

# OBSTRUCTION OF JUSTICE: THE ARBITRATION PROCESS FOR ANTI- DOPING VIOLATIONS DURING THE OLYMPIC GAMES

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## I. INTRODUCTION

The use of performance enhancing drugs has permeated nearly every level of athletic competition around the world.<sup>1</sup> The problem is so pervasive that common estimates of the percentage of Olympic track and field athletes who are on drugs range from 40% to 75%.<sup>2</sup> In the past few years, accusations of doping have been leveled at numerous American baseball and football players, international track and field stars and European soccer players and cyclists. Some of these athletes continue to test negative while several others have subsequently admitted their use.<sup>3</sup> The true percentage of athletes currently using performance enhancing drugs cannot be ascertained with any degree of certainty because drug use can only be conclusively verified when athletes get caught.<sup>4</sup>

At the beginning of the 1990's, the anti-doping movement possessed neither bark nor bite when the International Olympic Committee ("IOC") first became aware of drug use in sports an emerging threat.<sup>5</sup> During this time, there were several major track

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<sup>1</sup> See *Drugs in Olympic Competition: Hearing on IOC and USOC Proposals for Anti-Doping Reform Before the S. Comm. on Commerce, Science and Transportation* (1999) (prepared testimony of Richard W. Pound, Vice President, International Olympic Committee) [hereinafter Pound].

<sup>2</sup> See Pound, *supra* note 1

<sup>3</sup> See generally *Drugs In Sport*, News Archive, <http://www.drugsinsport.net/archive.htm> (last visited Feb. 5, 2005) (listing all the recent news articles in which athletes are accused of doping).

<sup>4</sup> See Brian J. Wong, *Doping In Sport: An Overview and Analysis of Doping and Its Regulation In International Sport* 30 (2003), in PETER BARTON HUTT, ED., *FOOD AND DRUG LAW: AN ELECTRONIC BOOK OF STUDENT PAPERS*, <http://leda.law.harvard.edu/leda/data/601/wong.pdf> (last visited Feb. 9, 2005). The author lists four types of investigation: investigative journalism, government investigation, drug testing, and athlete surveys. None of these techniques would be able to circumvent the need of the athlete to cover up their use. *Id.*

<sup>5</sup> See Michael S. Straubel, *Doping Due Process: A Critique of the Doping Control Process in International Sport*, 106 *DICK. L. REV.* 523, 553 (2002).

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and field stars that had tested positive for drug use.<sup>6</sup> These athletes had both the financial ability to take their accusers to court and a powerful motivation to remove the stain on their reputation.<sup>7</sup> The suits brought by Mary Decker-Slaney and Butch Reynolds, though largely unsuccessful, led the IOC to the realization that they needed a new dispute resolution process which would foreclose the athlete's access to litigation beyond the walls of the IOC.<sup>8</sup> It was obvious that the IOC had to find a way to limit its potential exposure to the financial harm of future suits, which would have eventually been successful.<sup>9</sup> Although primarily concerned with its potential liabilities, the IOC also recognized the importance of restoring the public's confidence in the legitimacy of the Olympic Games ("Games").<sup>10</sup> The IOC launched this new phase of their anti-doping efforts by introducing global standards for doping enforcement designed to help create a level playing field for athletes from every country and in every sport.<sup>11</sup> Using its unique status and power among the governing bodies of the sports world, the IOC subsequently imposed these standards on every organization by making their adoption a pre-requisite to being officially recognized.<sup>12</sup> As the problem of doping evolved from problem to crisis, the IOC demonstrated that they can and will change the rules of the Games, particularly when its survival depends on it.<sup>13</sup>

The IOC and its member organizations assert that the quick and efficient resolution of anti-doping violations during the Games

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<sup>6</sup> *Id.* Mary Decker-Slaney, the greatest distance runner in United States history, and Butch Reynolds, a former world record holder in the 400 meter race, both tested positive for the presence of performance enhancing drugs. Although their positive tests did not occur during the Olympic Games, the International Association of Athletic Federation, the body that governs track and field athletes, had similar provisions requiring arbitration for dispute resolution. After each of them were found guilty, they proceeded to bring suits in federal court seeking multi-million dollar damages. Both cases were dismissed for lack of jurisdiction, but it is widely believed that both were innocent of the charges. *Id.*

<sup>7</sup> See Mary K. Fitzgerald, *The Court of Arbitration for Sport: Doping and Due Process During the Olympics*, 7 *SPORTS LAW. J.* 213, 217 (2000).

<sup>8</sup> See *id.*

<sup>9</sup> *Id.*

<sup>10</sup> See Matthieu Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, *INT'L SPORTS L.J.* 2002, No.2 21 (2002) available at <http://www.sportslaw.nl> (last visited Feb. 5, 2005).

<sup>11</sup> See Fitzgerald, *supra* note 7, at 215.

<sup>12</sup> See *id.* Every sports and national organization must be officially recognized by the IOC or none of its member-athletes will be allowed to compete in the Games. *Id.*

<sup>13</sup> See *id.* In 1992, the growing global popularity of basketball led the IOC to alter its rule prohibiting professional athletes from participating in the Olympics. *Id.*

will discourage others from doping.<sup>14</sup> Athletes who test positive are immediately subject to several penalties: disqualification from their event, dismissal from the Games, forfeiture of any medals or honors and a two year fixed suspension from competition for first-time violators.<sup>15</sup> Whether or not this punishment is a deterrent is unclear; however, the number of athletes dismissed from the 2004 Athens Games for anti-doping violations was double that of the 2000 Sydney Games.<sup>16</sup>

The IOC and World Anti-Doping Agency (“WADA”) appear to believe that the ideal means to reverse the public’s lack of trust, cynicism, and disappointment in athletes and sports organizations is to produce increasing numbers of positive tests to illustrate the effectiveness of their campaign. In the short run, this is a viable strategy; however, as the short run has grown longer, the legal, ethical, and moral flaws in the program have begun to overshadow its successes. Currently, many of the program’s “successes” are being called into question and several testing methods are being widely disparaged by the greater scientific community.<sup>17</sup> Elimination of the use of performance enhancing drugs at all levels of competition is important to restore the reputations of the vast majority of athletes who are clean and to regain the public’s trust and respect.<sup>18</sup> By trying to reach that goal as quickly as possible, the IOC has employed means and methods that are moderately effective at best, and at worst, wholly incompatible with the American concept of justice.<sup>19</sup>

This Note will discuss the serious legal, ethical, and scientific questions raised by the dispute resolution process for anti-doping violations during the Olympic Games. Throughout the Note, I will highlight both procedural and substantive aspects of the process

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<sup>14</sup> See Frank Oschutz, *International Sports Law Perspectives: Harmonization of Anti-Doping Code Through Arbitration: The Case Law of the Court of Arbitration for Sport*, 12 MARO. L.J. 675, 682 (2002).

<sup>15</sup> *Anti-Doping Rules applicable to the Games of the XXVIII Olympiad in Athens in 2004*, art. 9.1, International Olympic Committee (2004). [hereinafter IOC Anti-Doping Rules].

<sup>16</sup> See generally Tom Weir, *Doping Cases Hit Record*, USA TODAY, Aug. 29, 2004, available at [http://www.usatoday.com/sports/olympics/athens/news/2004-08-29-doping-usat\\_x.htm](http://www.usatoday.com/sports/olympics/athens/news/2004-08-29-doping-usat_x.htm) (last visited Feb. 5, 2005) (discussing the record number of anti-doping violations at the Athens Olympiad).

<sup>17</sup> See *United States Anti-Doping Agency v. Tyler Hamilton*, AM. ARB. ASS’N No. 30 190 00713 03 (2005) (Campbell, dissenting).

<sup>18</sup> See generally JanWillem Soek, *The Fundamental Rights of Athletes in Doping Trials*, in DRUGS AND DOPING IN SPORT – SOCIO-LEGAL PERSPECTIVES 67 (John O’Leary ed., Cavendish Publishing Limited 2001) (discussing the lack of fairness and due process in doping trials).

<sup>19</sup> *Id.*

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which raise sufficiently serious legal issues to merit an American court's agreement to review an Olympic arbitration award. Part I will discuss the rise of doping in sports, and the manner in which the problem has been, and is currently being addressed within the Olympic Movement. Part II will explain the hierarchy of sports governing bodies beneath the IOC and also discuss the central role of the Court of Arbitration for Sport ("CAS") in the growth of the anti-doping movement and the enforcement of the Anti-Doping Code. Part III will discuss the due process concerns raised by the doctrine of strict liability as applied to anti-doping violations. Part IV will discuss the viability of bringing a legal challenge to an Olympic arbitration award in a United States court. Finally, Part V will examine three different dispute resolution methods which would better protect the rights of an athlete accused of an anti-doping violation.

## II. DOPING AND THE IOC

Elite athletes have been using performance enhancing drugs for over half a century.<sup>20</sup> Beginning in the 1950's, weightlifters used testosterone to gain bulk and strength, while in the 1960's cyclists used amphetamines to increase their stamina, helping them endure excruciatingly long races.<sup>21</sup> Once the seriousness of the problem became apparent, the IOC quickly moved to create the Medical Commission in 1967.<sup>22</sup> The Commission was formed with the primary mission of combating the growing use of performance enhancing drugs among Olympic athletes.<sup>23</sup> Currently, the Medical Commission produces the Anti-Doping Code for each Olympiad and until recently, was also responsible for creating the list of banned substances.<sup>24</sup> For most of the 1970's, the Anti-Doping Code was a largely ignored document and the IOC rarely applied or enforced its provisions.<sup>25</sup> The IOC's lack of attention to and enforcement of the Code was dramatically exposed in the 1980's by

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<sup>20</sup> See Pound, *supra* note 1.

