanova Will Not Contest Ban*, BBC (Aug. 5, 2016), <http://www.bbc.com/sport/olympics/36992847>.

362. *Id.*

363. DECISION OF THE IOC EXECUTIVE BOARD, *supra* note 5.

364. *Id.*

365. *Rio 2016: Russian Whistleblower Yuliya Stepanova Will Not Contest Ban*, *supra* note 361.

366. Liam Morgan, *No Intention to "Dilute" WADA Within Olympic Movement Claims Sir Graig After First "Think Tank"*, INSIDE THE GAME (Sept. 20, 2016), <http://www.insidethegames.biz/articles/1041865/no-intention-to-dilute-wada-within-olympic-movement-claims-sir-craig-after-first-think-tank>.

367. *Id.*

regarding a possible “Integrity Unit” which would deal with match-fixing, corruption, and anti-doping policies, which could have essentially replaced WADA.³⁶⁸ Declan Hill, the investigative journalist, presented at the think tank claiming that the IOC was speaking with the Qatar-based International Centre for Security in Sport (“ICCS”).³⁶⁹ However, the ICCS Director stated that these rumors were “wide of the mark.”³⁷⁰ While there was briefly a feeling that Bach was suggesting a “nuclear option” which would basically bring about a new organization, the IOC and WADA ended up seeming to be on better terms later in the year, with discussion about WADA having more strength.³⁷¹

VI. SUGGESTIONS FOR FIXING THE SYSTEM

The alleged Russian doping scandal and the resulting discord within the Olympic Movement highlight where action should be taken to strengthen the anti-doping system, ensuring it works well on paper and in practice. This section will describe steps the IOC and WADA should take in the coming years.

First, WADA needs increased funding to conduct investigations and should be given the authority to impose sanctions. As mentioned earlier, until the 2015 WADC, the organization did not have the authority to conduct investigations. While it has always been able to monitor its laboratories, the added investigatory authority was important for bringing forth the initial investigation led by Pound. This investigatory authority needs to continue, but it also needs increased support. Increased funding for additional investigations, as well as procedures for triggering investigations would be helpful for bringing other episodes of doping to light.

In addition to investigatory authority, WADA needs the authority

368. *Id.*

369. *Id.*

370. Sean Ingle & Owen Gibson, *IOC to Set Up Anti-Doping Unit to Curtail Power of WADA*, IRISH TIMES (Sept. 21, 2016), <http://www.irishtimes.com/sport/other-sports/ioc-to-set-up-anti-doping-unit-to-curtail-power-of-wada-1.2799448>.

371. See Rachel Axon, *IOC Seeks to Give WADA More Independence in Anti-Doping Efforts*, USA TODAY (Oct. 8, 2016), <https://www.usatoday.com/story/sports/olympics/2016/10/08/ioc-wada-anti-doping-summit/91783618/>; *IOC Backs Craig Reedie for New Three Year WADA Term*, INDIAN EXPRESS (Nov. 13, 2016), <http://indianexpress.com/article/sports/sport-others/ioc-backs-craig-reedie-for-new-three-year-wada-term-4373516/>.

to impose sanctions on athletes itself.³⁷² As described earlier, one of the benefits of WADA is that it does not have a stake in the outcome of the games and matches. By not having a stake, the organization lacks the bias that organizers of a sport have in their athletes succeeding, and is also less likely to intentionally be gentle for those who have a history of helping the organization.

In addition to giving WADA the authority to suspend athletes, it needs to have the authority to punish organizations which are non-compliant with the WADC. This means allowing WADA to directly punish NOCs, NGBs, IFs, and other institutions with code violations.³⁷³ This change could be implemented by including it in the next version of the WADC. Although many may argue that this would give WADA too much power, allowing these punishments to be challenged at CAS would provide a fair review. It should be understood that while this suggestion would be helpful for the world of sport in general, it likely would not have changed things relating to the Russian scandal. This is because the ROC was not found to be non-compliant with the code in any of the reports.

