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Landis, the Olympic Games, and the Future of  
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Article 2

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# Doping Control, Mandatory Arbitration, and Process Dangers for Accused Athletes in International Sports

Maureen A. Weston\*

## I. INTRODUCTION

Elite athletes who compete in the Olympics and other international sporting competitions undoubtedly train intensely at their sport. These athletes devote much of their lives and their physical, mental, and financial resources to reach the level of participating in top international sporting competitions. Athletes competing in this select arena understand that they must abide by the rules of their sport and competition. The mandatory rules governing participation in international sporting competition encompass much more than what happens among competitors on the field, court, or race course. As a condition of participating in international sporting competition, athletes generally waive rights to judicial recourse in their national courts and agree to mandatory arbitration of disputes regarding eligibility or discipline to the Court of Arbitration for Sport (CAS).<sup>1</sup> Further, athletes must comply with the strictures against doping under the World Anti-

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1. International Olympic Committee, Olympic Charter, Rule 59 (2007), [http://multimedia.olympic.org/pdf/en\\_report\\_122.pdf](http://multimedia.olympic.org/pdf/en_report_122.pdf) [hereinafter "Olympic Charter"] ("Any disputes arising on the occasion of, or in connection with, the Olympic Games, shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration."). All international sports federations have adopted CAS jurisdiction for dispute resolution. See *infra* Part II.B.

Doping Code (Code) and are subject to regular and random drug testing, in and out of competition.<sup>2</sup>

An athlete's life and livelihood can come to an abrupt halt upon a report by doping authorities that the athlete has tested positive for a prohibited substance, or upon a ruling by a sporting authority that the athlete is ineligible to compete.<sup>3</sup> Doping in sport is a serious offense. Doping by athletes threatens not only their health and the fairness to competitors, but also the integrity of the sport itself.<sup>4</sup> Intentional doping is cheating. Detecting doping is often complicated, as it can occur in elusive, sophisticated, and sometimes undetectable forms.<sup>5</sup> The international sport community has mobilized in the fight against doping, and adopted a world code against doping, which calls for strict liability against athletes found guilty of doping. Increasingly, athletes charged with doping in sport face subsequent criminal charges in national courts.<sup>6</sup>

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2. Olympic Charter, *supra* note 1, at Rule 44. See World Anti-Doping Agency, World Anti-Doping Code (2003), [http://www.wada-ama.org/rtecontent/document/code\\_v3.pdf](http://www.wada-ama.org/rtecontent/document/code_v3.pdf) [hereinafter "WADC 2003"]. The Code was first adopted in 2003, effective in 2004. *Id.* In 2007, the Code was substantially revised and put into effect in January 2009. World Anti-Doping Agency, World Anti-Doping Code (2009), [http://www.wada-ama.org/rtecontent/document/code\\_v2009\\_En.pdf](http://www.wada-ama.org/rtecontent/document/code_v2009_En.pdf) [hereinafter "WADC 2009"]. International sports federations have likewise adopted WADC standards into their respective regulations. See *infra* Part II.B and note 70.

3. See *Olympic Swimmer Jessica Hardy "I'm Innocent,"* USA TODAY, July 15, 2008, available at [http://www.usatoday.com/sports/olympics/beijing/swimming/2008-07-25-hardy-doping\\_N.htm](http://www.usatoday.com/sports/olympics/beijing/swimming/2008-07-25-hardy-doping_N.htm) ("She's known as a doper."). The news of a positive doping test or other adverse eligibility determination can be devastating for the athlete. Two weeks before the 2008 Summer Olympics, U.S. swimmer and medalist hopeful Jessica Hardy was shocked to learn that she had tested positive for a banned substance. *Id.* Hardy, who proclaimed her innocence, described this experience as "the worst in her life" and said that she vomited from anxiety. *Id.*

4. See generally Olympic Charter, Mission and Role of the IOC, *supra* note 1, at 14-15.

5. Reliable testing technology may lag behind detecting new drugs or forms of doping. Jessica K. Foschi, Note, *A Constant Battle: The Evolving Challenges in the International Fight Against Doping in Sport*, 16 DUKE J. COMP. & INT'L L. 457, 470 (2006). For example, tests had not been developed to detect tetrahydrogestrinone (THG or "the Clear"), a steroid distributed by the Bay Area Laboratory Cooperative (BALCO), until a track coach mailed a syringe containing THG to USADA. *Id.* at 470. Similarly, cheaters were ahead of authorities in blood doping of erythropoietin (EPO). *Id.* at 471.

6. See, e.g., Richard Sandomir & Michael S. Schmidt, *Congress Requests Clemens Inquiry*, N.Y. TIMES, Feb. 28, 2008, available at <http://www.nytimes.com/2008/02/28/sports/baseball/28clemens.html?r=1&scp=4&sq=clemens%20perjury&st=cse>. Roger Clemens faces potential perjury charges for allegedly lying about his use of illegal substances. *Id.* On February 28, 2008, a Congressional committee asked the Justice Department to investigate whether Clemens made false statements under oath about his use of steroids and human growth hormone. *Id.* Miguel Tejada pleaded guilty to perjury about his use of performance enhancing drugs in his Congressional testimony. See *Tejada Pleads Guilty to Charge of Lying*, ESPN.com, Feb. 12, 2009, <http://sports.espn.go.com/mlb/news/story?id=389948> (last visited Oct. 27, 2009). See also Matthew J. Mitten, *Symposium: From Grand Slams to Juries:*

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While the scientific and sporting communities have developed exacting standards for testing and laboratory practices, testing is not infallible, and not all positive tests are caused by intentional doping, athlete negligence, or competitor sabotage.<sup>7</sup> For example, a prohibited substance can be as innocuous as an ingredient in a nutritional supplement, hair restoration product, or Vicks Vapo Inhaler.<sup>8</sup> So imagine the state of an accused, possibly innocent, athlete on the eve of the Olympics or major competition, or after seemingly winning a gold medal or major title. The accusation alone converts the admired athlete into an apparent pariah. The years an athlete spends focused on training, competing, and working with coaches and teammates hardly prepares him or her for the complex process involved in clearing his or her name, and taking on the system that could render the

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*Performance-Enhancing Drug Use in Sports*, 40 NEW ENG. L. REV. 797, 807 (2006) (noting governmental authority to prosecute athletes who violate controlled substances laws).

7. For example, some prohibited substances are of an endogenous nature and naturally produced in the human body, such as testosterone. Accurately defining a prohibited (T/E) ratio applicable to all athletes is controversial.

WADA must somehow define the illegal level; yet, on the other hand scientists have conducted studies to show that humans (especially elite athletes) can naturally produce levels higher than those provided for under the Code. If true, the imperfect science behind these ratios are putting athletes at risk for false positive testing results.

See Foshi, *supra* note 5, at 472. See also Strahm, et. al., *Steroid Profiles of Professional Soccer Players: An International Comparative Study*, BRIT. J. SPORTS MED., Mar. 12, 2009, available at <http://bjsm.bmj.com/cgi/rapidpdf/bjsm.2008.056242v1> (concluding, in study conducted by WADA lab in Lausanne, Switzerland, that the T/E ratio test is “not fit for purpose”).

8. See Richard H. McLaren, *WADA Drug Testing Standards*, 18 MARQ. SPORTS L. REV. 1, 3 (2007) (noting tests that found a significant number of non-prohibited supplements contained prohibited substances creating both “false positive and false negatives”). U.S. skeleton sled racer Zach Lund was suspended one year due to his use of a hair restoration product which caused a positive test, even though he had listed this on his Doping Control form. *WADA v. Lund*, CAS No. 06/001, at 3 (2006). Briton Alain Baxter was forced to forfeit his bronze medal in the 2002 Winter Games in Salt Lake City because of his use of Vicks Vapor Inhaler for congestion; the brand he purchased in the United States contained a different chemical compound than that sold in England. Michael A. Hiltzik, *Athlete’s Unbeatable Foe*, L.A. TIMES, Dec. 10, 2006, available at <http://www.latimes.com/news/la-sp-doping10dec10,1,1552018.story?page=5>. Although finding that swimmer Kicker Vencill’s positive test was caused by a manufacturer’s contamination of a multi-vitamin, the arbitral panel ordered a two-year suspension, “just as in case of . . . ‘intentional doping.’” *Id.* The athlete had to pay a private lab to test all nutritional supplements he had taken to identify the source of the positive test. *Id.* Andreea Raducan was required to surrender her gold medal in the 2000 Summer Games due to use of an over-the-counter cold medication given by the team doctor. 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, 181 (2006).

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athlete ineligible, banned from sport, and possibly subject to criminal liability.<sup>9</sup>

Athletes in professional sporting leagues in the United States, such as baseball, hockey, football, basketball, and soccer, are also members of their respective sports' players' association (Players' Union), which operates as a labor union. These athletes are subject to mandatory arbitration pursuant to collective bargaining between the league and Players' Union. As the certified bargaining representative, the Players' Union is bound by law to act in good faith in representing its members and can assist the athlete in obtaining representation. Thus, when a professional athlete in the United States becomes involved in a disciplinary action, the athlete has access to representation through the Players' Union.<sup>10</sup> Persons charged with criminal offenses by public authorities may also have a right to counsel, including appointed counsel for defendants who cannot procure counsel on their own.<sup>11</sup>

By contrast, individual athletes participating in international sporting competitions lack an institutional support system that can advise athletes of their legal rights and provide effective representation. Frequently, athletes are informed of disciplinary charges on the eve, or in the midst, of major competitions. Athletes operating in this international sporting environment cannot obtain judicial recourse through their local (or any) court system. Rather, as a condition of participation, all athletes are required to consent to resolve any disputes exclusively by arbitration through the CAS.<sup>12</sup> Although the arbitration process through the CAS provides a procedure for an expedited hearing and disposition, realistically the athlete has limited time (or resources) in which to ascertain the issues he or she faces. Such restraints make it difficult to identify and obtain qualified legal representation, as well as the scientific expertise needed to investigate the charges and to present a comprehensive defense. Athletes find themselves

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9. Disgraced Olympic sprinter Marion Jones faced criminal penalties, including jail time, for lying to federal prosecutors. See also Paul C. McCaffrey, Note, *Playing Fair: Why the United States Anti-Doping Agency's Performance-Enhanced Adjudications Should Be Treated as State Action*, 22 WASH. U. J.L. & POL'Y 645, 659-60, n.113 (2006) (noting that "[i]t is a federal crime to possess, use, or traffic in some of the substances included on the Code's Prohibited List [and that] . . . [d]oping offenses are criminal offenses in several European nations, including Greece, Belgium, France, and Italy").