<sup>21</sup> *Id.*

<sup>22</sup> International Olympic Committee, History and Mission of the Medical Commission, [http://www.olympic.org/uk/organisation/commissions/medical/index\\_uk.asp](http://www.olympic.org/uk/organisation/commissions/medical/index_uk.asp) (last visited Dec. 21, 2004).

<sup>23</sup> *Id.*

<sup>24</sup> See *id.*

<sup>25</sup> See Jill Pilgrim & Kim Betz, *A Journey Through Olympic Drug Testing Rules: A Practitioner's Guide to Understanding Drug Testing*, 2 VAND. J. ENT. L. & PRAC. 210, 211 (2000).

the meteoric rise of the steroid fueled East German team.<sup>26</sup> The tipping point occurred when Ben Johnson, the Canadian sprinter, Olympic Gold Medalist and World Record holder, tested positive for steroids and later testified to having used them throughout his career.<sup>27</sup> Having seen and heard the public outrage and disgust, the sporting world realized that it had to radically alter the way it approached this issue.<sup>28</sup>

In response, the sports organizations toughened their rhetoric in public while continuing to hand down light sentences for violations, often choosing to ignore them altogether.<sup>29</sup> Because each sports body has its own rules and regulations for doping violations, they were able to protect the public image of their athletes and their sport by leniently dealing with violators.<sup>30</sup> Throughout most of the 1990's, the Anti-Doping Code remained difficult to enforce except during international competitions, due in part to the physical and financial inability of the IOC to effectively police all of the world's athletes and their governing bodies. The primary reason for this was the lack of trust among the National Olympic Committees ("NOC") and the concern that the IOC may not enforce the provisions honestly and uniformly across the range of sports and nations.<sup>31</sup> For this and other reasons, the IOC eventually realized that an effective campaign against doping would require the total support and logistical assistance of every one of its member organizations.<sup>32</sup>

In early 1999, the IOC convened the World Conference on Doping in Sports.<sup>33</sup> In addition to all the Olympic member organizations, the IOC invited representatives from the governments of several powerful countries with the hope of creating a global approach towards fighting this crisis.<sup>34</sup> What emerged was the Lausanne Declaration, a multi-national and multi-organizational

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<sup>26</sup> *Id.*

<sup>27</sup> See generally Straubel, *supra* note 5, at 525 (discussing how the discovery that Ben Johnson had used performance enhancing drugs produced a deeper sense of sadness and disappointment than previous revelations).

<sup>28</sup> *Id.*

<sup>29</sup> See Sarah Baldwin, Note, *Performance Enhancing Drug Use in Olympic Sport: A Comparison of the United States and Australian Approaches*, 24 *LOY. L.A. INT'L & COMP. L. REV.* 265, 266 (2002).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 268.

<sup>32</sup> Pound, *supra* note 1.

<sup>33</sup> See Fitzgerald, *supra* note 7, at 230.

<sup>34</sup> See Pound, *supra* note 1.

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commitment to fight doping at every level of organized sports.<sup>35</sup> With its history of inconsistent enforcement and ulterior motives, the assembled delegates made it clear that the IOC was not the right organization to direct this mission.<sup>36</sup> The need for an international doping authority, independent from the IOC, led to the creation of the World Anti-Doping Agency (“WADA”).<sup>37</sup> Having been removed from both the financial reliance on and political pressure of the IOC and the self-interest of the sports organizations, WADA capitalized on its independent status to garner the trust and respect of the athletes while exercising its authority to police the various sports bodies, ensuring that they are adhering to the Code and complying with their responsibilities.<sup>38</sup> As WADA’s influence as the leader in the global fight against doping continues to grow, the positive reputation and credibility of the organization rests on whether its rules and procedures become more widely understood and accepted and are exercised in a consistent and just manner.<sup>39</sup>

## III. THE COURT OF ARBITRATION FOR SPORT

The Court of Arbitration for Sport (“CAS”) was the brainchild of Juan Antonio Samaranch, the president of the IOC from 1980 to 2001.<sup>40</sup> A sharp rise in the number of disputes between sports governing bodies, organizations and athletes in the early 1980’s prompted him to create a private court solely dedi-

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<sup>35</sup> *See id.*

<sup>36</sup> *See* Fitzgerald, *supra* note 7, at 231.

<sup>37</sup> *Id.*

<sup>38</sup> Pound, *supra* note 1, at 6.

<sup>39</sup> *See* Fitzgerald, *supra* note 7, at 232

<sup>40</sup> *Id.* at 214. In addition to being the organizer and producer of each Olympiad, the IOC is the final arbiter for all legal disputes arising out of or related in any way to the Games. In the hierarchy of organizations within the Olympic Movement, the International Federations (“IF”) lie directly below the governing authority of the IOC. Every Olympic sport has a corresponding IF. The IF is the administrative and governing body for a sport, overseeing the global marketing and promotion of that sport in addition to producing every competition which takes place under its auspices. Directly under the authority of the IF in each sport is the corresponding National Governing Body (“NGB”) of the same sport. The role of an NGB is to oversee all the Olympic caliber athletes from their country who compete in that sport. During an Olympic year, the NGBs come under the authority of the NOCs who manage and control their nation’s world class athletes. Each NOC is also responsible for overseeing the selection of athletes to represent its country at the Games.

cated to resolving any kind of sports-related dispute.<sup>41</sup> Although the CAS was created by the IOC in 1983, it lacked real credibility for almost a decade because of its close relationship with and financial dependence upon the organization that created it.<sup>42</sup> Recognizing that the court did not command the level of trust and respect necessary to function effectively, the IOC and its member organizations created the International Council of Arbitration for Sport ("ICAS") in 1993.<sup>43</sup> ICAS was established with two objectives: the first was to create an organization to oversee the CAS and the second and primary objective was to have it be administratively and financially independent from the IOC.<sup>44</sup> Although it is an independent organization, the CAS performs the primary role in the IOC's efforts to bring the doping epidemic under control.<sup>45</sup> When the IOC introduced its Anti-Doping Code, it designated the CAS as the final tribunal for the resolution of doping disputes.<sup>46</sup> Every sports governing body was required to change its charter to comply with the designation of the CAS as the court of last resort.<sup>47</sup> When a dispute comes before the CAS on its final appeal, the panel's decision will be final, binding and internationally enforceable against the losing party.<sup>48</sup>

The vast majority of cases heard by the CAS proceed as either a traditional arbitration, with a three judge panel, or as an arbitration appeal.<sup>49</sup> In both types of proceedings, the arbitration panel is required to interpret and apply either the rules of the sporting federation that is a party to the dispute or the law previously chosen by contract between the parties.<sup>50</sup> In addition, all CAS hearings also adhere to the Code of Sports Related Arbitration.<sup>51</sup> These

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<sup>41</sup> See Oschutz, *supra* note 14, at 676. In addition to the increase in disputes, Samaranch felt that most courts did not understand the kinds of disputes that occur in the sports world. Having a court which specialized in the resolution of sports-related disputes would, over time, create a level of certainty in its decisions that could not be found in the courts. *Id.*

<sup>42</sup> See Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes*, 35 VAL. U.L. REV. 379, 382 (2001).

<sup>43</sup> See Reeb, *supra* note 10.

<sup>44</sup> See *id.*

<sup>45</sup> *Id.*

<sup>46</sup> See IOC Anti-Doping Rules, *supra* note 15 at 12.

<sup>47</sup> Richard H. McLaren, *International Law Weekend –West Symposium Issue: Sports Law Arbitration by CAS: is it the Same As International Arbitration*, 29 PEPP. L. REV. 101, 102 (2001).

<sup>48</sup> See Oschutz, *supra* note 14, at 677.

<sup>49</sup> See Richard H. McLaren, *International Sports Law Perspective: Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515, 518 (2001).

<sup>50</sup> See McLaren, *supra* note 47, at 102.

<sup>51</sup> See *id.* at 102.

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rules were created and introduced by the CAS to ensure greater uniformity in its jurisprudence and to help increase public confidence in the fairness and integrity of the institution.<sup>52</sup> As both its relevance and usefulness have grown, the CAS has gained the respect of the legal world and developed into the preeminent body for dispute resolution in the sports world.<sup>53</sup>

The Ad Hoc Division (“AHD”) of the CAS was created by ICAS in 1996 with the sole purpose of settling any disputes which arise during the course of an Olympiad.<sup>54</sup> The procedure of an AHD hearing is governed by the CAS Arbitration Rules (“CAS Rules”) for the Olympic Games in conjunction with the regulations of the CAS Code.<sup>55</sup> Produced and enacted by the ICAS prior to each Olympiad, the CAS Rules dictate the sequence of events following submission of a claim to the AHD and detail the procedures and protections available to the parties both during the hearing and after its conclusion.<sup>56</sup>

#### IV. STRICT LIABILITY

##### A. Overview

The IOC Anti-Doping Rules (“Rules”), in conjunction with WADA’s World Anti-Doping Code (“Code”), contain the rules and regulations that govern every aspect of doping regulation from the way a violation is detected, to the hearing procedure that follows confirmation of a violation, through the punishment it exacts from offenders.<sup>57</sup> From testing to punishment, the entire process lacks the majority of what Americans consider to be vital due process protections. However, the most troubling violation of the accused athlete’s rights<sup>58</sup> occurs with the Code’s application of strict

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<sup>52</sup> See Reeb, *supra* note 10, at 25.