WADA also needs authority to prohibit the hosting of sporting events in instances where the host is out of compliance with the WADC.³⁷⁴ For example, many athletes in the disciplines of bobsleigh and skeleton were upset and threatened to boycott the 2017 championships because they were scheduled to take place in Sochi, Russia.³⁷⁵ Latvia's team announced a boycott because of Russia's stealing of the Olympic spirit, while U.S. athletes debated whether to skip the event.³⁷⁶ The event had been previously scheduled in Sochi before the report came out and was not related to the allegations. Amid

372. See *Sport Faces 'Defining Moment' in Doping Fight, says Travis Tygart*, INDIAN EXPRESS (Dec. 6, 2016), <http://indianexpress.com/article/sports/sport-others/sport-faces-defining-moment-in-doping-fight-says-travis-tygart-4413193/>.

373. Perhaps the next version of the WADC could include provisions to make this easy to accomplish.

374. See Nick Butler, *Nick Butler: Control or Independence? A Vital Crossroads in the Fight Against Doping*, INSIDE THE GAMES (Sept. 12, 2016), <http://www.insidethegames.biz/articles/1041536/nick-butler-control-or-independence-a-vital-crossroads-in-the-fight-against-doping>.

375. Rebecca R. Ruiz, *Facing Athletes' Boycott, Bobsled and Skeleton Event Is Moved From Russia*, N.Y. TIMES (Dec. 13, 2016), <https://www.nytimes.com/2016/12/13/sports/olympics/russia-doping-scandal-bobsled-skeleton.html>.

376. Nick Hope, *Russian Doping: Latvia Will Boycott Sochi 2017 World Championships*, BBC (Dec. 11, 2016), <http://www.bbc.com/sport/winter-sports/38283356>. Ruiz, *supra* note 371.

this pressure, the International Bobsleigh and Skeleton Association decided to move the event so that athletes could focus on the competition instead of on accusations.³⁷⁷

Allowing WADA to strip events from countries that are not code complaint would bring about another disincentive for countries to engage in doping. Countries would be incentivized to better cooperate with doping regulators out of the fear of losing major events. Also, because international sporting events bring in large sums of money and national pride, it would put a lot more on the line.

The case relating to Russia's hosting sporting events is a little more complicated than one may perceive it to be, however. As mentioned earlier, Russia's NOC, the ROC, was not implicated in the McLaren Report. If a country's NOC is not implicated, it is questionable whether one can state that the country as a whole was involved in the doping. One could argue that Russia deserved to lose the event because of the improprieties that the report said occurred regarding the WADA laboratory and because of RUSADA's decertification. However, one cannot assume that just because a country's anti-doping laboratory or NADO is involved in impropriety that the entire country is involved and it would be unfair to innocent athletes to conclude that they are guilty by default because their country's anti-doping laboratories are not doing their job.

Russia is not the only country that had issues with its NADO. For example, a former executive for the Jamaica Anti-Doping Commission revealed that its system did not operate for "five or six months" prior to the 2012 Olympic Games in London.³⁷⁸ It would be unfair to assume that every Jamaican athlete was engaged in doping because of this error.³⁷⁹ One could argue that athletes should not be penalized for this type of thing but that countries should be penalized when their NADO or laboratories are non-compliant and that losing a competition is a fair way to punish a country. However, as discussed earlier, there are many

377. Ruiz, *supra* note 375.

378. Marina Hyde, *Jamaica's Cordial 'Not Now' to World Anti-Doping Agency is Bizarre*, THE GUARDIAN: WADA SPORTBLOG (Oct. 16, 2013), <https://www.theguardian.com/sport/blog/2013/oct/16/jamaica-world-anti-doping-agency-drugs>.