10. See Mark M. Rabuano, *An Examination of Drug-Testing as a Mandatory Subject of Collective Bargaining in Major League Baseball*, 4 U. PA. J. LAB. & EMP. L. 439, 441 (2002).

11. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (establishing a criminal defendant's right to counsel under the Sixth Amendment). This right is also codified in numerous state laws. See 50 State Statutory Surveys, *Right to Appointed Counsel*, Thomson Reuters West (June 2009).

12. Olympic Charter, *supra* note 1. This requirement is incorporated into the international sporting federation rules.

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up against a well-financed and experienced machine in the anti-doping agency, sporting federation, or governing body seeking sanction against the athlete.<sup>13</sup>

World Anti-Doping Agency (WADA) rules purport to provide the athlete a “right to a fair hearing.”<sup>14</sup> However, the applicable rules, participants, and system for arbitrating a doping charge are markedly different from a court of law. Under WADA rules, the doping report, conducted only by a WADA-accredited laboratory, is presumed valid.<sup>15</sup> The burden is on the athlete, who is likely at an information and resource disadvantage, to come forward with evidence that rebuts the presumption of doping, by showing the laboratory’s practice departed from international standards.<sup>16</sup> Even where the athlete can demonstrate a failure in compliance, such mistakes are excused unless found to be the cause of the adverse analytical finding.<sup>17</sup> This is a significant challenge indeed.

U.S. cyclist Floyd Landis aspired to take on the U.S. Anti-Doping Agency (USADA) when his 2006 title to the Tour de France became jeopardized by the report of a positive doping test conducted by a French laboratory. Unlike most athletes, Landis was able to mobilize the financial resources to hire proficient counsel and experts, to engage in detailed discovery of lab testing practices, to pursue the first public arbitration by an international athlete, and then to appeal the adverse ruling de novo to the

13. The International Olympic Committee (IOC) provided the initial \$25 million to establish WADA and covers 50% of its annual budget. See Jeff Passan, *No Joy in Mudslinging for MLB, WADA*, YAHOO! SPORTS, Jan. 18, 2008, <http://sports.yahoo.com/mlb/news?slug=jp-wadamlb011808> (last visited Oct. 27, 2009). National Doping Agencies receive funding from National Olympic Committees (NOCs) and International Federations (IF)s. USADA is funded by over \$8 million in federal grants and \$4 million from the United States Olympic Committee (USOC). See UNITED STATES ANTI-DOPING AGENCY, 2007 ANNUAL REPORT 12, available at [http://www.usantidoping.org/files/active/who/annual\\_report\\_2007.pdf](http://www.usantidoping.org/files/active/who/annual_report_2007.pdf). USADA has a professional staff, board of directors, in-house counsel and retained law firms. See United States Anti-Doping Agency, *Meet USADA*, <http://www.usantidoping.org/who/meet/> (last visited Oct. 27, 2009).

14. WADC 2003, *supra* note 2, at art. 8; WADC 2009, *supra* note 2, at art. 8.

15. *Id.* at art. 3.2.1.

16. WADC 2003, *supra* note 2, at art. 3.1. See also MCLAREN, *supra* note 8, at 23; Michael S. Straubel, *Doping Due Process: A Critique of the Doping Control Process in International Sport*, 106 DICK. L. REV. 523, 544-45 (2002) (“To begin, tests conducted by a certified laboratory are presumed accurate; therefore, the athlete has the burden of impeaching the results”); Andrew Goldstone, *Obstruction of Justice: The Arbitration Process for Anti-Doping Violations During the Olympic Games*, 7 CARDOZO J. CONFLICT RESOL. 361, 383 (2006).

17. See *infra* Part III.A.1 (regarding enhanced burden of proof upon athlete under WADC 2009).

international Court of Arbitration for Sport.<sup>18</sup> This uphill legal battle cost Landis over \$2 million.<sup>19</sup> The CAS panel not only affirmed Landis's disqualification but also imposed a \$100,000 sanction against Landis personally for having asserted "unfounded allegations" of misconduct against the French laboratory.<sup>20</sup> The cycling federation refused to authorize Landis to compete, even upon expiration of his two-year suspension, until he satisfied the \$100,000 fine.<sup>21</sup> Landis then filed a lawsuit in U.S. federal court seeking to vacate the CAS award and penalty.<sup>22</sup> Although the federal suit raised many questions, the very public case ended by stipulated dismissal and a confidential settlement which ultimately allowed Landis to compete upon conclusion of his suspension.

What are the lessons to athletes and policymakers from *USADA v. Landis*? Based on the price tag alone, few athletes could mount a similar

18. *USADA v. Landis*, AAA No. 30 190 0084 06 (2007) (majority opinion), available at [http://www.usada.org/files/active/arbitration\\_rulings/Landis%20Final%20\(20-09-07\)%20\(3\).pdf](http://www.usada.org/files/active/arbitration_rulings/Landis%20Final%20(20-09-07)%20(3).pdf) [hereinafter *Landis I*]. The perception or reality of unfairness in the anti-doping process apparently motivated supporters of Floyd Landis to mobilize and fund his defense via the Floyd Fairness Fund. Landis' case was followed closely and virtually worldwide on the internet. See, e.g., Trust But Verify, News, Research and Commentary About the Floyd Landis Doping Allegations, <http://trustbut.com> (last visited Oct. 27, 2009). Landis's appeal to the public became known as the "Wiki Defense," by internet postings of his test documents in hopes of "unearthing experts and explanations" for his suspicious test results. See Jennifer Hughes, *The Wiki Defense: What Floyd Landis Taught the Press About Drug Testing*, COLUM. JOURNALISM REV., June 2007, [http://www.cjr.org/on\\_the\\_job/the\\_wiki\\_defense.php](http://www.cjr.org/on_the_job/the_wiki_defense.php) (last visited Oct. 27, 2009) (noting the flurry of online debates in blogs and chat rooms about the Landis case, including responses by scientists, experts, and journalists questioning the testing and documents). "Wiki" refers to "the open editing systems best embodied by Wikipedia, the online encyclopedia that relies on a wisdom-of-the-crowds approach to verifying the accuracy of its entries." *Id.* See also ARNIE BAKER, MD, *THE WIKI DEFENSE*, available at <http://arniebakercycling.com/books/wiki.htm>.

19. Although victorious, USADA spent a comparable amount in prosecuting the Landis case: Two years, close to \$4 million spent by both sides combined, and an unquantifiable amount of collateral damage later, Floyd Landis' doping case rolled across what is normally the administrative finish line . . . . The Court of Arbitration for Sport released its ruling upholding a lower panel's opinion that Landis was guilty as charged of using synthetic testosterone to boost his performance in the 2006 Tour de France.

See Bonnie D. Ford, *Landis May Not Race Again, But He's Not Done Fighting*, ESPN.com, July 1, 2008, <http://sports.espn.go.com/oly/cycling/columns/story?id=3468423> (last visited Oct. 27, 2009).

20. Arbitration CAS 2007/A/1394, *Landis v. USADA*, award of 30 June 2008 [hereinafter *Landis II*].

21. Bonnie D. Ford, *In U.S. Federal Court Motion, Landis Claims Arbitrators Had Conflicts of Interest*, ESPN.com, Sept. 26, 2008, <http://sports.espn.go.com/oly/cycling/news/story?id=3611019> (reporting Landis's filing a lawsuit in U.S. District Court in Los Angeles, which seeks to vacate the CAS decision and fine on the grounds of arbitrator bias and conflicts due to repeat roles as arbitrators and anti-doping counsel).

22. See *Landis v. USADA*, Petition to Vacate Arbitration Award (C.D. Cal. 2008) [hereinafter *Landis III*]. See also *Landis Drops Suit*, VELO NEWS, Dec. 6, 2005, <http://www.velonews.com/article/85653> (last visited Oct. 27, 2009).

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challenge. Furthermore, if the Landis team was unable to break a chink in the armor of USADA, which has lost only one doping challenge to date, fewer athletes are likely to attempt to do so.<sup>23</sup> Is it the case that USADA is nearly always right and WADA testing is infallible, or possibly that most athletes realize that this is one contest they cannot win?<sup>24</sup> Even assuming WADA lab test reports are completely reliable, are athletes afforded due process to adequately protect their rights under the current system? How is an athlete's "right to a fair hearing" effectuated in a system that places the burden on the accused to prove test invalidity, without explicit provision for access to discovery, neutral scientific evaluation, or legal representation?

This Article considers the legal framework, process, and recourse for athletes in international competition to address sporting eligibility and disciplinary actions, particularly from the perspective of the accused athlete facing ineligibility sanction from sporting competition. Part II describes the rules and governing bodies in Olympic and international sporting competition pursuant to the Olympic Charter, which provides the regulatory framework for international sports. Part III examines the interplay between the doping arbitration rules and an athlete's right to a fair hearing, identifying the significant procedural barriers in the designated arbitral process. Part IV considers options for providing athletes with improved access to justice through procedural changes and access to legal advice and representation, including expert scientific evaluation, as well as other forms of legal assistance and insurance programs when contesting eligibility or discipline. This Article argues that athletes who are required to submit to mandatory drug testing, with attendant potential criminal liability, and to mandatory arbitration, should be provided meaningful access to competent legal representation when their athletic careers are in jeopardy. A proposed

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23. USADA's only loss to date came in January 2008. See *USADA v. Jenkins*, AAA No. 30 190 00199 07 (2008) (setting aside laboratory results where athlete established that the same lab technician had tested the athlete's 'A' and 'B' samples, in violation of international standards, and where USADA did not show the violation did not cause the adverse finding). Under the 2009 Code, the "same operator" problem is no longer considered an ISL violation. See generally WADC 2009, *supra* note 2.

24. See World Anti-Doping Agency, Minutes from Executive Board Meeting, Nov. 22, 2008, available at [http://www.wada-ama.org/rtecontent/document/EXCO\\_minutes\\_22Nov08\\_posted\\_120509.pdf](http://www.wada-ama.org/rtecontent/document/EXCO_minutes_22Nov08_posted_120509.pdf) (reporting lower budget forecast for next year, and sincerely hoping "that the message had been sent loud and clear from the CAS in relation to Mr. Landis would mean that athletes would understand that expensive attacks on the system, which is what Landis had done, would not be possible. The message was clear that the system was there and worked properly.").



model of athlete advisors or legal representatives can mirror the roster system used for CAS arbitrators, so athlete advocates can adequately advise athletes and avoid unwarranted challenges. Specialized training regarding the science of testing and doping should be provided to the panel of athlete advocates, similar to that provided to arbitrators and doping authorities.