<sup>53</sup> See McLaren, *supra* note 47, at 103.

<sup>54</sup> See *id.* The AHD acquires jurisdiction over the Olympics and its participants as a consequence of a clause contained on the Olympic Athlete Entry Form and expressed in Article 61 of the Olympic Charter.

<sup>55</sup> Court of Arbitration for Sport, *Arbitration Rules for the Olympic Games*, art. 17 (2006) available at <http://www.tas-cas.org/en/regle/frmregle.htm> (last visited Dec. 12, 2004).

<sup>56</sup> See Fitzgerald, *supra* note 7, at 224.

<sup>57</sup> See McLaren, *supra* note 49, at 535.

<sup>58</sup> An essential instrument in the IOC’s campaign against doping is the mandatory arbitration clause contained in the Olympic entry form. In order to receive permission to compete in



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liability for anti-doping violations.<sup>59</sup> Under this doctrine, the mere detection of a substance from the Prohibited Substances List results in a legal presumption that the athlete is guilty of the violation.<sup>60</sup>

Before analyzing the various issues connected with strict liability, it is appropriate to first analyze the procedure of an anti-doping violation arbitration hearing from a due process perspective because it illustrates how little respect exists for the rights of accused athletes during this process. For the sake of comparison, the United States Olympic Committee (“USOC”)’s interpretation of the due process protections they believe are constitutionally required for their disciplinary hearings include: allowing a reasonable time to prepare a defense, providing a right to call witness and present oral and written evidence, cross examining adverse witnesses, and sustaining a preponderance of the evidence standard for the National Governing Body (“NGB”).<sup>61</sup> As we will see, there are only one or two aspects of an Olympic anti-doping arbitration that meet the USOC’s minimum standards, which are not exemplary to begin with.

The eight principles that WADA believes must be respected in order for the proceeding to conform to the minimum standards of due process are contained in Article 8 of the Code, titled “Right To A Fair Hearing.”<sup>62</sup> It states that

[t]he hearing process shall respect the following principles: a timely hearing; fair and impartial hearing body; the right to be represented by counsel at the *Person’s* own expense; the right to be fairly and timely informed of the asserted anti-doping rule violation; the right to respond to the asserted anti-doping rule violation and resulting *Consequences*; the right of each party to present evidence, including the right to call and question witnesses (subject to the hearing body’s discretion to accept testi-

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the Games, every athlete must sign this form. The language of the clause compels every Olympic participant to consent to mandatory, final and binding arbitration for any dispute that arises during the course of the Games. However, resolution of an anti-doping violation during the Olympics is unique in that the legal doctrine of strict liability is applied in an arbitration which is mandatory, final and binding. See Oschutz, *supra* note 14, at 677.

<sup>59</sup> See IOC Anti-Doping Rules, *supra* note 15, art. 2.1.1. (stating that “. . .it is not necessary that intent, fault, negligence or knowing Use on the *Athlete’s* part be demonstrated in order to establish an anti-doping violation under Article 2.1”) [emphasis added].

<sup>60</sup> See Richard McLaren, *A New Order: Athlete’s Rights and the Court of Arbitration at the Olympic Games*, OLYMPIKA, Vol. VII, 1998, at 3.

<sup>61</sup> See Straubel, *supra* note 5, at 547.

<sup>62</sup> See *World Anti-Doping Code*, art. 8, World Anti-Doping Agency (2003). [hereinafter Code].

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mony by telephone or written submission); the Person's right to an interpreter at the hearing, with the hearing body to determine the identity, and responsibility for the cost of the interpreter; and a timely, written, reasoned decision.<sup>63</sup> (emphasis added) *Id.*

Although these protections barely resemble the due process rights granted by our Constitution, they are derived from the same general principles of national and international law and internationally recognized human rights.<sup>64</sup> WADA imposed these standards for all anti-doping hearing proceedings because numerous national and international sports bodies were ignoring the rights of their athletes and perverting their internal adjudication system to get the results they wanted.<sup>65</sup> By mandating these minimum protections for the athletes, WADA sought not only to have the athletes gain trust in the system, but, more importantly to make the arbitration procedure and its decisions less susceptible to outside legal challenges.<sup>66</sup> A major obstacle to any further due process protections for these hearings is the significant financial cost it would entail. Conversely, if the athletes' rights were better protected, it is clear that the Olympic system would be viewed as more credible and trustworthy by the public and inspire more confidence from the athletes.<sup>67</sup>

While the Code contains evidence of minor improvements in the protection of the rights of athletes, two aspects remain that an American judge reviewing an Olympic arbitral award would likely find very troublesome. First, when an athlete tests positive, the Code permits the "provisional suspension" of that athlete even though a hearing has not yet taken place.<sup>68</sup> Second, the Code allows the public disclosure of the positive test result before the hearing occurs.<sup>69</sup> These provisions are objectionable because they interfere with the right of the athlete to a fair hearing and have the potential to poison the public perception of the accused athlete.<sup>70</sup> For example, in the case of Tyler Hamilton, (an Olympic cyclist

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<sup>63</sup> *Id.*

<sup>64</sup> See Alec Van Vaerenbergh, *Regulatory Features and Administrative Law Dimensions of the Olympic Movement's Anti-doping Regime*, IILJ WORKING PAPER 2005/11 (2005). [hereinafter Vaerenbergh].

<sup>65</sup> *Id.* at 31.

<sup>66</sup> See *id.* at 32.

<sup>67</sup> See Straubel, *supra* note 5, at 545.

<sup>68</sup> Code, *supra* note 62, at art. 7.5.

<sup>69</sup> Code, *supra* note 62, at art. 14.2.

<sup>70</sup> See Vaerenbergh, *supra* note 64, at 34.

champion in the 2004 Athens Olympics), high ranking officials from both WADA and the IOC publicly proclaimed their belief that not only was he guilty of doping, but that all the results in his career should now be considered suspect.<sup>71</sup> Comments like these are not only contrary to the values of Olympic sportsmanship and ethics, but are also directly opposed to the core values of WADA to act professionally, impartially and “in accordance with the highest standards of ethical behavior.”<sup>72</sup> These problem areas are the most egregious examples of why the lack of due process protections during the arbitration process should expose the decisions of the panel to judicial review in national courts.

### B. Justifications and Illustrations

The broad anti-doping policy rationales advanced by the Code include the desire for a level playing field, the protection of the athletes’ health, the social standing and image of the sports world, and the importance of sports as a provider of role models.<sup>73</sup> These goals are deemed significant enough to the sports world that athletes who are found to have violated the anti-doping restrictions contained in the Code are subject to its application of strict liability.<sup>74</sup> In the world of international athletic competition, the use of strict liability for doping offenses has been justified by the “flood-gates argument.”<sup>75</sup> The belief is that if athletes were permitted to raise any excuses when the presence of a prohibited substance has been confirmed, then the fight against doping would become impossible.<sup>76</sup> A more compelling argument is one advanced in a 1995 CAS decision which stated that there are many aspects of competition and, in fact, life, that can be unfair, such as when an athlete becomes ill on the day of a competition.<sup>77</sup> In addition, the decision states that it is reasonable “not to repair an accidental unfairness to

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<sup>71</sup> 2005 AM. ARB. ASS’N No. 30 190 00713 03 (Campbell, dissenting)

<sup>72</sup> World Anti-Doping Agency, *Strategic Plan - 2004-2009* (2003), available at [http://www.wada-ama.org/rtecontent/document/StratP\\_ENG.pdf](http://www.wada-ama.org/rtecontent/document/StratP_ENG.pdf) (last visited Nov. 10, 2004).

<sup>73</sup> G. Kaufmann-Kohler, A. Rigozzi & G. Malinverni, *Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law* (2003), <http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf> (last visited Dec. 5, 2004).

<sup>74</sup> *Id.* at 13.

<sup>75</sup> *Id.* at 29.

<sup>76</sup> *Id.* at 29.

<sup>77</sup> *Id.* at 30.

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an individual by creating an intentional unfairness to the whole body of other competitors.”<sup>78</sup>

One of the legal justifications for a strict liability offense is that it is appropriate when the proscribed conduct has the potential to seriously threaten the health or safety of a community.<sup>79</sup> Consequently, the type of threat posed by the prohibited activity is considered to be of sufficient gravity that the actor is placed on notice of the likelihood of its regulation, removing the need to prove *mens rea* for this type of offense. The basic concept of strict liability is that “culpability is not an element of the offense” and the prosecutor is relieved of the burden of “proving the offender’s culpable state of mind.”<sup>80</sup> The question of whether the action was taken with malice, completely innocently, or somewhere in between is not a question that is considered in determining a violation.<sup>81</sup>

The types of problems inherent in strict liability are best illustrated by the following three cases. The most famous injustice that has occurred under this rule is the case of the 16-year-old Romanian Gymnast, Andreea Raducan, the gold medalist in the Women’s Individual All-Around competition at the Sydney Games.<sup>82</sup> While warming up for her event, she complained to the team doctor that she did not feel well. He gave her a pill of an over-the-counter decongestant, which he had also given to one of her teammates.<sup>83</sup> After the medal ceremony, she was taken to the anti-doping control station, as required, and produced three urine samples. The presence of a prohibited substance, pseudo-ephedrine, was detected in the “A” and “B” samples, establishing a violation of the Anti-Doping Code.<sup>84</sup> The IOC immediately disqualified her, withdrew her medal and ordered her to return it.<sup>85</sup> Using her right to appeal the IOC’s decision, she requested a hearing before an AHD tribunal.<sup>86</sup> In her defense, she asserted that the amount of urine in the “B” sample was less than the minimum required by the Code, that there was a discrepancy between the

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<sup>78</sup> *Id.*

<sup>79</sup> See 21 AM. JUR. 2d *Criminal Law* § 145 (2004).