379. It should be noted that there have also been Jamaican athletes who have been found guilty of doping offences. For example, Usain Bolt lost a medal from the 2008 Olympic Games in Beijing after a teammate from his relay team was found guilty of a doping violation. Victor Mather, *Usain Bolt Stripped of Gold Medal After Relay Teammate Found Guilty of Doping*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/sports/olympics/usain-bolt-jamaica-stripped-2008-olympic-relay-gold-medal-nesta-carter.html>.

different institutions within the Olympic Movement. If a country's NADO is not compliant with doping rules, it does not mean that a NGB for an individual sport working with an IF to host a competition was involved as well. Relating to the Russian example, the IBSF reversed the provisional suspension that was given to a team of Russian skeleton athletes.³⁸⁰ If the IF was correct in doing so, it means that one would have to question whether the NGB for the sport was actually involved in doping.

Perhaps the best way to handle this would be for WADA to be able to prevent a country from hosting a major event when the government has been found to be involved in the doping offence. New regulations would need to be made for this to work. Within the Olympic Movement, discipline for offences works well for affiliated institutions, as well as individuals such as athletes and actors who are involved. However, the setup does not work as well for dealing with national governments. In 2008, the IOC initially banned Iraq from competing in the Beijing Olympic Games because of government interference.³⁸¹ This was eventually resolved to allow the country to compete after the IOC met with the Iraqi government.³⁸² However, even though the Iraqi government was involved, the ban was issued in the form of the suspension of the country's NOC.³⁸³

Even if rules were put in place to allow a country to lose a major event following government involvement in doping offences, it is not certain that the scandal relating to Russian doping would fall into this category. For the final McLaren Report draft, the term "state sponsored system" was replaced with the term "institutional conspiracy."³⁸⁴ There has been some speculation in the press that this may be because the term "state sponsored" was interpreted as being linked to the Kremlin. Even if this is the case, it would need to be decided what level of government involvement is needed in order for a country to lose an event. It is completely understandable that one should question

380. Nick Butler, *Nick Butler: Stalling IOC are Still Missing the Point About McLaren Report Evidence*, INSIDE THE GAMES (Feb. 27, 2017), <http://www.insidethegames.biz/articles/1047552/nick-butler-stalling-ioc-are-still-missing-the-point-about-mclaren-report-evidence>.

381. *International Olympic Committee Bans Iraq From Beijing Games*, FOX NEWS (July 24, 2008), <http://www.foxnews.com/story/2008/07/24/international-olympic-committee-bans-iraq-from-beijing-games.html>.

382. INT'L OLYMPIC COMM., IRAQI ATHLETES TO COMPETE AT BEIJING OLYMPICS (July 29, 2008), <https://www.olympic.org/news/iraqi-athletes-to-compete-at-beijing-olympics>.

383. *International Olympic Committee Bans Iraq From Beijing Games*, *supra* note 380.

384. Butler, *supra* note 380.

whether a country should lose an event if the government participation in cheating did not come from the top.³⁸⁵

Another major obstacle to allowing WADA to strip countries from hosting events upon the findings of doping offences is the large amounts of money that are spent on hosting events and the significant amounts of preparation that are put toward events in advanced. While taking a sporting event following a country's doping allegations may be a fair penalty, it can create problems for event organizers, sponsors, athletes, and spectators who make plans far in advanced to be able to attend the event. Further, it is foreseeable that for some events, it could be difficult for new venues to be found in time. Because of this, it would work best for countries to be able to lose major events but for there to be a cutoff date in the rules for logistical reasons that after which, a major event cannot be moved.

It appears that the movement for countries to lose major events because of doping allegations is already taking place. Leaders from nineteen NADOs issued a joint statement which included urging international sport event hosts to avoid allowing Russia to host events.³⁸⁶ Prior to this, the Russian Biathlon Union voluntarily gave back the junior world championships and World Cup meeting.³⁸⁷ Similarly, the ISU moved the World Cup speed skating meet to avoid focusing on "accusations and controversies."³⁸⁸ There have been calls for FIFA to strip Russia of the 2018 World Cup for soccer.³⁸⁹ However, this will be FIFA's decision.³⁹⁰ Thus, this is different from WADA having the ability to threaten a country that it will lose an event because of non-compliance with doping regulations.