## II. REGULATORY FRAMEWORK AND DISCIPLINARY PROCESS IN OLYMPIC AND INTERNATIONAL SPORTS

### A. *Governing Bodies in International Sports*

The organizational and regulatory structure for Olympic and international sports competition is based upon the Olympic Movement, as set out in the Olympic Charter.<sup>25</sup> The Olympic Movement consists of governing bodies operating within an international and domestic organizational structure.<sup>26</sup> At the pinnacle of this structure is the International Olympic Committee (IOC), a non-profit, non-governmental organization formed and operating in Lausanne, Switzerland, under Swiss law.<sup>27</sup> Under the Olympic Charter, the IOC possesses the rights to and governs the operation of the Olympics, and is the “final authority on all questions concerning the Olympic Games and the Olympic Movement.”<sup>28</sup> The IOC recognizes, among other things, two categories of governing bodies, which play a prominent role in the Olympic movement. International Sports Federations (IFs) administer Olympic programs for a particular sport, conduct international competitions, and define the eligibility and technical rules for international competition.<sup>29</sup> For each participating country, the IOC also recognizes a National Olympic Committee (NOC), and considers these NOCs “the sole authorities responsible for the representation of their respective countries at the Olympic Games as well as

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25. Olympic Charter, *Introduction, supra* note 1, at 10 (noting the Olympic Charter governs the organization, action, and operation of the Olympic Movement, serves as the statutes of the IOC, and defines the reciprocal rules and obligations of the three main constituents of the Olympic Movement, namely the IOC, the IFs, and NOCs).

26. *Id.* at Rule 1. *See also id.*, *Fundamental Principles of Olympism*, at 12 (“Every individual must have the possibility of practicing sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity, and fair play.”).

27. *Id.* at Rule 15.

28. *Id.* at Rule 19(3). *See also id.* at Rule 15 (“The decisions of the IOC are final. Any dispute relating to their application may be resolved . . . in certain cases, by arbitration before the Court of Arbitration for Sport (CAS).”).

29. *Id.* at Rule 27.

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at other events held under the patronage of the IOC.”<sup>30</sup> These NOCs in turn recognize separate national governing bodies (NGBs) within their countries responsible for managing each Olympic sport and the selection of athletes. NGBs are also members of their respective sport’s international federation.<sup>31</sup> In addition, the Olympic Movement includes the Organizing Committees of the Olympic Games (OCOGs), and, “[o]f course, the athletes.”<sup>32</sup>

### 1. Role and Function of the International Federations (IFs)

The IOC currently recognizes thirty-five international sporting federations.<sup>33</sup> Among these are the International Cycling Union (UCI), the International Athletic Association Federation (IAAF) for track and field, and Federation Internationale de Natation (FINA) for swimming.<sup>34</sup> IFs are responsible for establishing and enforcing the rules concerning the practice of their respective sport worldwide.<sup>35</sup> The IFs determine the rules for status and eligibility, which apply to all athletes and national governing bodies for international competition in a particular sport. IFs retain authority to review decisions of an NGB, which may be subject to conflicting authority by its respective NOC.<sup>36</sup> Disputes among these governing bodies may be referred to arbitration or resolved by the IOC.<sup>37</sup> Although they may receive

30. YASSER, MCCURDY, GOPLERUD & WESTON, *SPORTS LAW: CASES & MATERIALS* 967 (6th ed. 2007); *See* Olympic Charter, *supra* note 1, at Rule 28 §3.

31. YASSER, *supra* note 30, at 967.

32. Olympic Movement, *Who Is the Olympic Movement?*, [http://www.olympic.org/uk/organisation/index\\_uk.asp](http://www.olympic.org/uk/organisation/index_uk.asp) (last visited Oct. 27, 2009) (“The Olympic Movement includes the International Olympic Committee (IOC), Organizing Committees of the Olympic Games (OCOGs), the National Olympic Committees (NOCs), the International Federations (IFs), the national associations, clubs, and, of course, the athletes.”).

33. Olympic Charter, *supra* note 1, at Rule 26.

34. *See, e.g.*, Federation Internationale de Natation, <http://www.fina.org> (last visited Oct. 27, 2009); International Athletic Association Federation, <http://www.iaaf.org> (last visited Oct. 27, 2009); International Cycling Union, <http://www.uci.ch> (last visited Oct. 27, 2009).

35. Olympic Charter, *supra* note 1, at Rule 27 §1.1.

36. *Reynolds v. Int’l Amateur Athletic Fed’n*, 23 F.3d 1110 (6th Cir. 1994) is the leading example of the potential for procedural quagmire in international sports. The IAAF refused to accept the U.S. arbitral award or order by the U.S. Supreme Court to allow the athlete to compete and ultimately escaped liability for a \$27.3 million judgment due to lack of personal jurisdiction over IAAF in the United States. *Id.* at 1118-19. *See also* Mary K. Fitzgerald, *The Court of Arbitration for Sport: Dealing with Doping and Due Process During the Olympics*, 7 *SPORTS L.J.* 213, 219 (2000) (describing TAC, the NGB, as “caught in the crossfire between the U.S. courts and the IAAF.”).

37. *Id.* at 215.

government support, IFs are considered non-profit organizations of private law. IFs receive funding from media, governmental, and commercial sources.<sup>38</sup>

## 2. Role of the National Olympic Committee - USOC

The United States Olympic Committee (USOC) serves as the national representative of the United States to the IOC. The USOC is chartered by Congress under the Amateur Sports Act of 1978 (ASA) to act as the exclusive governing body for U.S. participation in the Olympic and Pan-American Games.<sup>39</sup> Pursuant to the Act, the USOC recognizes a single sports organization to act as the NGB for each sport.<sup>40</sup> The NGBs in turn represent the United States in international sporting federations, coordinate athletic competitions, and recommend individuals and teams to the USOC to represent the United States in international sporting competitions.<sup>41</sup> The ASA also requires the USOC to hire an ombudsman to provide independent advice to athletes, at no cost, about applicable laws and procedures.<sup>42</sup> The Athlete Ombudsman does not represent the athlete, but the athlete can invite the Ombudsman to attend hearings. Communications between the Ombudsman and athlete are confidential.<sup>43</sup> In addition, the USOC contracts with USADA “to conduct drug testing, manage test results and adjudicate disputes for participants in the Olympic movement within the United States . . . .”<sup>44</sup>

The USOC has a substantial budget, as the recipient of funding from Olympic-related broadcasting proceeds, sponsorships, and trademark contracts. The USOC budget increased from \$2.2 million in 1988, to \$30

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38. See International Sports Federation, Charter, available at <http://www.getbig.com/info/ifbb/faq-isfc.htm>.

39. 36 U.S.C. § 220503(3) (1998). In 1998, the Act was amended and renamed the Ted Stevens Olympic & Amateur Sports Act, 36 U.S.C. §§ 220501-220529.

40. *Id.* § 220503.

41. *Id.* § 220523(a).

42. 36 U.S.C. § 220509(b)(1)(A) (2006). See also USOC Athletes' Advisory Council, Bylaws, at § VII (2006), available at <http://teamusa.org/content/index/1585> (describing role and function of the ombudsman). Since 1999, John Ruger has served as the USOC Athlete Ombudsman. [http://www.usocpressbox.org/usoc/Pressbox.nsf/AllDocsUNID/459158F638A2832F8725726B0069EB85/\\$FILE/Ruger,%20John.pdf?open](http://www.usocpressbox.org/usoc/Pressbox.nsf/AllDocsUNID/459158F638A2832F8725726B0069EB85/$FILE/Ruger,%20John.pdf?open).

43. *Id.* at VII.(B)(3). The Athlete Ombudsman reports directly to the Chair of the Athletes' Advisory Council (AAC), which is composed of “one representative from each Olympic and Pan American sport elected from the National Governing Body (NGB) of each sport.” *Id.* at II.(A). The mission of the AAC is “[t]o communicate the interests and protect the rights of athletes, in cooperative support of the USOC achieving its mission.” *Id.* at I.

44. United States Anti-Doping Agency, Protocol for Olympic Movement Testing § 1 (2004).

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million just before the 1996 Olympic Games in Atlanta.<sup>45</sup> In 2005, the USOC was to spend \$45.8 million on NGBs and athlete support, and another \$15.2 million on Olympic training centers in Colorado, New York, and California.<sup>46</sup> The USOC provides stipends, coaching, and training support for Olympic athletes.<sup>47</sup> The overall proposed budget for the USOC between 2006 and 2008, a time period that included both the 2006 Winter Games in Turin and the 2008 Summer Games in Beijing, was \$575 million.<sup>48</sup> Additionally, in 2007, fully seventy percent of the USOC's \$180.6 million budget was spent on athlete services.<sup>49</sup> However, these services do not include the payment of defense costs to athletes accused of anti-doping violations.

*a. AAA Arbitration under the Amateur Sports Act (ASA)*

A primary purpose of the ASA is to provide for the prompt resolution of disputes.<sup>50</sup> The ASA charges the USOC to provide "swift resolution of conflict and disputes" involving athletes and its member organizations and "to protect the opportunity of an athlete . . . to participate in amateur athletic competition."<sup>51</sup> Translated, this means that athletes must submit all eligibility-related disputes to arbitration, rather than to the courts. The Act

45. See Melissa R. Bitting, *Mandatory, Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for Job Security?*, 25 FLA. ST. U. L. REV. 655, 664-65 (1998).

46. Eddie Pells, *USOC Budget Keeps Money Flowing Towards Athletes*, Feb. 15, 2005, available at <http://signonsandiego.com/sports/20050215-1558-oly-usoc-budget.html>.

47. Bitting, *supra* note 45, at 666 (reporting that the USOC provides up to \$15,000, in addition to cash awards for medals). Participation in sports is employment for many Olympic athletes; approximately 1,600 athletes rely on USOC monthly stipends. *Id.* Other sources of athlete income include commercial endorsements, and appearance fees. *Id.*

48. *USOC Says Budget Is Fine*, ESPN.com, Jan. 6, 2005, <http://sports.espn.go.com/espn/print?id=1961096&type=story> (last visited Oct. 27, 2009).

49. James Jarman, *USOC Cuts Budget and Claims to Give More to Athletes Than Tax Filings Show*, KOAA.com, Nov. 26, 2008, available at [http://www.koaa.com/aaaa\\_top\\_stories/x1589516783/USOC-cuts-budget-claims-to-give-more-to-athletes-than-tax-filings-show](http://www.koaa.com/aaaa_top_stories/x1589516783/USOC-cuts-budget-claims-to-give-more-to-athletes-than-tax-filings-show).