<sup>80</sup> 21 AM. JUR. 2d *Criminal Law* § 146 (2004).

<sup>81</sup> *Id.*

<sup>82</sup> See GABRIELLE KAUFMANN-KOHLER, *ARBITRATION AT THE OLYMPICS: ISSUES OF FAST-TRACK DISPUTE RESOLUTION AND SPORTS LAW* 82 (2001).

<sup>83</sup> See *id.*

<sup>84</sup> See IOC Anti-Doping Rules, *supra* note 46, art. 2.1.

<sup>85</sup> See KAUFMANN-KOHLER, *supra* note 82, at 82.

<sup>86</sup> IOC Anti-Doping Rules, *supra* note 15, art. 12.2.2.

amount of urine she handed in and the amount at the laboratory, and that her disqualification violated principles of fairness and equality.<sup>87</sup> Her appeal was denied by the panel, without a hearing on the merits. Because she had taken the pill, the Code imposed liability, regardless of her intent or lack of knowledge that it was a banned substance.<sup>88</sup> The gold medal went to her teammate who was cleared because she was taller and heavier than Ms. Raducan, thus having a reduced and legal concentration of the substance.<sup>89</sup>

In a landmark 1996 decision, an arbitration panel from the American Arbitration Association (“AAA”) refused to enforce the sanctions imposed by La Federation Internationale de Natation<sup>90</sup> (“FINA”) on Jessica Foschi, a swimmer who tested positive for an anabolic steroid.<sup>91</sup> It held that because she was “without fault, without knowledge of how the prohibited drug entered her body, the Federation’s strict liability drug rules and sanctions imposed thereon violated due process, fundamental fairness and were arbitrary and capricious.”<sup>92</sup> The panel went on to declare that the effect of the Federation’s strict liability policy was to ensure punishment of the guilty at the possible expense of the innocent, a policy by which they were unwilling to abide.<sup>93</sup> Not surprisingly, FINA appealed the AAA ruling to the CAS. The CAS acknowledged the right of an IF to impose sanctions on an athlete but reduced the imposed sanction from two years to six months.<sup>94</sup> The opinion cited several mitigating factors for the reduction including the fact that the athlete was thirteen, there was evidence showing she was not a chronic user and the fact that the ingestion of the substance had not enhanced her performance.<sup>95</sup>

While the IOC considers strict liability the only way to effectively deal with the doping problem, it seems unconcerned about the harm that it can cause to the careers of innocent athletes.<sup>96</sup> When athletes test positive, they “are unwillingly forced to deal

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<sup>87</sup> See KAUFMANN-KOHLER, *supra* note 82, at 87-88.

<sup>88</sup> IOC Anti-Doping Rules, *supra* note 15, art 2.2.

<sup>89</sup> See Baldwin, *supra* note 29, at 267.

<sup>90</sup> This organization, commonly known as FINA, is the IF for the sport of swimming.

<sup>91</sup> See Aaron N. Wise, “Strict Liability” Drug Rules of Sports Governing Bodies, 146 *NEW L.J.* 1161, 1162 (1996).

<sup>92</sup> *Id.* at 1161.

<sup>93</sup> See *id.* at 1162.

<sup>94</sup> Richard McLaren, *supra* note 66, at 7.

<sup>95</sup> See *id.* at 8.

<sup>96</sup> See Oschutz, *supra* note 14, at 681.

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with the instant notoriety and opprobrium of being a drug cheat.”<sup>97</sup> At the 2002 Winter Olympics in Salt Lake City, the IOC stripped Alain Baxter, a British athlete, of his bronze medal in men’s slalom skiing because he had used a Vicks inhaler that contained a prohibited substance, of which trace amounts were found in his system.<sup>98</sup> In its ruling, the CAS noted that although the ingestion was clearly inadvertent and had no performance enhancing effect, it had no choice but to sustain the IOC’s decision.<sup>99</sup> The panel’s opinion is notable for the fact that it stressed Baxter’s lack of guilt, implicitly criticizing strict liability’s potential for punishing the innocent.<sup>100</sup>

## C. Issues of Science

The threshold question in an analysis of the anti-doping violation is whether a prohibited substance is present in the urine or blood samples taken from the athlete. A violation is the result of either “[t]he presence of a prohibited substance . . . in an athlete’s bodily specimen” or the “[u]se or attempted use of a prohibited substance or a prohibited method.”<sup>101</sup> The presence of a prohibited substance is an issue of fact determined by laboratory testing. One of the responsibilities assigned to WADA in their management of the international anti-doping campaign is the creation and maintenance of the Prohibited Substances List. The contents of the list are solely and exclusively the domain of WADA, and are not able to be challenged by either an individual or an organization.<sup>102</sup> This unassailable authority can raise serious problems for both athletes and manufacturers who one day are using or making substances deemed legal and then, at some later date, find out that that same substance has now been deemed prohibited by the scientists at WADA.<sup>103</sup> To be placed on the list, a substance must, in theory, satisfy two out of the following three criteria: taking it is

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<sup>97</sup> See Hayden Opie, *Drugs in Sports and the Law – Moral Authority, Diversity and the Pursuit of Excellence*, Eighth Annual Robert F. Boden Lecture at Marquette University Law School 14 MARQ. SPORTS L. REV. 267, 276 (2004) [hereinafter Opie].

<sup>98</sup> *Id.* at 275.

<sup>99</sup> *Id.*

<sup>100</sup> *See id.*

<sup>101</sup> IOC Anti-Doping Rules, *supra* note 15, art. 2.1, 2.2.

<sup>102</sup> *See Vaerenbergh, supra* note 64, at 26.

<sup>103</sup> *See id.*

harmful to the individual; if taken, it has been found or is believed to enhance performance; or it is against the “spirit of the sport.”<sup>104</sup>

The 2005 Prohibited List contains over 100 specific substances.<sup>105</sup> In addition to the enumerated substances in every category, each list also includes “other substances with similar chemical structure or similar pharmacological effect(s), and their releasing factors, are prohibited.”<sup>106</sup> This addition perfectly illustrates the quandary with which WADA is faced. The speed and frequency with which new drugs are being developed means that WADA will never have a comprehensive list of performance enhancing substances.<sup>107</sup> However, the catchall clause secures the organization’s authority to sanction an athlete using a substance that is not listed.<sup>108</sup> An additional result of this imprecision is that it greatly increases the burden of care on athletes, who are uncertain about what could come back to haunt them. For example, an athlete who uses vitamin supplements runs the risk that they might contain a prohibited substance.<sup>109</sup> Neither the athlete nor his or her physician would ever know there was a problem with that substance until they were informed that they had violated the anti-doping code.<sup>110</sup>

#### i. Flaws in Testing

An athlete’s uncertainty is not limited to whether or not a substance is banned; in many cases it is the substance’s level of concentration that creates the violation.<sup>111</sup> When a minor adjustment to

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<sup>104</sup> See Robert Dawson, *How Not To Stop The Cheats*, NEW SCIENTIST, October 4, 2003, at 23.

<sup>105</sup> *World Anti-Doping Code 2005 Prohibited List*, World Anti-Doping Agency (2004) [hereinafter WADA List].

<sup>106</sup> *Id.*

<sup>107</sup> See Wong, *supra* note 4, at 8. Another problematic aspect of the prohibited substance list is that most substances which are banned also have legitimate medical uses. The threshold at which a drug becomes performance enhancing cannot always be exactly determined, but that doesn’t mean that it will not be included on the list. Testing results from the drug’s manufacturer are likely to only address the drug’s medicinal qualities. The tests required to determine a drug’s performance enhancing potential are costly and time consuming. There is insufficient funding available for WADA to be proactive in this research. Without the assistance and co-operation of the pharmaceutical industry, WADA’s effectiveness will be limited. *Id.* at 51, 52.

<sup>108</sup> See Ken Foster, *The Discourses of Doping: Law and Regulation in the War Against Drugs*, in *DRUGS AND DOPING IN SPORT – SOCIO-LEGAL PERSPECTIVES* 191 (John O’Leary ed., Cavendish Publishing Limited 2001); Lauri Tarasti, *When can an athlete be punished for a doping offense? Procedural faults and the burden of proof*, <http://www.blues.uab.es/olympic.studies/doping/tarasti.htm> (last visited Dec. 21, 2004).

<sup>109</sup> See Opie, *supra* note 97, at 275.

<sup>110</sup> See Tarasti, *supra* note 108.

<sup>111</sup> See Wong, *supra* note 4, at 9.