385. This author is not stating whether or not this occurred regarding Russia. It is recommended that the reader also read the McLaren Report to develop his or her own conclusion regarding how involved the Russian government was in the conspiracy described in the report, as well as what to make of the described conspiracy.

386. See Eoghan Macguire, *Anti-Doping Chief: Russia Needs to 'Show Contrition'*, CNN (Jan. 11, 2017, 5:21 PM), <http://edition.cnn.com/2017/01/11/sport/nado-russia-doping-sport/>; *Russia May Lose World Cup if Key Teams Refuse to Participate – Ex-WADA Leader*, SPUTNIK (Jan. 27, 2017), <https://sputniknews.com/sport/201701121049539201-russia-world-cup-2018-risk/>.

387. Dmitriy Rogovitskiy, *Doping: Russia Loses World Cup Biathlon, Speed Skating Events*, REUTERS (Dec. 22, 2016), <http://www.reuters.com/article/us-athletics-biathlon-russia-idUSKBN14B2BP>.

388. *Id.*

389. *Russia Should be Stripped of 2018 FIFA World Cup*, N.Z. HERALD (Dec. 12, 2016), http://www.nzherald.co.nz/sport/news/article.cfm?c_id=4&objectid=11765100.

390. *Russia May Lose World Cup if Key Teams Refuse to Participate – Ex-WADA Leader*, *supra* note 386.

Aside from WADA receiving more authority, it needs to be given the direction of punishing those engaged in doping. Upon its establishment, WADA had the official purpose of serving “as an independent watchdog for Olympic sports worldwide.”³⁹¹ In fact, upon learning of Stepanov’s complaint, former Director General of WADA, David Howman, stated, “[w]e don’t want to be the police. We can’t be the police.”³⁹² Reddie has been described as having the view “that WADA was better suited to offer sports federations and countries advice when they asked for it rather than pursue accusations of cheating.”³⁹³ Serving as a watchdog and policymaker is a different role than that of policing doping. WADA needs to be involved in policing doping in order to be completely effective.

One could argue that it is a good thing when the watchdog involved in policy and writing the rules is not the one who enforces the rules. This provides a separation that can prevent conflicts of interest. However, an agency that exists with policing doping as part of its mission is needed. If this is not done by WADA, it needs to be done by another agency instead of the role being given to various actors in the Olympic Movement over different jurisdictions. There is nothing wrong with these actors having a role in enforcing doping rules; however, there needs to be a separate, independent agency that does this as well.

WADA is uniquely situated as the agency to enforce doping rules because, as described earlier, it is independent with the sole purpose of going against doping in sport. Thus, it does not have an allegiance to any particular sport or athletes. WADA’s is headquartered in Montreal, Canada as a Swiss private law foundation, which makes WADA international in nature, not having allegiance to a single government. This also benefits the organization’s ability to serve this role. Until the mission of policing sport is considered by everyone to be a primary part of the organization’s mission, it is likely that the agency will not be acting at its potential.

While independence is one of WADA’s most positive attributes, WADA’s independence could be improved. A specific area of concern is with WADA’s funding. The agency receives half of its funds from national governments. In theory, if every government funded WADA equally, there would be no issues, as an agency cannot be biased in

391. Ruiz et al., *supra* note 1.

392. *Id.*

393. *Id.*

favor of every single country. However, countries have been able to provide WADA with additional funds. For example, Russia was reported as providing WADA with over a million U.S. dollars above its annual contribution in 2015.³⁹⁴ According to an agency spokesperson, countries do not receive special treatment for making extra donations.³⁹⁵ There is no reason not to believe that this is true; however, this brings about the issue that the appearance of impropriety may come about even when it does not exist. Preventing any behavior from coming about where foul play could be perceived, even when it is not present, is important for ensuring WADA's legitimacy.