50. *Dolan v. U.S. Equestrian Team*, 608 A.2d 434, 437 (N.J. Super. Ct. App. Div. 1992) (noting the history of in-fighting for NGB recognition as impetus for requiring arbitration).

51. 36 U.S.C. §§ 220503(8), 220509(a). The term "amateur" in the Act is dated and does not accurately reflect that the Act covers both professional and amateur athletes who participate in international-level competition. Since 1992, the international federations have been conferred the authority to open eligibility to professional and amateur athletes, and most athletes competing at the elite level of the Olympic Games "are in fact professionals." Maidie E. Oliveau, *Navigating the Labyrinth of "Amateur" Sports ADR Procedures*, 13 DISP. RESOL. J. 6, 6-7 (2007).

authorizes an aggrieved party to appeal an NGB or USOC determination to the American Arbitration Association (AAA) for a binding determination.<sup>52</sup> USADA has incorporated this provision for first-instance domestic arbitration of doping charges.<sup>53</sup> The arbitration is before a panel of three arbitrators, unless agreed otherwise, and according to the ASA, “[s]hall be open to the public,” although this latter provision has only been invoked once and with dubious success.<sup>54</sup> Recourse through the judicial system is limited, because applicable administrative remedies through domestic arbitration must be exhausted.<sup>55</sup>

*b. Interplay between the ASA and International Codes*

While Congress may have envisioned a streamlined procedure for dispute resolution, Olympic athletes and the USOC must operate in a larger international arena. Athletes in international competition are also subject to the rules, standards and procedures of the IOC, WADA/USADA, which are incorporated into the regulations of the athletes’ respective IF, NOC, and NGB.<sup>56</sup> Although the ASA does not address recourse after the initial AAA

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52. 36 U.S.C. § 220529 (stating “[a] party aggrieved by the determination of the [USOC] may obtain review” by filing a demand for arbitration with the American Arbitration Association (AAA)). The Act precludes a court from granting injunctive relief within twenty-one days of the start of an Olympic event. *Id.*

53. The AAA hearings involving doping disputes are governed by commercial arbitration rules, as modified by the “Supplementary Procedures.” See American Arbitration Association, Supplementary Procedures for the Arbitration of Anti-Doping Rule Violations, R-1, <http://www.adr.org/sp.asp?id=28627> (last visited Oct. 27, 2009).

54. 36 U.S.C. § 220529(b)(2)(C). See also § 220529(b)(5) (providing that the parties may offer evidence, and that “[t]he arbitrators shall be the sole judges of the relevancy and materiality of the evidence offered. Conformity to legal rules of evidence is not necessary.”). Floyd Landis was the first athlete to invoke his right to a public arbitration. His public arbitration process provided an important means for transparency and a measure of accountability on the doping arbitral process. Yet, in the second arbitration, Landis chose a closed hearing. Although the rules provide that the hearing “shall be public,” in practice, athletes opt for a private hearing. See Maureen C. Weston, *Anatomy of the First Public International Sports Arbitration: Surprising Practical, Legal and Policy Issues in USADA v. Floyd Landis* (forthcoming 2010). The advocacy strategy in a high-profile public arbitration is complex, due to the desire to present the case to the public senses, yet also to an apparent dispassionate arbitral panel. *Landis Panel Criticizes Legal Team*, GLOBAL ARB. REV., July 2, 2008, available at <http://www.globalarbitrationreview.com/news/article/14646/landis-panel-criticizes-legal-team>.

55. See, e.g., *Lee v. Taekwondo Union*, 331 F. Supp. 2d 1252 (D. Haw. 2004) (ruling federal court lacks subject matter jurisdiction over coach’s race discrimination claim due to duty to exhaust internal remedies, i.e., arbitration); *Barnes v. Int’l Amateur Athletic Fed’n*, 862 F. Supp. 1537 (S.D. W.Va. 1993). See also Jason Gubi, *The Olympic Binding Arbitration Clause and the Court of Arbitration for Sport: An Analysis of Due Process Concerns*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 997, 1009 (2008).

56. Oliveau, *supra* note 51, at 7 (explaining how the ASA, USOC, AAA, and CAS relate).

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arbitration, rules of the governing international sporting entities provide for a *de novo* hearing before an international panel of CAS arbitrators, with final determination only by the Swiss Federal Tribunal.<sup>57</sup> Under this ostensibly “private law” framework, the USOC and its athletes do not have access to U.S. courts or, necessarily, U.S. legal protections.<sup>58</sup> Yet, whether the international rules obligate U.S. athletes to appeal domestic arbitration rulings exclusively to CAS, or whether they have access to domestic courts to appeal (or seek vacatur of) an adverse domestic arbitral ruling, continues to be tested.<sup>59</sup>

The IOC also recognizes two other distinct entities which are increasingly integral to the Olympic Movement and international sport: (1) the Court of Arbitration for Sport; and (2) the World Anti-Doping Agency.

### *B. Mandatory Arbitration for Athletes in the Court of Arbitration for Sport*

Considering that thousands of athletes from over 200 countries<sup>60</sup> participate in the Olympics and international sporting competition, litigation involving sports-related disputes could conceivably span the globe.<sup>61</sup> After more than a few highly contentious, costly, and negatively publicized

57. WADC 2009, *supra* note 2, at art. 13.2.1. See also 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. (forthcoming 2009).

58. See, e.g., *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181 (D.D.C. 1980) (ruling that the USOC is a private, rather than state, actor, despite its significant connections with Congress); *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 545 (1987) (rejecting claims that the USOC’s trademark ban on use of the name “Gay Olympic Games” violated First or Fifth Amendment rights because the USOC was not a governmental actor).

59. See *infra* note 99 (describing vacatur efforts in Landis III).

60. In August 2008, China hosted the XXIX Olympiad. Nearly 11,000 athletes represented 202 countries during the two-week competition. See Beijing 2008 Olympic Games, <http://en.beijing2008.cn/media/usefulinfo/> (last visited Oct. 27, 2009). Broadcasts of the Games were watched by billions of viewers worldwide. *Id.*

61. COURT OF ARBITRATION FOR SPORT, GUIDE TO ARBITRATION 1, 7, available at <http://www.sportundrecht.de/EU-Recht/CASguideArbitration.pdf> (explaining suitability of arbitration for international disputes for parties not domiciled in the same country, such as providing a single jurisdiction and choice of law and language, as well as expertise in sports-related matters and process flexibility). See also JOHN DEMESTRE & CO., CAS - THE COURT OF ARBITRATION FOR SPORT (2000), available at <http://fulltext.ausport.gov.au/fulltext/2000/law/jdmcas.pdf> (describing the benefits of CAS arbitration); Darren Kane, *Twenty Years On: An Evaluation of the Court of Arbitration for Sport*, MELB. J. INT’L L., available at <http://austlii.law.uts.edu.au/au/journals/MelbJIL/2003/10.html> (discussing the development of CAS *lex sportiva*).

judicial lawsuits and interventions,<sup>62</sup> IOC President Juan Antonio Samaranch conceived of the idea of a single arbitral authority and tribunal for international sports-related disputes.<sup>63</sup> In the early 1980s, the IOC voted to create and approve the Court of Arbitration for Sport to serve as the exclusive arbitral tribunal for the binding adjudication of disputes by members of the Olympic Movement. As of 1995, the Olympic Charter provides that “any dispute arising on the occasion of or in connection with the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport.”<sup>64</sup> As a condition of participating in the Olympics, athletes must sign a Court of Arbitration for Sport Waiver form and thereby waive rights to their national courts and attendant laws and procedures.<sup>65</sup> Arbitration clauses are incorporated into the statutes of each of the sport federations, associations or sport bodies, and athletes are required to consent to arbitration.<sup>66</sup>

### 1. CAS Operations

CAS was originally financed exclusively by the IOC, and its membership largely comprised IOC appointments.<sup>67</sup> In response to a judicial decision by the Swiss Supreme Court,<sup>68</sup> which questioned CAS independence in light of the numerous links between the IOC and CAS, the International Court of Arbitration for Sport (ICAS) was established to manage and finance CAS independent of the IOC.<sup>69</sup> In the Paris Agreement

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62. The case by Butch Reynolds against the IAAF illustrates the practical benefit of a single arbitral form for international sports. See *Reynolds v. Int’l Amateur Athletic Fed’n*, 23 F.3d 1110 (6th Cir. 1994). Reynolds’ lawsuit ran the litigation gamut from Ohio state court, to federal court, up to the U.S. Supreme Court, only to be dismissed after six years for lack of personal jurisdiction. *Id.* See also Bitting, *supra* note 45, at 660-61 (describing “the controversy that would not go away”).

63. Court of Arbitration for Sport, History of the CAS, <http://www.tas-cas.org/history> (last visited Oct. 27, 2009).

64. Olympic Charter, *supra* note 1.

65. For example, cyclists must hold a license from their national federation in order to participate in elite international cycling events. As a condition of obtaining a license, each cyclist agrees to CAS jurisdiction. See *Landis I*, *supra* note 18. This is not negotiable.

66. COURT OF ARBITRATION FOR SPORT, GUIDE TO ARBITRATION, *supra* note 61, at Appendix I (providing standard clauses for sports entities).

67. Matthieu Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, in THE COURT OF ARBITRATION FOR SPORT 32 (Ian S. Blackshaw et al. eds., 2004). ICAS serves as the administrative arm of CAS. Fitzgerald, *supra* note 36, at 221.

68. *Gundel v. Int’l Equestrian Fed’n*, in DIGEST OF CAS AWARDS, 1986-1998, at 561 (Matthieu Reeb ed., 1998).

69. See Reeb, *supra* note 67, at 35 (noting that ICAS, composed of 20 high-level jurists as members, is charged with administration and financing of CAS); Michael Straubel, *Enhancing the*

in 1994, over thirty-one international sports federations signed an agreement to constitute and recognize ICAS.<sup>70</sup> CAS jurisdiction is now recognized by all international federations and national Olympic committees, whose bylaws, statutes, and contracts provide for CAS arbitration.

CAS is a private international arbitration tribunal based in Switzerland, with additional offices in Sydney, Australia and New York City. Absent the consent of the parties otherwise, CAS operates under Swiss law and in accordance with the Code of Sports-Related Arbitration (CAS Code).<sup>71</sup> CAS is structured into three divisions: (1) the Olympic Division, or Ad Hoc Division, first used in the 1996 Atlanta Games, is on-site to resolve any disputes arising during the Games within a twenty-four hour time period; (2) the “Ordinary Arbitration Division” handles primarily commercial contract disputes arising from legal relations between parties who have agreed to dispute resolution before CAS;<sup>72</sup> and (3) the “Appeals Arbitration Division,” which adjudicates disputes resulting from final-instance decisions taken by tribunals within CAS or the sporting federations or other sports bodies.<sup>73</sup> CAS also may issue Advisory Opinions, at the request of the IOCs, the IFs, NOCs, or associations recognized by the IOC, about any legal issue with respect to the practice of development of sport.<sup>74</sup>

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*Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 LOY. U. CHI. L.J. 1206, 1212 (2006).