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the threshold concentration of a prohibited substance changes a gold medal winner to a drug cheat, it is imperative that the levels be the result of precise and accurate scientific research.<sup>112</sup> At a recent meeting of international sports officials in Cologne, the IOC was informed that the concentration level for a nandrolone violation was not scientifically based.<sup>113</sup> This revelation raises serious questions about all prior decisions whose bases lay in the concentration levels contained on the list. Because of the fundamental questions a revelation like this raises about the flawed and/or imprecise methods used to create the Prohibited Substances list, this type of evidence would be instrumental in allowing an athlete to effectively mount a legal challenge to the threshold level that WADA has deemed sufficient to constitute a violation.<sup>114</sup>

Some of the substances on the Prohibited Substances List are naturally produced by the human body.<sup>115</sup> In the case of testosterone, a natural human hormone, the Code considers a violation to have occurred when the level of concentration is inconsistent with normal endogenous production.<sup>116</sup> In 1997, the International Amateur Athletic Federation accused Mary Decker Slaney of committing a doping offense.<sup>117</sup> After running the 5000 meter race at the national trials for the Atlanta Olympics, her urine sample showed a highly elevated level of testosterone.<sup>118</sup> However, at the time there was no test which could differentiate between testosterone which was naturally produced by the body and testosterone that had been injected.<sup>119</sup> Her claim that her high testosterone ratio was the result of various physiological conditions including changing birth control pills, her menstrual cycle and alcohol use, was rejected by the International Association of Athletics Federations (“IAAF”) panel that heard her case.<sup>120</sup>

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<sup>112</sup> See John O’Leary, *Doping Solutions and the Problems with ‘Problems’*, in *DRUGS AND DOPING IN SPORT – SOCIO-LEGAL PERSPECTIVES* 258 (John O’Leary ed., Cavendish Publishing Limited 2001).

<sup>113</sup> See *id.*

<sup>114</sup> See *id.*

<sup>115</sup> See Tarasti, *supra* note 108.

<sup>116</sup> See *id.*

<sup>117</sup> See Straubel, *supra* note 5, at 527.

<sup>118</sup> See *id.* at 528.

<sup>119</sup> See Tarasti, *supra* note 108.

<sup>120</sup> See Straubel, *supra* note 5, at 527. At that time, IAAF regulations allowed it to conduct its own arbitration hearing. Her attorneys refused to appear before the IAAF panel because they felt it was heavily biased against accused athletes. After conducting the hearing without her, the IAAF found her guilty. Slaney immediately filed suit in Indiana Federal District Court. The



Another problematic area for detecting anti-doping violations is bio-transformation. This occurs when a substance is changed from one chemical to another because of a chemical reaction within the body.<sup>121</sup> Last summer in Athens, a Colombian cyclist who won the bronze medal in the Women's Points Race was disqualified and stripped of her medal.<sup>122</sup> During the hearing, she categorically denied taking the substance, arguing that the presence of the substance in her body was the result of the bio-transformation of a non prohibited substance. In addition, her NOC, the Colombian Olympic Committee, presented evidence on her behalf.<sup>123</sup> The result of the test that they performed on her was negative.<sup>124</sup> The Disciplinary Commission of the IOC determined that even if the positive finding had been due to biotransformation, strict liability required the subsequent actions.<sup>125</sup> On appeal, the CAS reversed the decision of the IOC executive board and returned her bronze medal.<sup>126</sup> They determined that the presence of the prohibited substance resulted from a non prohibited substance having transformed after being ingested.<sup>127</sup> The panel also found that the substance she originally took was not on the List. This finding allowed the CAS panel to set aside the IOC original decision.<sup>128</sup> In addition, they found that the application of strict liability to a substance which WADA determines is "similar" to a prohibited substance, but is not enumerated on the Prohibited List, is subject to challenge.<sup>129</sup>

## ii. Tyler Hamilton

The most compelling and unusual doping case from the 2004 Olympics is that of the American cyclist, Tyler Hamilton. A month after winning the gold medal in the time trial event in Athens, the

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District Court dismissed the case for lack of jurisdiction, and the Seventh Circuit Court of appeals affirmed the District Court, never reaching the merits. *Id.*

<sup>121</sup> MERRIAM-WEBSTER'S MEDICAL DESK DICTIONARY (2d ed. 2002).

<sup>122</sup> Press Release, International Olympic Committee, IOC Sanctions Cyclist Maria Luisa Calle Williams for Failing Anti-Doping Test (Aug. 29, 2004), available at [http://www.olympic.org/uk/news/media\\_centre/press\\_release\\_uk.asp?id=1063](http://www.olympic.org/uk/news/media_centre/press_release_uk.asp?id=1063) (last visited Dec. 21, 2004).

<sup>123</sup> *See id.*

<sup>124</sup> *See id.*

<sup>125</sup> *See id.*

<sup>126</sup> Press Release, Court of Arbitration for Sport, Maria-Luisa Calle Williams (Columbia/Point Race) To Keep Bronze Medal (Oct. 20, 2005), available at <http://www.tas-cas.org/en/medias/media2.htm> (last visited Nov. 30, 2005).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

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IOC announced that his “A” blood sample “gave rise to an adverse analytical finding” which suggested that he had been transfusing his blood with the blood of someone else.<sup>130</sup> Not only was this the first time that anyone had been accused of this offense in Olympic history, but it was also the first Olympics in which the new method of flow cytometry was used to detect this type of doping.<sup>131</sup> The IOC and Hamilton requested an analysis of the “B” sample to either confirm or reject the analysis of the “A” sample. Unfortunately, the lab had mistakenly frozen the “B” sample instead of refrigerating it, rendering it useless.<sup>132</sup> Since the “B” sample could not confirm the “A” sample, there was no anti-doping violation and Tyler Hamilton retained his gold medal.<sup>133</sup> Because there was no violation, there was no hearing, so the facts about what transpired with those samples remained unknown for some time.

WADA’s Independent Observers Report on the 2004 Olympic Games was issued in the fall of 2004 and revealed the actual sequence of events.<sup>134</sup> The laboratory analysis of Hamilton’s “A” sample found it to be negative, though it noted some suspicion of blood transfusion.<sup>135</sup> The analysis was reported to the Medical Director of the IOC who conferred with the Doping Control Laboratory, which again confirmed that they could not report the sample as positive.<sup>136</sup> Because the analysis was negative, the “B” sample was then frozen.<sup>137</sup> As a result of numerous conversations over the course of two weeks between the lab’s scientists, the IOC Medical Director and the WADA Science Director, the President of the IOC was finally informed and the sample was reanalyzed. In an extraordinary turn of events, the lab then found the sample to be positive.<sup>138</sup>

The report raises questions about this case that can only leave both the observer and the athlete to question the validity and accu-

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<sup>130</sup> Press Release, International Olympic Committee, IOC Statement on Pending Anti-Doping Procedure (Sept. 23, 2004) available at [http://www.olympic.org/uk/organization/commissions/medical/full\\_story\\_uk.asp?id=1092](http://www.olympic.org/uk/organization/commissions/medical/full_story_uk.asp?id=1092) (last visited Dec. 21, 2004). [hereinafter IOC Statement]

<sup>131</sup> Hamilton, 2005 AAA No. 30 190 00130 05, at 2.

<sup>132</sup> Associated Press, WADA CHIEF: HAMILTON GOT AWAY WITH DOPING (Sept. 30 2004), available at <http://msnbc.msn.com/id/6091700>.

<sup>133</sup> Hamilton, 2005 AAA No. 30 190 00130 05, at 2

<sup>134</sup> World Anti-Doping Agency, *Independent Observers Report – Olympic Summer Games 2004 – Athens* § 5, art. 3 (2004), <http://www.wada-ama.org/rtecontent/document/AthensIOReport.pdf> (last visited Dec. 21, 2004).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

racy of the whole process. The lab's initial decision not to find the sample positive was based on a lack of confidence in the lab's ability to meet the accreditation criteria required to make a valid report.<sup>139</sup> The lab was unable to confirm a positive result even though it had been selected by both WADA and the IOC to perform that very function.<sup>140</sup> WADA is only supposed to receive information about positive results, yet there was a great deal of communication between the IOC and WADA in the wake of the negative finding.<sup>141</sup> During the three weeks between tests, there was no change in the ability of the lab to meet the criteria for accreditation that previously had been viewed as a barrier to it being able to declare the sample positive.<sup>142</sup>

An even tougher critique of this test is made in the dissent of an award of the AAA in a case, currently on appeal, involving similar charges made by the United States Anti-Doping Agency against Tyler Hamilton. Attacking the science of the test, the dissent claims that WADA's testing method does not use objective criteria, but instead employs a subjective, qualitative approach to identify violations.<sup>143</sup> Tests used in the Olympics should only be permitted when their methods are objective, quantitative, and verifiable.<sup>144</sup> The testimony in this case showed that even though the WADA Criteria had not been subject to peer review, was never sufficiently validated, and the rate of false positives was never calculated, WADA still chose to use a scientifically unsound testing method rather than waiting until a sound method had been developed.<sup>145</sup>

### iii. Erythropoietin ("EPO") Test

Surprisingly, the aforementioned blood transfusion test is not the most controversial test currently used by WADA. That dubious honor belongs to the test designed to detect EPO.<sup>146</sup> EPO is a protein that is naturally produced by the body, which when used as

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<sup>139</sup> *Id.*

<sup>140</sup> World Anti-Doping Agency, *supra* note 134.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See Hamilton, 2005 AAA No. 30 190 00713 03, at 4.

<sup>144</sup> See *id.*

<sup>145</sup> See *id.*

<sup>146</sup> See Dr. Jeff Jones, *Serious Concerns Over Urinary EPO Test* (Sept. 23, 2005) available at [http://www.cyclingnews.com/news.php?id=features/2005/epotest\\_problems](http://www.cyclingnews.com/news.php?id=features/2005/epotest_problems) (last visited Nov. 15, 2005).