As an independent agency, WADA needs funding to complete its mission. Preventing governments, organizations, or people from being able to donate as much as they want could hurt the agency's ability to bring in enough money to function at the best of its ability. However, protocols should be established to prevent those in the agency's administration from knowing where donations come from. This could either come from funding going through a separate agency, or from funding practices being kept secret from those involved in the parts of the agency that are engaged in enforcing anti-doping rules. Funding sources would also have to be kept secret from WADA's top leadership and likely the foundation board and other decision makers. It could be argued that this moves away from the direction of bringing about increased transparency. In order to deal with this, independent auditors could be employed to ensure that the agency is correctly receiving and using all of its funds.

A similar protocol could be used to protect WADA from being influenced by members of the Olympic Movement, the other half of the agency's funding. Tygart has suggested that the IOC could use a blind trust, which could increase the transparency of WADA.³⁹⁶ Funneling all of WADA's funding from the Olympic Movement side, as well as the money that it receives from governments, through the blind trust would be an excellent way to avoid bias or the appearance of bias relating to this funding.

In addition to funding, the leadership of WADA should be more independent. One way that this could be brought about is through a prohibition on the leadership serving in a major office in another agency. For example, Reddie was criticized for serving as the president

394. *Id.*

395. *Id.*

396. *Sport Faces 'Defining Moment' in Doping Fight, says Travis Tygart, supra note 372.*

of WADA while he was on the executive board of the IOC.³⁹⁷ Even if there were not conflicts of interest, this could create the appearance of conflicts of interest, which could be harmful to both WADA and the IOC. It may seem as though there is no harm from this because both institutions are a part of the Olympic family. However, there could be instances where the IOC and WADA have different interests, and this separation can prevent issues from occurring. While Reddie stepped down from his IOC executive board position, he remained an IOC member. Although, there are likely many who believe that even this is too far in the direction of there being a conflict of interest; this is not the case. The IOC consists of members from various institutions that are involved in the Olympic Movement. As a result, the IOC can be viewed as loosely representative of the Movement. Excluding a WADA executive from being on the membership would exclude WADA from being represented at the IOC, and the organization's representation has the potential to be very helpful. For example, IOC Medical Commission Chairperson Arne Ljunquist has questioned host cities about their doping control and has had acted strongly against doping in sport.³⁹⁸ If the head of WADA is an IOC member, he or she has the potential to connect with others, such as Ljunquist, to encourage them in their fight against doping. As a member, the president of WADA also has the ability to work to make the fight against doping more salient.

In addition to the appearance of conflicts of interest coming from WADA presidents being a part of Olympic organizations, presidents coming from national governments could also have conflicts of interest. It is foreseeable that a future president of WADA could act, or be perceived as acting, lenient on members of his or her own country. Safeguards are needed to protect from this. One safeguard is having co-presidents, with one always being from the Olympic side and one always being from the national government side, instead of having them rotate back and forth. It is unlikely that this would be deemed a feasible alternative; however, prohibiting the head of WADA from being actively involved with his or her country's Olympic team or government would help mitigate conflicts of interest.

Change in the makeup of the Foundation Board would also be helpful to improving WADA's function. The current setup of half of

397. *Id.*

398. See generally Arne Ljungqvist, *The Fight Against Doping – A Task for the IOC*, in *THE FIGHT AGAINST DOPING: SOCIAL RESPONSIBILITY OF SPORTS & POLITICS ON NATIONAL & INTERNATIONAL LEVEL 19* (Werner Blumenthal ed., 2010).

the members coming from national governments and the other half coming from the Olympic Movement looks like a great way to avoid bias on paper. However, in practice, there is concern that both sides of the board have the potential for bias, with members from the government side being biased toward their countries and those from the Olympic side being biased in favor of being more lenient regarding their sport or sport in general.

In order to fix this, the Foundation Board should include independent members. These independent members would not have allegiances to either national governments or to Olympic sports, but would have the sole interest of defeating doping. These members could be appointed by other members of the Foundation Board, or could be appointed by the NADOs. Even members of the Foundation Board who are appointed by sports organizations should not serve at a high-level position in these organizations. For an example of the type of issue that this can raise, one should look to Andres Besseberg, the president of the International Biathlon Union (“IBU”). While serving as one of the Foundation Board members from the Olympic side, he awarded the 2021 Biatholon World Championships to Russia during the period following the first McLaren Report.³⁹⁹ One can see how this action on the behalf of the IBU could be perceived as presenting a conflict of interest with WADA.