70. Reeb, *supra* note 67, at 34.

71. Court of Arbitration for Sport, Procedural Rules, available at <http://www.tas-cas.org/rules> [hereinafter “CAS Code”]. The Code of Sport-Related Arbitration sets forth the procedural rules for CAS arbitrations. *Id.* The Code has governed CAS arbitration procedures since November 22, 1994. The Code is comprised of sixty-nine articles, divided into: (1) Statutes of the working bodies (arts. S1 to S26); and (2) the Procedural Rules (arts. R17-R69). Reeb, *supra* note 67, at 34.

72. These typically involve contractual disputes. For example, contracting parties may designate CAS arbitration to resolve disputes such as sponsorship contract, broadcasting rights, or employment and agency contracts involving athletes, managers, other third party liability, and civil liability claims, such as accidents to athletes during a sports competition. These claims are submitted to Ordinary Arbitration. Reeb, *supra* note 67, at 36. *See also* COURT OF ARBITRATION FOR SPORT, GUIDE TO ARBITRATION, *supra* note 61, at 11. Ordinary arbitration proceedings are confidential and awards not public, unless otherwise provided. CAS Code, *supra* note 71, at Rule 46.

73. Reeb, *supra* note 67, at 35. *See also* Fitzgerald, *supra* note 36, at 220 (describing four types of disputes).

74. CAS Code, *supra* note 71, at Rules 60-62 (Advisory Opinion).



## 2. CAS Arbitrators and Selection Process

Although ICAS formally selects arbitrators, arbitrators eligible to serve on a CAS panel are initially proposed by the IOC, IFs, and NOCs. ICAS is also to select one-fifth of the CAS roster “after appropriate consultation with a view to safeguarding the interests of the athletes.”<sup>75</sup> Organizations representing athletes, however, are not provided official participation in this process.<sup>76</sup> CAS arbitrators are to have legal training and recognized competence in sports law.<sup>77</sup> The arbitrators are guided by the CAS Code for procedural rules, including obligations to carry out their functions with objectivity and independence.<sup>78</sup> Once approved by ICAS, CAS arbitrators are appointed for a renewable four-year term and included on a roster of CAS arbitrators.<sup>79</sup> In 2007, the list of CAS arbitrators included 275 persons from seven countries.<sup>80</sup> The roster of available CAS arbitrators is sizeable, but in practice, the pool of arbitrators selected by parties is relatively small.<sup>81</sup> Unlike public judges who work full-time as judges, CAS arbitrators serve when appointed and otherwise engage in other professional work. Thus, arbitrators with the requisite experience in sport may also have work that includes representing and counseling clients in the sport industry. Until a policy change effective January 2010, CAS rules did not prohibit members of its arbitral pool from acting as advocates in representing clients before other CAS panels.<sup>82</sup> Notwithstanding, the rules do require arbitrator

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75. *Id.* at art. S14.

76. *Id.* See also *Landis III*, *supra* note 22; Straubel, *supra* note 69, at 1235-36.

77. Straubel, *supra* note 69, at 1233. CAS Code, *supra* note 71, at arts. S12-14.

78. COURT OF ARBITRATION FOR SPORT, GUIDE TO ARBITRATION, *supra* note 61, at 12 (noting the Sports Code is drafted to integrate within Swiss Federal Law on Private International Law, which governs international arbitration and is seated in Switzerland).

79. Reeb, *supra* note 67, at 36 (noting that the Code stipulates that the ICAS must call upon “personalities with a legal training and who possess recognized competence with regard to sport.”).

80. Figure for 2007. See Court of Arbitration for Sport, History of the CAS, <http://www.tas-cas.org/en/infogenerales.asp/4-3-238-1011-4-1-1/5-0-1011-3-0-0> (last visited Oct. 27, 2009). The roster for the AAA Panel of North American CAS members is significantly smaller, listing thirty-eight arbitrators. See American Arbitration Association, <http://www.adr.org> (last visited Oct. 27, 2009). As of May 1, 2009, the Supplementary Rules were amended and now provide that the pool of AAA/CAS arbitrators be U.S. citizens. See American Arbitration Association, Supplementary Procedures for the Arbitration of Anti-Doping Rule Violations, *supra* note 53, at R-3.

81. See Straubel, *supra* note 69, at 1233 (characterizing demographics of listed arbitrators as largely homogenous in age, gender, and nationality); *Landis III*, *supra* note 22, at 21-22 (reporting the most frequently selected arbitrators).

82. *Id.* at 18 (stating that “many of the most frequently-selected arbitrators are those that continue to represent private clients [or WADA, or who have partners who do so] before CAS panels. Powerful financial incentives clearly exist to align the financial interests of the ‘judges’ with those of the ‘repeat player litigants.’”). See Press Release, Court of Arbitration for Sport, Court of Arbitration for Sport Amends Its Rules (Oct. 1, 2009), available at <http://www.tas->

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independence from the parties and disclosure of circumstances that might likely affect the arbitrator's independence.<sup>83</sup>

### 3. CAS Appeals Arbitration for Disciplinary Cases

Disciplinary cases, including doping, and those concerning athlete eligibility and field-of-play issues, are submitted to CAS Appeals Arbitration.<sup>84</sup> Athletes have the option to seek a first-instance arbitration before a domestic panel of CAS where available or to go directly to final arbitration before CAS.<sup>85</sup> Both the athlete and the prosecuting authority have the option to appeal the domestic CAS ruling by filing a request for final arbitration to CAS within twenty-one days from the date of the domestic ruling.<sup>86</sup> If seeking a Panel of three arbitrators, the athlete must designate his arbitrator in his statement of appeal, due within ten days after the time limit for appeal expires.<sup>87</sup> The respondent designates its appointed arbitrator, and the Appeals Division President appoints a third arbitrator who

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[cas.org/d2wfiles/document/3546/5048/0/2009.10.01%20PR%20Eng%20FINAL.pdf](http://cas.org/d2wfiles/document/3546/5048/0/2009.10.01%20PR%20Eng%20FINAL.pdf) (announcing "end of the double hat arbitrator/counsel").

83. CAS Code, *supra* note 71, at Rule 33. Parties may also challenge an arbitrator's independence within seven days after information giving rise to the challenge is known. *Id.* at Rule 34. ICAS rules on such challenges. *Id.*

84. COURT OF ARBITRATION FOR SPORT, GUIDE TO ARBITRATION, *supra* note 61, at 11. [D]isciplinary cases are generally dealt within the first instance by the competent sports authority, and subsequently become the subject of an appeal to the CAS, which then acts as a court of last instance. In 2000, disciplinary cases accounted for 65% of the total number of cases handled by the CAS.

*Id.* See also Reeb, *supra* note 67, at 37.

85. *Id.*; see also Court of Arbitration for Sport, Organization and Structure of the ICAS and CAS, <http://www.tas-cas.org/en/infogenerales.asp/4-3-238-1011-4-1-1/5-0-1011-3-0-0> (last visited Oct. 27, 2009). While CAS and WADA operate at the international level, parallel agencies of each may exist at national levels. In Floyd Landis's case, although the doping report occurred in France, Landis was prosecuted by the USADA. His public arbitration hearing was held before a panel of three arbitrators in Malibu, California. He then "appealed" to an international panel of CAS. See *infra* Part III. This first-instance arbitration option is available to athletes where provided for by national law, such as the Amateur Sports Act for U.S. athletes. Otherwise, international athletes appeal directly to CAS. See Weston, *supra* note 57.

86. CAS Code, *supra* note 71, at Rule 47 (noting appeal to CAS may be filed "against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance.").

87. *Id.* (referring to Rule 51 (Grounds of Appeal)); *Id.* at Rules 42-54 (Initiation of the arbitration). See also *id.* at Rule 64-66 (Costs of the Procedure - noting that other than a minimum fee, the Appeals arbitration proceedings are free of charge. Parties remain responsible for other costs of the hearing).

serves as President of the Panel. The Panel makes a de novo review of the facts and the law and conducts a hearing in which the parties, witnesses, and any experts needed are heard.<sup>88</sup> In “the absence of a majority,” the President of the Panel is to decide the case alone.<sup>89</sup> The Panel prepares a reasoned, written award, which is final and binding upon the parties. Arbitrations under the appeals procedure do not require confidentiality, and CAS may publish the awards, unless the parties stipulate otherwise.<sup>90</sup> The seat of CAS arbitrations is Lausanne, Switzerland.<sup>91</sup> This is significant because, regardless of where the physical arbitration takes place, it is considered to occur in Switzerland. Thus, Swiss arbitration law governs.<sup>92</sup>

#### 4. Judicial Review and Enforcement of CAS Awards

The ability to vacate or seek judicial review of CAS awards is limited. A former version of Rule 59 expressly allowed for challenges on “[a]n extremely limited number of grounds”<sup>93</sup> if raised within thirty days of the

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88. *Id.* at Rule 57 (Examination of the Appeal). *See also* Court of Arbitration for Sport, Statutes of ICAS and CAS, *available at* <http://www.tas-cas.org/statutes>.

89. *Id.* at Rule 59. The CAS Code does not explain when an “absence of a majority” would occur in a three-member panel. *See id.* It is thus unclear whether this provision is triggered, for example, if all arbitrators agree on a basic result but they differ in their approach, or whether an arbitrator must agree with both the result and the analysis of the president in order for his “vote” to “count.” *See id.* In such a case, the President appears to have more decisional power than the arbitrators selected by the parties. *See id.* A previous version of this amended rule explained that “this is the case particularly if each of the three arbitrators is of a different opinion.” *See* COURT OF ARBITRATION FOR SPORT, GUIDE TO ARBITRATION, *supra* note 61, at Rule 46.

90. CAS Code, *supra* note 71, at Rule 59. Although the CAS Rules require a written reasoned award, they do not require the panel to disclose how individual arbitrators voted. Such disclosure could facilitate future parties in making informed decisions about arbitrator selection.

91. *Id.* at Rule 28.

92. Switzerland’s Federal Code on Private International Law applies to arbitrations where the seat of the tribunal is in Switzerland. Switz. Fed. Code on Private Int’l Law, ch.12, art. 176 (1987), *available at* <http://www.tas-cas.org/useful-texts>.