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a performance enhancing drug greatly increases endurance.<sup>147</sup> The test currently being used by WADA was developed by the French Anti-Doping Laboratory and introduced to the sporting world at the Sydney Olympics in 2000.<sup>148</sup> This unprecedented test distinguishes between artificial EPO and human EPO.<sup>149</sup> The problem is that it appears to have resulted in false positives for at least three athletes, all of whom have appealed the findings of their tests and had the results reversed.<sup>150</sup>

In 2002, WADA decided to subject the test to an independent review.<sup>151</sup> The report they submitted in March 2003 proposed numerous refinements and improvements to the test.<sup>152</sup> To date, none of the recommendations contained in this report have been put into practice, and only one slight modification has been made to the test which was never subjected to any rigorous independent scrutiny.<sup>153</sup> Ironically, the 2002 report was removed from WADA's website when the false positives began to occur in 2004.<sup>154</sup> Dr. Don Catlin, the director of the UCLA Olympic Analytical Laboratory, responsible for uncovering the BALCO doping scandal, believes that this test is so flawed that he has chosen not to reapply for a grant from USADA which had funded their EPO research.<sup>155</sup> In addition, Dr. Catlin claims that WADA authorities have always known that the test was flawed, but were more concerned with having a test than it being flawed.<sup>156</sup>

Attempting to defend itself in the wake of the reversals of three athletes' positive EPO test results, WADA issued a statement this past fall entitled "Clarification About the EPO Detection Method." In this statement, WADA claims to have taken steps to bring greater certainty and clarity to the analysis of EPO test results; however, it also maintains that no athletes have been sanc-

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<sup>147</sup> Duncan Mackay, *EPO Test Flaws May Be Failing Athletes*, THE GUARDIAN (UK), Sept. 20, 2005, available at <http://sport.guardian.co.uk/athletics/story/0,,1573843,00.html> (last visited Nov. 20, 2005).

<sup>148</sup> See Jones, *supra* note 146.

<sup>149</sup> *Id.*

<sup>150</sup> Mackay, *supra* note 147.

<sup>151</sup> Jones, *supra* note 146.

<sup>152</sup> *Id.*

<sup>153</sup> See *id.*

<sup>154</sup> *Id.*

<sup>155</sup> Brian Alexander, *The Awful Truth About Drugs In Sports*, OUTSIDE MAGAZINE, October 2005, available at <http://outside.away.com/outside/features/200507/drugs-in-sports-1.html>, at 5.

<sup>156</sup> See *id.* at 4.

tioned as a result of various testing abnormalities.<sup>157</sup> This past November, WADA convened all of their lab directors from around the world for an emergency meeting to discuss the EPO test and how to interpret and analyze testing results.<sup>158</sup> In public, WADA has refused to admit that any problems exist with the test, even after the events of last summer, when three positive EPO results were all overturned on appeal.<sup>159</sup> One of the exonerated athletes, an American runner named Bernard Lagat, brought a claim in the German courts against WADA and the IAAF for \$500,000 in lost earnings.<sup>160</sup> Although the court rejected his claim for that amount, he is appealing the decision.<sup>161</sup> Another exonerated athlete, Rutger Beke, has stated that he plans to sue WADA and three WADA-approved labs for \$185,000 in damages.<sup>162</sup> If just one athlete wins a judgment against WADA or the IOC for damages sustained as a result of their steadfast use of this highly problematic test, the political, ethical and financial repercussions for the anti-doping movement would be devastating.

#### D. Hearing Procedure

When the Chairman of the IOC Medical Commission is informed by the testing lab that there has been an adverse analytical finding of an athlete's sample, a tightly structured procedure commences.<sup>163</sup> The President of the IOC convenes a disciplinary commission, which then presides over the hearing.<sup>164</sup> The hearing must be concluded and a decision handed down within 24 hours of the athlete being informed of the violation.<sup>165</sup> The decision of the IOC commission can only be appealed to the CAS.<sup>166</sup> It is during this very rapid hearing process that the rights of the athlete are most

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<sup>157</sup> World Anti-Doping Agency, *Clarification About the EPO Detection Method* (2005), [http://www.wada-ama.org/rtecontent/document/EPO\\_QA.pdf](http://www.wada-ama.org/rtecontent/document/EPO_QA.pdf) (last visited Dec. 20, 2004).

<sup>158</sup> Amy Shipley, *WADA Is Still Confident In EPO Test*, WASHINGTON POST, Nov. 4, 2005, at E03.

<sup>159</sup> *Id.*

<sup>160</sup> Ken Ferris, *Lagat To Continue With Damages Claim Against IAAF, WADA*, REUTERS, Nov. 30, 2005 <http://abcnews.go.com/Sports/wireStory?id=1359538>.

<sup>161</sup> *Id.*

<sup>162</sup> Timothy Carlson, *Beke Sues WADA* (Oct. 20, 2005) available at <http://www.insidetri.com/news/fea/3044.0.html>.

<sup>163</sup> See Pilgrim & Betz, *supra* note 25, at 216.

<sup>164</sup> IOC Anti-Doping Rules, *supra* note 15, art. 7.2.

<sup>165</sup> *Id.* art. 7.2.15.

<sup>166</sup> *Id.* at 12.2.

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likely to be disregarded. While athletes are entitled to have an attorney present at the proceeding, the difficulty of finding an attorney in a foreign country, who is immediately prepared to fully and vigorously defend their client, means this right is largely in name only.<sup>167</sup> More disturbing is the fact that the USOC does not provide counsel to American athletes involved in a dispute.<sup>168</sup> Although the USOC lawyers remain on site during the Games, they are there solely to represent the USOC and to protect its interests.<sup>169</sup>

The case law of the CAS establishes that the burden of proof for determining a violation rests with the body making the allegation.<sup>170</sup> The accusing party is required to provide proof of the violation; however, in doping cases the evidence is usually limited to the presence of a prohibited substance in the sample of an athlete. The actual standard of proof lies somewhere between the civil standard of a preponderance of the evidence and the criminal standard of beyond a reasonable doubt.<sup>171</sup> Under the Code, the presence of the substance is considered to be *prima facie* proof of a violation.<sup>172</sup> The principle of *prima facie* proof allows prohibited behavior or a cause of a finding to be proven indirectly through the use of presumptions based on criteria which have been previously established.<sup>173</sup> By proving the existence of the prohibited substance, the conduct which likely caused the substance's presence is also proven.<sup>174</sup> *Prima facie* proof is a presumption, and as such, the athlete has the ability to rebut the presumption by providing evidence that the presence of the substance may have been caused by something other than the actions of the athlete.<sup>175</sup> When a substance is in a "grey zone," due to scientific uncertainties about threshold levels or because it is produced endogenously, the CAS has ruled that the accusing party must offer further proof that the athlete

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<sup>167</sup> See generally Vaerenbergh, *supra* note 64, at 33.

<sup>168</sup> See U.S. OLYMPIC COMM., SUMMARY OF NEW IOC ANTI-DOPING RULES FOR THE ATHENS OLYMPIC GAMES (2004). [hereinafter USOC Summary].

<sup>169</sup> See *id.*

<sup>170</sup> See Oschutz, *supra* note 14, at 691.

<sup>171</sup> See Klaus Vieweg, *Symposium: International Sports Law & Business In the 21st Century: The Definition of Doping and The Proof of A Doping Offense (An Anti-Doping Rule Violation) Under Special Consideration of the German Legal Position*, 15 MARQ. SPORTS L. REV. 37, 41 (2004).

<sup>172</sup> *Id.* at 45.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

engaged in the prohibited conduct.<sup>176</sup> In addition, the athlete must offer alternate explanations for the presence of the substance.<sup>177</sup>

One of the ways that athletes had been able to rebut the presumption of prohibited substance usage was by alleging that their sample had been tainted in some way, intentionally or innocently, and that somewhere during the collection, transportation and analysis of the sample, an event occurred which had made the results of the sample unreliable. Recently, the IOC and WADA anti-doping codes added a presumption that all laboratory analysis was conducted in accordance with the International Standard for Laboratories.<sup>178</sup> It remains theoretically possible for the athlete to rebut this presumption by showing that the lab's handling of his sample departed from the international standard.<sup>179</sup> When the burden of proof is placed on or shifts back to the athlete, the rules lower the standard to a preponderance of the evidence.<sup>180</sup> However, the lower standard is irrelevant because the athlete is not given the right to examine the lab's report.<sup>181</sup>

Because doping is a strict liability offense that does not require a showing of mens rea, it is primarily the consequence of an act rather than the act itself that creates the punishable offense.<sup>182</sup> However, this does not remove the need for the accuser to show a causal link between the consequence, the presence of the prohibited substance in the athlete's system, and the prohibited conduct, doping.<sup>183</sup> When there are no circumstances in which a substance can be present in an individual's system other than through ingestion, injection or absorption, then the causal link between the consequence and the conduct is considered to have been established.<sup>184</sup> Given the extraordinary complexity of the human body, it should not be surprising that numerous other means exist by which certain substances can be present in an individual's system without having indulged in the prohibited conduct.<sup>185</sup>

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<sup>176</sup> CAS, *Bernhard v. Int'l Triathlon Union*, No. 1998/222 (1999) in DIGEST OF CAS AWARDS II, at 340 (Matthieu Reeb ed., 2002). [hereinafter *Bernhard*].

<sup>177</sup> *Id.*

<sup>178</sup> IOC Anti-Doping Rules, *supra* note 15, art. 3.2.1.; Code, *supra* note 62, art 3.2.1.