Foundation Board members appointed from the national government side also have the potential for conflicts of interest. Everyone coming from different national governments could help mitigate this type of concern; however, as demonstrated by the 2002 figure skating corruption case in which a French judge was pressured to vote for the pair representing Russia regardless of the performance of other skaters,⁴⁰⁰ representatives from one country can be pressured to act favorably for another country. Because of this, it is wise to continue having some of the Foundation Board membership come from the Olympic Movement.

The most significant issue that needs to be changed about the anti-doping system is the system of testing being handled by local actors, such as NADOs and laboratories that are administered locally. This is also likely one of the hardest changes to bring about. First, it should be understood that some NADOs do an excellent job. USADA has an

399. Butler, *supra* note 380.

400. Sale, *Pelletier Share Gold with Russian Pair*, ESPN (Feb. 15, 2002), <http://www.espn.com/oly/winter02/figure/news?id=1333280>.

excellent reputation.⁴⁰¹ Its comprehensive testing and enforcement is beneficial to U.S. competitors as well as to sports as a whole. It would be a shame if this type of organization was lost. However, there have been issues with many other NADOs. As mentioned earlier, Jamaica's NADO did not test thoroughly for months leading up to the London Olympics and RUSADA was suspended. Other organizations have had issues as well. For example, there are allegations that top athletes from Brazil were not tested for a brief period prior to the 2016 Olympic Games in Rio de Janeiro after complaints came about that the testing was interfering with the team's training routine.⁴⁰² It is unfair to athletes everywhere when testing is setup as an uneven patchwork where some athletes have comprehensive testing and others, for either purposeful reasons or non-purposeful reasons such as a country's lack of resources, are not tested thoroughly.

Instead of athletes being tested by representatives from an individual NADO, WADA should run testing throughout the world. This would ensure consistency regardless of a country's resources. Additionally, this would take away any type of pressure that a NADO may receive from its NOC or government to be lenient on its own country's athletes.

It is also vital that the personnel engaged in the testing be from various countries around the world. For example, in Russia, testers might be from the Netherlands, Argentina, and Equatorial Guinea, while testers in the U.S. might be from Sweden, Iran, and Japan. This would be expensive and would require a lot of effort to coordinate testers living abroad for out-of-competition testing; however, it is necessary as otherwise, testers might officially work for WADA but could be easily influenced by either their country's government or NOC.

Similarly, laboratories need to be run by WADA, as well as staffed by personnel from various countries around the world, instead of being merely WADA-accredited. This would be an expensive endeavor; however, this is likely the only way to ensure that a country's

401. For an illustration of USADA's excellent reputation, one can look to the way that many of the speakers at the symposium at which this article was presented described their belief that USADA does an excellent job.

402. Sudipto Ganguly, *Brazil's Top Athletes Were Not Drug Tested Ahead of Rio Olympics . . . as WADA Chief Slams 'Unacceptable' Actions of Games' Host Nation*, DAILY MAIL (Aug. 5, 2016), <http://www.dailymail.co.uk/sport/sportsnews/article-3725150/Brazil-s-athletes-not-drug-tested-ahead-Rio-Olympics-WADA-chief-slams-unacceptable-actions-Games-host-nation.html>.

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institutions do not have the ability to impact the laboratory results. As such, laboratory officials will need to come from around the world and not be merely from the countries hosting the labs. Proposals for increasing WADA's funding have included using the IOC giving WADA millions of dollars, through a blind trust, as well as taxing broadcast revenue for sporting events.⁴⁰³ These are excellent ideas for ways to bring in funds for this type of drastic change, but as it is difficult to ask for money, it does not seem likely that these proposals will go through in the near future. Regardless, a lot of additional money needs to be spent on the war against doping.