93. COURT OF ARBITRATION FOR SPORT, GUIDE TO ARBITRATION, *supra* note 61, at Rule 46, 59 (citing grounds such as

incompetence or irregular formation of the arbitration Panel, arbitration award going beyond the application of which the CAS is seized or the lack of a decision on one of the major points of the application, violation of the rights of the parties to be heard or lack of equal treatment, and incompatibility of the award with public order

and referencing application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of the New York Convention.) *See* NEW YORK CONVENTION, 21 U.S.T. 2517, 330 UN.T.S. 38 (June 10, 1958), *available at* <http://www.tas-cas.org/en/arbitrage.asp/4-3-293-1023-4-1-1/5-0-1023-3-0-0/>. This treaty is codified as U.S. law, and incorporated into the Federal Arbitration Act, 9.U.S.C. § 201 (providing for enforcement of the Convention in the United States).

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award and the “only court of appeal is the Swiss Federal Tribunal.”<sup>94</sup> As amended, Rule 59 now altogether omits references to challenges to the CAS awards and expressly states that:

The award . . . shall be final and binding upon the parties. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration.<sup>95</sup>

The expectation of finality of CAS awards under the CAS Code, however, does not eliminate the operation of the New York Convention or the Swiss arbitration law,<sup>96</sup> which govern enforcement of foreign and Swiss arbitral awards, respectively. These statutes provide that a court may deny enforcement of an award where a party was under some incapacity, the arbitration was not valid or violated due process, the award is beyond the scope of the arbitration agreement, the procedure was not in accordance with the parties' agreement, or where enforcement is deemed contrary to public policy.<sup>97</sup> Because the CAS Code situates the seat of CAS arbitration in Switzerland, only Swiss courts have jurisdiction to review CAS awards, unless otherwise provided.<sup>98</sup> Even if a U.S. or other foreign court were to assert jurisdiction to vacate a CAS award under the New York Convention

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94. COURT OF ARBITRATION FOR SPORT, GUIDE TO ARBITRATION, *supra* note 61, at Rule 46, 59.

If one of the parties refuses to execute the award of his own free will, the other party may obtain its execution by initiating exequatur proceedings before state courts of the place of execution. A very large number of countries are parties to the 1958 New York Convention on the recognition and compulsory enforcement of foreign arbitration awards . . . . It is therefore this agreement which governs the enforcement of awards in most cases.

*Id.*

95. CAS Code, *supra* note 71, at Rule 59.

96. CAS awards are subject to the New York Convention, which obligates signatory countries to enforce international arbitral awards and provides limited grounds for challenge in Article V. Challenge to CAS awards in U.S. courts under national law, such as the Federal Arbitration Act, to date, have not succeeded. *See, e.g.,* *Gatlin v. USADA/IAAF*, 2008 WL 2567657, at \*1 (N.D. Fla. 2008) (stating that the New York Convention applied). The district court in *Landis III* did not have an opportunity to rule on this issue.

97. NEW YORK CONVENTION, 9 U.S.C § 201 art. V. *See also* Gubi, *supra* note 55, at 1006.

98. *See* Switz. Fed. Code on Private Int'l Law, ch.12, art. 191 (1987), available at <http://www.tas-cas.org/useful-texts> (providing that an appeal may be taken only to the Swiss Federal Supreme Court). *See also id.* at art. 190 (identifying limited appeal grounds for irregular designation of the tribunal; erroneous jurisdiction; award beyond scope of submission; failure to respect party equality or right to be heard; and award incompatibility with Swiss public policy).

(or even the Federal Arbitration Act), the viability of a court remedy is questionable. For example, international sporting federations may be outside the reach of a U.S. court's personal jurisdiction, and thus not abide by a U.S. court's vacatur.<sup>99</sup>

### C. *Mandatory Testing of Athletes in International Competition*

#### 1. The World Anti-Doping Program

The second major force in international sport and the fight against doping is the World Anti-Doping Agency (WADA), a private foundation governed by Swiss law with headquarters in Canada.<sup>100</sup> WADA promulgates, administers, and enforces the World Anti-Doping Program (WADP). The purposes of the WADP are:

To protect the Athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide, and . . . [t]o ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping.<sup>101</sup>

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99. In *Reynolds v. IAAF*, the federation refused to comply with a U.S. Supreme Court order to allow Reynolds to participate in the Olympic Games in Barcelona. See *Reynolds v. IAAF*, 23 F.3d 1110, 1111 (6th Cir. 1994). Ultimately, the court held the IAAF was not subject to personal jurisdiction in Ohio, rendering Reynold's jury award void. See *id.* The IAAF similarly refused to participate in U.S. court proceedings filed by Justin Gatlin, seeking to vacate a CAS award. See *Gatlin v. USADA*, 2008 WL 2567657 (N.D. Fla. 2008). Landis attempted to vacate his CAS award in U.S. District Court in Los Angeles, claiming arbitral bias under the U.S. Federal Arbitration Act, or, alternatively, the New York Convention. See *Landis v. USADA*, Amended Motion to Vacate Arbitration Award, No. CV-08-06330, at 11 (C.D. Cal. filed Nov. 3, 2008). The case raised the question of whether the U.S. court had subject matter jurisdiction, as Landis alleged, under 28 U.S.C. § 1332, or whether objections could only be raised in the Swiss Federal Tribunal. See *id.* Landis' attorneys argued that although CAS rules authorize appeal only to the Swiss Federal Tribunal, CAS rules do not preempt an athlete's rights under either the FAA or the New York Convention. *Id.* at 1:8-10. This case was settled before the court ruled on this issue. *Id.* The USOC, in a brief submitted in *Gatlin*, argued that the New York Convention governed. Response of Defendant U.S. Olympic Comm. to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction at 2, *Gatlin v. USADA*, No. 3:08cv241/LAC/EMT (N.D. Fla. June 22, 2008).

100. WADA was formed following a World Conference convened by the IOC in 1999. David Howman, *Sanctions Under the World Anti-Doping Code* 1 (Nov. 12, 2003) (unpublished paper presented at Australian and New Zealand Sports Law Conference), available at [http://www.wada-ama.org/rtecontent/document/LEGAL\\_sanctions\\_howman.pdf](http://www.wada-ama.org/rtecontent/document/LEGAL_sanctions_howman.pdf). WADA members or "stakeholders" are comprised of "governments or public authorities of the world, and . . . the Olympic Movement or private international sporting bodies." *Id.* WADA headquarters are in Montreal, Canada, with a ten member Executive Committee and thirty-five member Foundation Board. *Id.*

101. WADC 2009, *supra* note 2, at 11.

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WADP is structured into three levels.<sup>102</sup> The first level of WADP is the World Anti-Doping Code (Code). Effective since 2004, with a revised Code in effect since January 2009, the Code “[i]s the fundamental and universal document upon which the [WADP] in sport is based.”<sup>103</sup> The Code is designed to provide a framework “for harmonized anti-doping policies, rules, and regulations within sport organizations and among public authorities.”<sup>104</sup> The Code sets forth specific anti-doping rules, definitions of doping, burdens of proof, prohibited substances and methods, and addresses standards for testing, sample analysis, sanctions, appeals, confidentiality, reporting, and statute of limitations.<sup>105</sup> Pursuant to the Code, WADA is authorized to appeal to CAS on rulings by anti-doping organizations in the adjudication of doping cases.<sup>106</sup> Accordingly, WADA assumes an active role monitoring compliance with the Code.<sup>107</sup>

The Olympic Charter has been amended to require all members of the Olympic Movement to adopt and implement the Code to remain in the Olympic Games.<sup>108</sup> The Code also has international recognition in the International Convention Against Doping in Sports (ICADIS), adopted in

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102. *Id.* at 12. *See also*, World Anti-Doping Agency, Q&A on the Code, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=367> (last visited Oct. 27, 2009) (What is the Anti-Doping Code?).

103. WADC 2009, *supra* note 2, at 11.

104. WADC 2003, *supra* note 2, at 6.

105. USADA, Harmonization Through the World Anti-Doping Program, PLAY TRUE, Issue 3, at 5 (2005).

106. WADC 2009, *supra* note 2, at art. 13.1.1 (WADA Not Required to Exhaust Internal Remedies).

107. *See generally* WADC 2009, *supra* note 2. In addition to its monitoring role, WADA has powers of intervention in ensuring that Therapeutic Use Exemptions (TUEs) are consistently granted. *Id.* at art. 4.4. WADA is also authorized to accredit laboratories, and to prepare the annual List of Prohibited Substances and Methods. WADA’s work also includes education, awareness, and research programs. *Id.* at art. 3.

108. *Id.*, Comment, at 11. Note also that “[s]ince many governments cannot be legally bound by a non-governmental document, they are implementing the Code by ratifying the International Convention against Doping in Sport, an international treaty that was unanimously approved by 191 governments at UNESCO’s General Conference in October 2005.” *See* Frank Oschutz, *Harmonization of Anti-Doping Code Through Arbitration: The Caselaw of the Court of Arbitration for Sport*, 12 MARQ. SPORTS L. REV. 675, 676 (2002). *See also* USADA, International Standards: Key Changes, PLAY TRUE, Issue 3, at 9, 14 (2008) (noting IOC power to exclude non-compliant sports from the Olympic program).

2005 by the General Conference of the United Nations Economic, Social, and Cultural Organization (UNESCO).<sup>109</sup>

Prior to adoption of the Code by all sporting bodies, the testing and standards of what constituted prohibited substances were disjointed and varied by sport federation rule.<sup>110</sup> Thus, for example, Ross Rebagliati, the first gold medalist in snowboarding at the 1998 Winter Games, tested positive for marijuana. Yet, he successfully averted a doping sanction because CAS ruled that the International Skiing Federation had not specified marijuana as a prohibited substance.<sup>111</sup> By contrast, a British athlete was forced to forfeit a silver medal due to alleged cannabis use because the International Skating Federation had adopted the IOC Medical Code, which listed cannabis as prohibited.<sup>112</sup> Since the world sport community's adoption of the Code and harmonization of the doping rules across sports,<sup>113</sup> the viability of an athlete eliminating sanction upon a positive test report has dimmed dramatically.<sup>114</sup> In the time period from 2001 to 2007, only one athlete had been successful in challenging a doping charge brought by USADA.<sup>115</sup> The grounds upon which that athlete prevailed—proving violation of the rule that a different lab analyst perform testing of the

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109. WADC 2009, Comment, *supra* note 2, at 11; UNESCO, International Convention Against Doping in Sports (2005), available at <http://unesdoc.unesco.org/images/0014/001425/142594m.pdf#page=2>. Signatory nations to the Convention commit to enforcement of the Code. See Robyn R. Goldstein, Note, *An American in Paris: The Legal Framework of International Sport and the Implications of the World Anti-Doping Code on Accused Athletes*, 7 VA. SPORTS & ENT. L.J. 149, 159 (2007) (noting WADA advisory role and lobbying for ratification of the international convention); Michael Straubel, *Is the International Convention Against Doping in Sport the Missing Link to USADA Being a State Actor and WADC Coverage of U.S. Pro Athletes?*, 19 MARQ. SPORTS L. REV. 63 (2008). (reporting that approximately eighty-six countries, including the United States, have ratified ICADIS).