<sup>179</sup> IOC Anti-Doping Rules, *supra* note 15, art 3.2.1.

<sup>180</sup> IOC Anti-Doping Rules, *supra* note 15, art 3.1

<sup>181</sup> See Soek, *supra* note 18, at 61.

<sup>182</sup> *Bernhard*, *supra* note 176, at 338.

<sup>183</sup> *Id.* at 339.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

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In the past year, the anti-doping violation known as a “non-analytical positive” has been used to suspend numerous athletes associated with the BALCO scandal, including Tim Montgomery, the former world record holder in the 100 meters.<sup>186</sup> In general, a non-analytical positive refers to a violation which is not based on the results of a drug test.<sup>187</sup> Until this year, its use was limited to actions like refusing to submit to a drug test, possession of a prohibited substance, or tampering with the sample collection process. This year, its use has been expanded to the prosecution of athletes against whom there is only circumstantial evidence of doping.<sup>188</sup> Even though prosecutions for non-analytical positives are by their nature based on less concrete evidence, the Code states that the burden of proof is exactly the same as for analytical positives.<sup>189</sup> The procedure for a non-analytical positive hearing is significantly different because there is no positive test, no presumption of fault, and no presumption to rebut.<sup>190</sup> As such, the burden never shifts to the athlete, and the accusing organization is required to prove each element of the case.<sup>191</sup> Although a non-analytical positive case has yet to occur during the Olympics, it seems clear that the IOC, WADA, the IFs, and the NOCs are all comfortable with using it should the circumstances permit that type of prosecution.

## E. Punishment

An anti-doping violation has a fixed or mandatory suspension attached to it.<sup>192</sup> If a violation occurs during the course of the Olympics, an athlete who is in violation will be disqualified from the Games and any medals, points or prizes are forfeited.<sup>193</sup> Next, the athlete’s IF will normally impose an ineligibility period of two years if it is the athlete’s first violation.<sup>194</sup> A second violation carries the penalty of lifetime ineligibility.<sup>195</sup> The IF does have discre-

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<sup>186</sup> Cameron Myler, *How Much Is Enough? Using Circumstantial Evidence to Prosecute Olympic Sport Athletes for Anti-Doping Rule Violations*, 16 N.Y. ST. B.A. ENT. ARTS & SPORTS L.J. 8, 9 (2005).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Vaerenbergh, *supra* note 64, at 37.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> See Pound, *supra* note 1.

<sup>193</sup> See Code, *supra* note 62, art. 9.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* art. 10.2.



tion to modify the ban in favor of the athlete in exceptional circumstances, as well as to impose additional sanctions.<sup>196</sup> Critics argue that mandatory penalties appear to punish everyone equally, but their practical effects on athletes found guilty of the same violation are very different.<sup>197</sup> The result of a two year ban on an equestrian is likely to impose no financial hardship resulting from a loss of earnings (there is little to begin with) and given the longevity of equestrian careers, a two year absence would be no more than a minor inconvenience.<sup>198</sup> However, a two year ban for a sprinter could effectively end his career, closing the door on the potential financial rewards for which that athlete had spent his entire life training.<sup>199</sup> It is the belief of both the IOC and WADA that fixed sanctions are necessary for the global fight against doping.<sup>200</sup> Flexible sanctions would lead to inequalities greater than those which currently occur.<sup>201</sup> If two skiers from different countries tested positive for the same substance and one was simply disqualified from the event and the other was given a two year ban, it would be not only unfair but unjust.<sup>202</sup>

The argument for imposing such harsh penalties for violations, some of which are often the result of simple negligence, is that they serve as a deterrent to anyone who is contemplating doping.<sup>203</sup> There is no statistical proof that this severe punishment actually fulfills that objective, and given the significant increase in positive test results both in and out of the Olympics, there seems to be no tangible evidence of its deterrent effect either.<sup>204</sup> Interestingly, there is very little criticism from the athletes about the appropriateness and proportionality of the lifetime ban for a second offense.<sup>205</sup> When an athlete has tested positive twice, the likelihood

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<sup>196</sup> *Id.*

<sup>197</sup> See Opie, *supra* note 97, at 273.

<sup>198</sup> See generally John Hoberman, *Learning From The Past: The Need for Independent Doping Control*, Presented at the Duke Conference on Doping (May 7, 1999) (discussing the opinion of the former head of the IOC Medical Commission that sanctions have the potential to financially ruin an athlete and are unjustified) <http://www.law.duke.edu/sportscenter/hoberman.pdf> (last visited Dec. 20, 2004).

<sup>199</sup> *Id.*

<sup>200</sup> Kaufmann-Kohler, *supra* note 73, at 50.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> See *id.* at 45.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 48.

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that he has actively chosen to use prohibited substances and is a chronic cheat seems near certain.<sup>206</sup>

## V. ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Outside of Switzerland, a judicial challenge to the enforcement of an IOC or AHD decision award is governed by the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention.<sup>207</sup> Article III requires signatories to recognize decisions as binding and enforce them.<sup>208</sup> Article V, integral to the analysis of this Note, sets out the grounds for refusing to recognize an arbitration award.<sup>209</sup> These grounds include 1(b), which allows refusal when “[t]he party against whom the award is invoked was . . . unable to present his case” and 2(b) which allows refusal when “[t]he recognition or enforcement of the award would be contrary to public policy of that country.”<sup>210</sup> These two grounds for refusal have been interpreted by U.S. courts to require the violation of either an American due process standard or the most basic ideas of justice.<sup>211</sup>

Federal district courts are given jurisdiction to hear cases challenging the recognition of foreign awards from 9 U.S.C. B 203.<sup>212</sup> U.S. courts have found the public policy defense to be narrowly defined. The standard regulating such determinations could not be met by any of the procedural or substantive defects of an anti-doping violation hearing.<sup>213</sup> Instead, the court should be directed to the topic of the athlete’s agreement to settle all claims by arbitration.<sup>214</sup> If the court were to take the position that the athlete’s submission to arbitration was a regulatory precondition as opposed to an individual, informed choice, the court could refuse to enforce the award on public policy grounds.<sup>215</sup> Realistically, the one issue

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<sup>206</sup> *Id.*

<sup>207</sup> See Urvasi Naidoo & Neil Sarin, *Dispute Resolution at Games Time*, 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 489, 495 (2002).

<sup>208</sup> U.N. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, art. III (June 10, 1958) [hereinafter U.N. CONVENTION].

<sup>209</sup> *Id.* art. V.

<sup>210</sup> *See id.*

<sup>211</sup> *See* *Parsons v. RAKTA*, 508 F.2d 969, 971, 975 (1974).

<sup>212</sup> *See id.* at 971.

<sup>213</sup> *See generally* *Slaney v. International Amateur Athletic Federation*, 244 F.3d 580, 593 (stating the standard as having “violated the most basic notions of morality and justice”).

<sup>214</sup> Vaerenbergh, *supra* note 64, at 20.

<sup>215</sup> *Id.*

on which U.S. courts have been willing to review decisions of sports bodies occurs when the constitutional requirements of due process are concerned.<sup>216</sup> Within the due process defense, there are evidentiary matters quite vulnerable to attack.<sup>217</sup> The general rule of the courts is that once parties have agreed to arbitrate, the arbitrator has the discretion to determine the scope of the evidence that will be allowed.<sup>218</sup> To challenge the discretion of the arbitrator in admitting or denying evidence, the attacking party must show a clear abuse of discretion.<sup>219</sup> If the arbitrator's ruling on an evidentiary issue is binding and has the legal effect of denying the opportunity to produce evidence, then the ruling cannot be justified, causing a due process violation.<sup>220</sup> "When the exclusion of evidence actually deprived a party of a fair hearing . . . it is appropriate to vacate an arbitral award."<sup>221</sup> Additionally, the courts have found that the more important the evidence is in terms of deciding the case, the more likely due process will be violated by a rejection of that evidence.<sup>222</sup> For example, while the validity of any antidoping violation decision must be analyzed on a case-by-case basis, the IOC's new procedural presumption that all laboratory testing has been completed according to international standards would seem to be a prime issue for attack.

While there have been very few instances in the U.S. of judicial review of the awards of sports tribunals, there have been many in England.<sup>223</sup> The English courts have demonstrated a willingness to review decisions when they significantly affect the livelihoods of athletes or raise serious issues of procedural fairness.<sup>224</sup> Additionally, the Council of Europe has noted an increase in the judicial review of arbitration awards largely because of "their significant effect on athletes' fundamental rights."<sup>225</sup> As the number of athletes willing to challenge awards grows along with the number of courts willing to review awards and governments become more involved in the international campaign against doping, it seems that

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<sup>216</sup> *Id.* at 19.

<sup>217</sup> See Osamu Inoue, *The Due Process Defense to Recognition and Enforcement of Foreign Arbitral Awards in United States Federal Courts: A Proposal for a Standard*, 11 AM. REV. INT'L ARB. 247, 265 (2000).

<sup>218</sup> See *id.* at 267.

<sup>219</sup> *Id.*

<sup>220</sup> See *Id.*

<sup>221</sup> *Slaney*, 244 F.3d at 593.

<sup>222</sup> See Inoue, *supra* note 217, at 259.

<sup>223</sup> Vaerenbergh, *supra* note 64, at 19.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 19.