It is also important that samples from around the world be sent to various laboratories. This would ensure that a country does not know if a laboratory within its territory will test its athletes or athletes for a locally hosted competition. While this proposal may seem like an overreaction, the alleged happenings in the McLaren Report indicate that this type of drastic technique is needed.

One may question the need for NADOs if WADA takes over the function of conducting drug tests. However, they can still play a major role in the fight against doping. First, WADA handling the testing would free NADOs to focus their resources on other areas to achieve their goals. Also, they can serve a watchdog group policy making function. USADA has done an excellent job of advising when it believes that members of the Olympic Movement are not living up to their responsibilities in the fight against doping. It is hopeful that if WADA takes over the doping tests, USADA can put more time and resources into this. Additionally, NADOs can still be allowed to press charges against athletes when they believe that they have been engaged in a doping offence. Finally, NADOs could play a major role in monitoring the doping controls for athletes competing at lower levels, such as in recreational sports where the leagues fall under the WADC. While one may think that this is a low priority, research has shown that many high school teenagers have started doping practices.⁴⁰⁴ As doping filters down to lower level athletes, increased amounts of enforcement at these levels is needed.

An alternative model, although similar, would be having WADA

403. See *Sport Faces 'Defining Moment' in Doping Fight*, says Travis Tygart, *supra* note 372.

404. See *Growth Hormones Use Exploding Among High School Teens*, N.Y. POST (July 23, 2014), <http://nypost.com/2014/07/23/growth-hormone-use-exploding-among-high-school-teens/>.

give all drug testing to an independent organization. This organization would be under WADA's auspices and would be worldwide and have personnel travel and conduct doping control at various countries around the world. This would accomplish the same goal, which is preventing organizations based in a country from being responsible for doping control within their country, in order to avoid potential corruption or bias.

An easier suggestion for improving the anti-doping system is bringing about increased protection for whistleblowers. In the past, the agency's protocol functioned in a way that would almost work against whistleblowers.⁴⁰⁵ For example, after WADA was sent an email explaining how clean urine was being substituted for urine that would have resulted in a positive test at the Moscow laboratory, they forwarded it to various athletics officials, "including Russian ones who were implicated in the allegations."⁴⁰⁶ This type of practice is problematic because it has the potential for making life difficult for a whistleblower. Additionally, it has the potential for making others less likely to come forward with additional information.

WADA thus needs to ensure that all whistleblowing communications are kept confidential and that they are not shared with others in the Olympic Movement, even if it is part of an investigation. Additionally, WADA needs to ensure that there are adequate whistleblower protections throughout the Olympic Movement. This includes at NOCs and NADOs at the national level, as well as sports federations. Further, WADA needs to ensure protection for any whistleblowers who may be in danger because of their information disclosure.

Another area for which the entire anti-doping system could be improved is with increased athlete representation. The Pechstein case, discussed earlier, highlights the need for athlete representation at ICAS. Athletes should also be involved in the selection of WADA foundation board members. One might think that this goes against WADA's strength of unilaterally imposing doping rules. However, having one or two foundation board members appointed by athletes would include the athlete's perspectives for the best ways to fight doping. Athlete representation could be limited to one or two foundation board members to ensure that they do not prevent the

405. See Ruiz et al., *supra* note 1.

406. *Id.*

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agency from being strict on doping.

CONCLUSION

Although the current anti-doping system appears to be the optimal system on paper, recent issues indicate that the system is not working and that major improvements are needed in order to keep sport clean. If added, the suggested reforms would greatly enhance WADA and the anti-doping system. They would work along with the WADC's tough penalties for cheaters along with lesser penalties for those with inadvertent doping offences which makes the code look optimal on paper. It is likely that there will always be athletes attempting to gain an unfair advantage from doping and that athletes and anti-doping authorities will likely always be a cat and mouse game. However, giving WADA a greater amount of authority, ensuring that drug testing is conducted at the international level instead of at the national level, and increasing the agency's independence are all major steps that can hopefully bring about greater success for WADA in preventing doping.