110. World Anti-Doping Agency, A Brief History of Anti-Doping, [http://www.wada-ama.org/en/dynamic.ch2?page Category.id=312](http://www.wada-ama.org/en/dynamic.ch2?page%20Category.id=312). See also Foschi, *supra* note 5, at 461.

111. See Richard McLaren, *CAS Doping Jurisprudence: What Can We Learn?*, 1 INT'L SPORTS L. REV. 4 (2006), available at [http://www.wada-ama.org/rtecontent/document/McLaren\\_learn.pdf](http://www.wada-ama.org/rtecontent/document/McLaren_learn.pdf).

112. See Oschutz, *supra* note 108, at 675 (noting that no athletes were charged with doping during the 1994 Games in Lillehammer, Norway).

113. McLaren, *supra* note 111, at 4.

114. Effective in 2004, the Code has been adopted by over countries, and all members of the Olympic Movement "as the basis for the fight against doping in sport[s]." Oschutz, *supra* note 108, at 676 (noting acceptance of the Code by more than 570 sports organizations, including all 35 international sports federations, all national committees, the IOC, and many other sports organizations). See also Howman, *supra* note 100, at 1 (noting acceptance by eighty-seven countries).

115. See *USADA v. Jenkins*, AAA No. 30 190 00199 07 (2008).

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athlete's 'A' and 'B' samples—has since been revised and acceptable under the 2009 Code.<sup>116</sup>

The second level of the WADP involves four International Standards that work in conjunction with the Code to provide uniformity among all sports and countries in specific technical and operational areas. The first is the List of Prohibited Substances and Prohibited Methods (List) which specifies what constitutes doping.<sup>117</sup> WADA is authorized to revise the List “whenever the need arises” and publishes the List at least annually, while also maintaining a current list on its website.<sup>118</sup> Second, the International Standards for Testing (IST) addresses the process for effective testing, maintaining sample identity and integrity, and athlete notification.<sup>119</sup> Third, the International Standards for Laboratories (ISL) is intended “[t]o ensure production of valid test results and evidentiary data to achieve uniform and harmonized results and reporting from accredited laboratories.”<sup>120</sup> Fourth, the International Standard for Therapeutic Use Exemptions (TUE) sets forth the process and circumstances for authorizing an athlete needing medication for particular documented medical conditions or illnesses.<sup>121</sup> While compliance with the Code and International Standards is mandatory, WADP includes a precatory third level Models of Best Practices and Guidelines, offering guidance to stakeholders relating to implementation of the Code.<sup>122</sup>

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116. See USADA, Harmonization Through the World Anti-Doping Program, *supra* note 105, at 12.

117. WADC 2009, *supra* note 2, at art. 4.2.1.

118. *Id.*, Comment, at art. 4.1; *see id.*, Comment, at art. 4.2.1 (“There will be one Prohibited List. The substances which are prohibited at all times would include masking agents and those substances which, when [u]sed in training, may have long-term performance enhancing effects such as anabolics.”).

119. *Id.* at art. 5. The 2009 Code includes new clauses addressing RTP. *See id.* at 37.

120. WORLD ANTI-DOPING AGENCY, INTERNATIONAL STANDARDS FOR LABORATORIES § 1.0 (2009), [http://www.wada-ama.org/rtecontent/document/International\\_Standard\\_for\\_Laboratories\\_v6\\_0\\_January\\_2009.pdf](http://www.wada-ama.org/rtecontent/document/International_Standard_for_Laboratories_v6_0_January_2009.pdf); *see also* WADC 2009, *supra* note 2, at art. 6.

121. *Id.* at art. 4.4 (providing that “[e]ach International Federation shall ensure . . . a process is in place whereby Athletes with documented medical conditions requiring the Use of a Prohibited Substance . . . may request a therapeutic use exemption.”).

122. WADC 2009, Purpose, Scope, & Organization of the World Anti-Doping Program & the Code, *supra* note 2, at 12-13. The 2009 Code also created a new standard for privacy protection, ISPPPI. USADA, Harmonization Through the World Anti-Doping Program, *supra* note 105, at 5.



## 2. Doping Defined

Athletes are personally responsible for ensuring compliance with the Code.<sup>123</sup> Athletes are routinely and randomly tested both in and out of competition for prohibited substances.<sup>124</sup> The presence “[o]f a Prohibited Substance or its [m]etabolites or [m]arkers in an [a]thlete’s bodily specimen” constitutes a doping violation.<sup>125</sup> This is a strict-liability rule, as “[i]t 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 . . . .”<sup>126</sup> Liability applies, even in cases where the equities favor the athlete and the result was caused by inadvertent use, mislabeling, or faulty medical advice, although these factors may mitigate the sanction.<sup>127</sup> A doping violation also occurs where an athlete has used, attempted to use, possessed a Prohibited Substance or Method, refused or failed to submit to testing, tampered with doping control, failed to provide whereabouts information or engaged in the administration or trafficking of any Prohibited Substance or Method.<sup>128</sup>

## 3. Doping Control Administration and Adjudication by ADOs

All sporting federations and governing bodies have incorporated WADA rules into their respective regulations and are formally responsible for enforcement of anti-doping rules.<sup>129</sup> In terms of practical management,

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123. WADC 2009, *supra* note 2, at art. 2.1. The Anti-Doping Rules are very explicit in stating that, “It is each Athlete’s personal duty to ensure that no *Prohibited Substance* enters his or her body.” *Id.* at art. 2.1.1.

124. *Id.* at art. 2.4. Athletes are accustomed to random testing. See, e.g., World Anti-Doping Agency, Anti-Doping Rule Violations, art. 2.4 (2006), [http://www.wada-ama.org/rtecontent/document/LEGAL\\_code\\_appendix.pdf](http://www.wada-ama.org/rtecontent/document/LEGAL_code_appendix.pdf) (commentary stating that “[u]nannounced out-of-competition testing is at the core of effective Doping Control”); Jared Eborn, *Levi’s Not Blue: Utah’s Leipheimer Relaxing After Big Cycling Season*, DESERT MORNING NEWS, Sept. 28, 2007, available at <http://deseretnews.com/article/1,5143,695213860,00.html> (quoting cyclist Levi Leipheimer, “We get tested all the time. They show up at your door unannounced and test you. We’re tested before races and after races. We’re tested all the time.”). But some athletes, such as tennis great Rafael Nadal, complain it is onerous. See *Testers Treat Us Like Criminals*, Feb. 12, 2009, <http://www.guardian.co.uk/sport/2009/feb/12/rafael-nadal-drugs-test-criminals-olympic-andy-murray> (last visited Oct. 27, 2009).

125. WADC 2009, *supra* note 2, at art. 2.1. See also *id.* at art. 1 (“Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through 2.8 of the Code.”).

126. *Id.* at art. 2.1.1. See also Connolly, *supra* note 8, at 179, n.66.

127. See WADC 2009, *supra* note 2, Comment, at art. 2.1.1.

128. *Id.* at arts. 2.2-2.8.

129. Howman, *supra* note 100, at 1-2.

these sporting entities typically delegate this responsibility by contracting with national anti-doping agencies (NADOs) to conduct all testing and adjudicate challenges. NADOs thus have jurisdiction over athletes in the NADOs country, as well as those “who are nationals”<sup>130</sup> to conduct target testing and testing without advance notice.<sup>131</sup>

Testing is generally conducted from an analysis of two urine samples provided by the athlete. Samples are sent to a WADA-accredited laboratory which tests the ‘A’ doping control sample and reports results in accordance with the ISL.<sup>132</sup> Testing protocols provide that lab results showing an Adverse Analytical Finding (AAF) be reported to the NADO, which then conducts an initial review to ensure no TUE or ISL departure.<sup>133</sup> Thereafter, the NADO is to notify the athlete of the AAF and the anti-doping rule allegedly violated.<sup>134</sup> This notification should also inform the athlete of his right to request an analysis of the ‘B’ Sample, as well as the opportunity for the athlete or his representative “to attend the B Sample opening and analysis . . . and to request copies of the A and B Sample laboratory documentation package.”<sup>135</sup> The athlete’s own expert may observe the testing of the ‘B’ sample but may not perform independent testing. The testing process does not permit impartial peer review.<sup>136</sup> Upon notice of the initial AAF, an athlete is subject to mandatory provisional suspension by the federation. This also generally triggers team suspension and elimination of institutional support through the NGB or NOC.<sup>137</sup> The alleged doping violation becomes public, often reported by the press. Realistically, guilt is presumed.<sup>138</sup> It is at this point that the athlete has the right to request arbitration to contest the doping charge.

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130. WADC 2009, *supra* note 2, at art. 5.1. *See also* Fitzgerald, *supra* note 36, at 236 n.169 (explaining that athletes are subject to the testing jurisdiction of the NADO of their home country as well as of the NADO in which the athlete is present).

131. WADC 2009, *supra* note 2, at art. 5.1.

132. *Id.* at art. 6.1.

133. *Id.* at art. 7.1 (Results Management Process).

134. *Id.* at art. 7.2.

135. *Id.* The documentation package includes information under the ISL. *See infra* Part III.A.2.

136. McLaren, *supra* note 8, at 5.

137. WADC 2009, *supra* note 2, at art. 7.5.1 (provisional suspension). *See also id.* at art. 7.5.2 (regarding athlete right to provisional hearing prior to suspension).

138. *See* Goldstein, *supra* note 109, at 158.