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there is only one way out for the IOC and WADA.<sup>226</sup> By integrating more due process protections into the hearing procedure, they would be significantly better insulated against outside challenges and much more worthy of the trust and support of the athletes.<sup>227</sup>

## VI. SOLUTIONS

Few would deny that the current campaign to eliminate doping from sports is not only necessary but vital to regain the public's trust in professional and amateur athletes. However, it is the manner in which that campaign is being waged that makes the desired result far from being a certainty. Organizations like the IOC and WADA, which have placed themselves on the front lines of this war, seem unable to view the long term repercussions of the questionable methods and procedures they have put in place. As the doping problem has grown and the campaign against it has proven only moderately successful, alternate solutions have been proposed including the adoption of criminal procedure to the hearings, global harmonization of doping procedure, and the codification of a rebuttable presumption of guilt. The adoption of any one of these would significantly improve the rights of athletes while enhancing the moral legitimacy of those who enforce the rules.

### A. Use of Criminal Procedure

As discussed above, it is unlikely that the IOC would ever be willing to bear the burden of fully incorporating criminal procedure into its arbitration system because the increased procedural safeguards would greatly increase both the cost of conducting a hearing and the amount of time needed to ensure a fair hearing. I would argue that the principal reason for limiting the due process protections of athletes is that it would make the prosecution of anti-doping violations much more difficult and probably less successful. However, it is the most appropriate system for violations treated as criminal in nature with corresponding punitive punishments that lack any rehabilitative element.<sup>228</sup> While the IOC is willing to ap-

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<sup>226</sup> *Id.* at 21.

<sup>227</sup> *Id.*

<sup>228</sup> See generally Janwillem Soek, *The Legal Nature of Doping Law*, 2 INT'L SPORTS L.J. 2002 2 (2002) (discussing the need to employ criminal procedure in doping trials).

ply the criminal law concepts of guilt and intent and use those concepts in imposing punishment, it is unwilling to apply the corresponding procedural protection, choosing to operate under private law procedure instead.<sup>229</sup> The use of criminal procedure would ensure that the athlete and the accuser are on equal footing, and the athlete is protected against an over-reaching governing body which does not bear its evidentiary burden.<sup>230</sup> Given that the repercussions of a decision against an athlete are substantial and likely career ending, it is only reasonable to afford him or her a minimum of procedural protection.<sup>231</sup>

For more than fifty years Italy has had laws criminalizing doping, though their use and effectiveness were limited until recently.<sup>232</sup> The adoption of Law No. 376 of 14 December 2000 radically amended the previous legislation, implementing the European Anti-Doping Convention and establishing “doping” as a criminal offense.<sup>233</sup> While most of the language and definitions are quite similar to those in the Code and the Rules, two sections stand out. The provisions of Section 7, entitled “[D]rugs containing doping substances,” require all producers, importers and distributors of drugs included in the classes of the Prohibited List to “provide the Ministry of Health with data confirming the amounts produced, imported, distributed and sold to pharmacies, hospitals or other authorized facilities, for each pharmaceutical specialty.”<sup>234</sup> In addition, the packaging of any product which contains a drug on the prohibited list must have a special symbol which identifies the presence of a prohibited substance and the instruction sheet must have a paragraph with details of “precautions for those practicing sports.”<sup>235</sup> A conviction for doping imposes a prison sentence anywhere from three months up to three years and is coupled with a fine of between 2,500 and 50,000 Euros.<sup>236</sup>

Italy is a pioneer in the anti-doping movement and one of its cities, Turin, is the host of the 2006 Winter Olympics. Because the

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<sup>229</sup> See *id.* at 7; Soek, *supra* note 18, at 59.

<sup>230</sup> See Soek, *supra* note 228, at 5.

<sup>231</sup> *Id.* at 1.

<sup>232</sup> INTERNATIONAL ENCYCLOPEDIA OF LAWS- SPORTS LAW 87, 89 (Roger Blanpain et al. eds. 2004 & Supp. 1 2004) available at <http://www.cer-leuven.be/iel/modelmono/sport-italy.pdf> (last visited Dec. 20, 2004) [hereinafter Sports Law].

<sup>233</sup> *Id.* at 92.

<sup>234</sup> Law N. 376 of 14 December 2000, *Regulation of Health Standards in Sports Activities and the Fight Against Doping*, §7 (Italy).

<sup>235</sup> *Id.*

<sup>236</sup> Sports Law, *supra* note 232, at 96

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law of the sovereign applies to anyone who is within its boundaries, the Italian police have the authority to arrest, try, and imprison any athlete who tests positive during the Games. During this past fall, the IOC was forced into a very awkward and very telling position.<sup>237</sup> The Presidents of both the IOC and WADA applied significant pressure on the Italian government to relax its doping law during the Games.<sup>238</sup> The IOC's justification for the request involved an ethical issue not a criminal issue; a rationale that does not even pass the laugh test.<sup>239</sup> A more plausible reason is that during the Winter Games, the IOC and WADA will not be the supreme authority that they always have been.<sup>240</sup> Not only could the sight of athletes being arrested severely damage the reputation of the Olympics, but the anti-doping system which they have worked so hard to create and control might not be superseded by the Italian system.<sup>241</sup> It is inconceivable that the self interest of these organizations which devote countless time, money, and effort into their work fighting doping is such that they were willing to take a public stand against the enforcement of anti-doping policies.

### B. International Harmonization of Doping Policy

Rather than being viewed as a solution, the international harmonization of the policies and procedures that relate to doping should be considered the principal mechanism through which the IOC and WADA could gain a greater level of trust and understanding within the athletic community. Most IFs and NOCs have an arbitration procedure in place for the resolution of anti-doping violations which occur outside of competition.<sup>242</sup> Athletes are more familiar with that procedure if indeed they are familiar with any procedure. Once jurisdiction over an athlete migrates to the IOC as it does during the Olympic Games, another process with

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<sup>237</sup> See generally Nathaniel Vinton, *I.O.C. Stops Fighting Doping Laws in Turin*, N.Y. TIMES, Oct. 29, 2005, available at <http://www.nytimes.com/2005/10/29/sports/othersports/29ioc.html?ex=1140152400&en=1dd6e49c6d3b821f&ei=5070#> (last visited Oct. 29, 2005).

<sup>238</sup> Associated Press, *Dissent Grows Over Doping Proposal for Turin Olympics* (Oct. 18, 2005) available at <http://msnbc.msn.com/id/9741083/> (last visited Oct. 29, 2005).

<sup>239</sup> Selena Roberts, *Steroid Laws: Punishment and Justice for All*, N.Y. TIMES, Nov. 2, 2005, at D1.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> See generally Baldwin, *supra* note 29, at 287 (asserting that the systems in place in the USOC and the Australian Olympic Committee contain much greater protection of the rights of their athletes).

very different rules and procedures applies.<sup>243</sup> The majority of athletes are unsure of their rights and unfamiliar with the procedure of a hearing because most organizations do not take an active role in educating their athletes. This general lack of knowledge is an even greater disadvantage during the Games because hearings occur within such a short period of time, so there is no real opportunity for the athletes to become properly educated.<sup>244</sup> Even without incorporating any additional procedural protections into an international treaty on doping, the benefit of simply being aware of what awaits them at a hearing would be of great value to all athletes.

### C. Volunteer Program

The most creative solution to the problem has been proposed by Dr. Catlin. As the head of drug testing at the Olympic Games in Los Angeles, Atlanta, and Salt Lake City, Dr. Catlin is more knowledgeable about the issues surrounding the doping problem than nearly anyone in the world.<sup>245</sup> He has proposed the creation of what he calls the “Volunteer”<sup>246</sup> As the name suggests, athletes would volunteer to have extensive biological profiles of their bodies created.<sup>247</sup> The profiles would be used to create a set of “biomarkers” which would illustrate what level of substance is and is not normal for that particular athlete.<sup>248</sup> With their base levels established, athletes who choose to continue their participation would be required to have ongoing checkups, the results of which would prove that they continue to be clean.<sup>249</sup> Because each person’s body behaves differently with different substances, having a biological profile for each athlete would significantly increase the accuracy of test results and allow for variable concentration thresholds accounting for the biological variations of individuals.<sup>250</sup> The system does raise concerns, however, about an athlete effectively being forced to volunteer or risk being perceived as a cheater. The system also raises concerns about the reliance on doctors due to

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<sup>243</sup> See *id.*

<sup>244</sup> See USOC Summary, *supra* note 168, III.

<sup>245</sup> See generally Alexander, *supra* note 155, at 1.

<sup>246</sup> *Id.* at 7.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> See generally Alexander, *supra* note 155, at 7.

<sup>250</sup> *Id.* at 8.

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the complicity of some doctors in past scandals.<sup>251</sup> However, Dr. Catlin's plan contains numerous ideas to increase the reliability of test results which is exactly the type of improvement that needs to be explored further.

## VII. CONCLUSION

The sharp increase in positive substance test results among Olympic athletes makes it clear that the campaign to eradicate doping has had little effect thus far.<sup>252</sup> It appears that the punishment is not a sufficient deterrent to those willing to risk doping<sup>253</sup> evidenced by the record number of athletes were expelled from the Athens Games for anti-doping violations.<sup>254</sup> It appears that the IOC and WADA do not currently feel an incentive to make any changes to their system. Their position will surely change when (not if) an athlete successfully challenges an anti-doping violation in the court of their homeland and is awarded significant damages.

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<sup>251</sup> *Id.*

<sup>252</sup> Weir, *supra* note 16.

<sup>253</sup> *Id.*

<sup>254</sup> *See id.*