The prosecuting authority in a doping arbitration is the athlete's sporting federation, which delegates responsibility to a WADA agency.<sup>139</sup> USADA, a non-profit corporation, has authority for drug testing and prosecution of alleged violations committed by U.S. athletes, even where the alleged doping violation occurred abroad.<sup>140</sup> According to its website, "USADA's process eliminates the NGB involvement in sanctioning their own athlete."<sup>141</sup> The hearing process is conducted before the North American division of CAS, in accordance with the AAA Rules on Olympic Arbitration, with the option for direct or final decision through CAS.<sup>142</sup> Again, "CAS decisions are final and binding except for any review required by law applicable to the annulment or enforcement of arbitral awards."<sup>143</sup>

#### 4. Sanctions, Mitigation, and Aggravation

The sanctions for a doping violation include disqualification, forfeiture, and a period of ineligibility. A doping violation arising from an in-competition test includes the athlete's automatic disqualification from the event, including forfeiture of any medals, points, and prizes.<sup>144</sup> This

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139. Technically, the international sporting federation delegates to the NGB responsibility for adjudication of anti-doping violations. The NGBs contract these enforcement responsibilities to USADA. The NGB remains obligated to enforce the CAS decision upon the athlete from the USADA adjudication. So essentially, the IF and NGB are in a prosecutorial role, rather than a role to represent or defend the athlete. This role has caused confusion among some athletes, who believed their membership with and payment of dues to the NGB would enable the NGB to "act as sort of a union to represent the interests of cyclists . . ." See Neal Rogers, *Mr. Rogers' Neighborhood: Landis Lashes Out*, VELONEWS, Jan. 18, 2008, available at <http://beta.velonews.com/article/71315>.

140. See *Landis I*, *supra* note 18, at 5. For example, the USADA prosecuted Floyd Landis although the testing, competition, and alleged violation took place in France. *Id.* at 5, 7.

141. American Arbitration Association, Online Library, at 4, <http://www.adr.org/si.asp?id=4700> (last visited Oct. 27, 2009). See also American Arbitration Association, *supra* note 53, at R-4.

142. See *supra* Part II.B.3. See also American Arbitration Association, *supra* note 53.

143. WADC 2009, Comment, *supra* note 2, at art. 13.2.1. See also *id.*, Comment, at art. 13 ("The object of the Code is to have anti-doping matters resolved through fair and transparent internal processes with a final appeal . . . . [D]ecisions by [ADOs] are made transparent in Article 14. Specified Persons and organizations, including WADA are then given the opportunity to appeal those decisions."). "The definition of interested Persons and organizations with a right to appeal under Article 13 does not include athletes, or their federations, who might benefit from having another competitor disqualified." *Id.*

144. *Id.* at art. 9 (including the comment to Article 9 and reference to Article 11 on consequences to teams). See also Juliet Macur, *Olympians Caught Doping Are Named*, N.Y. TIMES, Apr. 29, 2009, [http://www.nytimes.com/2009/04/30/sports/othersports/30doping.html?\\_r=1&hp](http://www.nytimes.com/2009/04/30/sports/othersports/30doping.html?_r=1&hp) (last visited Oct. 27, 2009).

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sanction extends to all team awards.<sup>145</sup> A two-year sanction is imposed for an athlete's first violation of the use of prohibited substances or methods, and a lifetime ban is imposed for a second violation.<sup>146</sup> Under the 2009 Code, the period of ineligibility for trafficking or administering prohibited substances was increased to a minimum of four years extending up to a lifetime ban.<sup>147</sup>

The Code provides for the possible reduction or elimination of the period of ineligibility where the athlete can establish that he or she had no significant fault or negligence in connection with the violation.<sup>148</sup> This exception is narrowly construed and limited to exceptional circumstances beyond the fault or negligence of the athlete, where the athlete could prove, "despite all due care, he or she was sabotaged by a competitor."<sup>149</sup> The athlete remains responsible for keeping his or her body free from prohibited substances, choosing medical personnel, and relying on labels.<sup>150</sup> Potential mitigation is also available where the athlete provides substantial assistance in discovering or establishing anti-doping violations to an "Anti-Doping Organization, criminal authority or professional disciplinary body which results in . . . establishing a criminal offense or breach of professional rules by another Person."<sup>151</sup> The 2009 Code permits a sanction reduction where an athlete "admits the commission of an anti-doping rule violation" before

145. WADC 2009, *supra* note 2, at art. 11. The IOC revoked the Olympic medals of Marion Jones' teammates. See Amy Shipley, *Jones Running Mates Told to Return Medals*, WASH. POST, Apr. 11, 2008, at E02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/10/AR2008041003272.html>.

146. WADC 2009, *supra* note 2, at art. 10.2. See also *id.* at art. 14 (regarding confidentiality and reporting information concerning AAF, public disclosure, and athlete whereabouts). *Id.* at art. 17 (providing a statute of limitations starting eight years from date of violation).

147. *Id.* at art. 10.3.2.

148. *Id.* at art. 10.4-5 (elimination or reduction of ineligibility period under specified circumstances, such as absence of intent or fault). See also Howman, *supra* note 100, at 3,4 (describing sanctions as ranging from a warning to a life ban from competition, depending upon the type of anti-doping violation, individual circumstances in the case, the substance or quantity detected, and recidivism).

149. WADC 2009, Comment, *supra* note 2, at art. 10.5.1. This does not include sabotage by an athlete's spouse, coach, or others in his or her circle of associates.

150. *Id.* at art. 10.5.2. (commenting that the no fault or negligence standard would not apply "a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement."). See Foschi, *supra* note 5, at 465-68 (describing sanction of swimmer Kicker Vencill for contaminated multi-vitamin).

151. WADC 2009, *supra* note 2, at art. 10.5.3 (noting that the hearing panel determines whether suspension is appropriate and that any such exception is subject to approval by WADA and the applicable International Federation).

other evidence of a violation is known.<sup>152</sup> As a corollary, aggravating circumstances or multiple violations may increase the period of ineligibility beyond the standard first violation sanction of two to four years.<sup>153</sup>

### 5. Evaluating the Doping Adjudication Process

Although the adoption of the WADA Code has helped to streamline doping standards and procedures, the increasingly punitive nature of the process and sanctions mandated by the Code requires greater scrutiny.<sup>154</sup> A number of CAS decisions indicate that the Tribunal is limited to enforcing the strict doping codes as written, even where the equities appear to lie with the athletes.<sup>155</sup> Ambiguity is rarely resolved in the athlete's favor. As one CAS panel consoled, "The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable Persons, which the law cannot repair."<sup>156</sup>

## III. THE PRECARIOUS STATE OF ATHLETE DUE PROCESS AND FAIR HEARING RIGHTS IN DOPING ARBITRATIONS

That "life's not fair" is little consolation to an athlete whose livelihood, reputation, and dreams have been stripped away. The procedures for doping adjudications under the WADA Code may convey an appearance of a neutral process; however, closer examination reveals significant procedural and fairness shortcomings in the doping control and disciplinary arbitration

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152. *Id.* at art. 10.5.4. This applies where the ADO has no knowledge of a violation. "It is not intended to apply to circumstances where the admission occurs after the Athlete or other Person believes he or she is about to be caught." *Id.*, Comment, at art. 10.5.4.

153. *Id.* at art. 10.6-7 (describing aggravating circumstances to include committing the violation as part of a doping plan or scheme, possessing multiple prohibited substances, or engaging in deceptive conduct to avoid detection).

154. See Oliver Niggli & Julien Sieveking, *Selected Case Law Rendered Under the World Anti-Doping Code*, JUSLETTER, Feb. 2006, at 1 (reporting that nearly 230 decisions involving doping charges were rendered by the CAS and IFs in 2005).

155. See Connolly, *supra* note 8, at 193 (citing Arbitration CAS 2004/OG/003, Edwards v. IAAF, award of 17 Aug. 2004 (involving a case where a sanctioned athlete was given glucose tablets by her doctor)). See also McLaren, *supra* note 8, at 16 (non-prohibited supplements).

156. WADC 2003, Comment, *supra* note 2, at art. 2.1.1 (citing Arbitration CAS 94/129, Quigly v. IIT, award of 23 May 1995, at 6). Even the U.S. federal courts have expressed sympathy for athletes caught in this process, and yet the courts are largely powerless to remedy. See Gatlin v. USADA, No. 3:08-cv-241/LAC/EMT, 2008 WL 2567657, at \*2 (N.D. Fla. 2008) (stating "Mr. Gatlin is being wronged, and the United States Courts have no power to right the wrong perpetrated upon one of its citizens."). The court considered that Justin Gatlin was suspended from participating in the Olympic trials due to a "paper-work violation" in extending a therapeutic use exemption to use prescription medication for his recognized disability. *Id.*

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process to which athletes must submit. The following examines problematic aspects of this process, the availability of legal protections, and options for establishing a more balanced and accountable process.

#### A. *Process Concerns with Doping Arbitrations*

An accused athlete entering the doping arbitration process not only lacks assurances of the rule of law, due process, and evidentiary protections that exist in a civil or criminal justice proceeding, but also has to overcome significant procedural obstacles, that do not apply in other fora.

##### 1. Burden of Proof and Presumptions of Validity

A significant hurdle for athletes challenging a doping violation charge is the burden of proof set out in the WADC.<sup>157</sup> Under the WADC, the ADO has the burden of establishing that an anti-doping rule violation has occurred.<sup>158</sup> The standard of proof is “comfortable satisfaction.”<sup>159</sup> Although a violation may be “established by any reliable means, including through admissions, testimony or witnesses, or other documentation evidencing a violation,”<sup>160</sup> the burden is *presumptively met* when the doping report is made, as most are, by a WADA-accredited laboratory.<sup>161</sup>

The burden shifts to the athlete to rebut the presumption, for example, by establishing a departure from an International Standard.<sup>162</sup> In order to meet this burden, an athlete presumably needs access to detailed scientific and technical information about the laboratory’s testing process, sequencing, instrumentation and methods used, the reliability and accuracy of test

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157. WADC 2003, *supra* note 2, at art. 3.

158. *Id.* at art. 3.1.

159. *Id.* This standard of proof “is greater than a mere balance of probability but less than proof beyond reasonable doubt.” WADC 2009, *supra* note 2, at art. 3.1. While this standard is not used in the U.S. common law system, it is used in civil law countries. As an international document, the Code does blend elements of civil and common law standards. See Paul Greene, *United States Anti-Doping Agency v. Montgomery: Paving a New Path to Conviction in Olympic Doping Cases*, 59 ME. L. REV. 149, 152 (2007).

160. *Landis II*, *supra* note 20, at 7.

161. WADC 2003, *supra* note 2, at art 6.1 (“Doping Control Samples shall be analyzed only in WADA-accredited laboratories . . .”). *Id.* at art. 3.2.1 (“WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories analysis.”).

162. *Id.* (noting the applicable standard of proof is by a balance of probability).

results, internal protocols, chains of custody, and competency of lab personnel.<sup>163</sup> Yet, access to this type of documentation is not readily available, disclosed, or guaranteed.<sup>164</sup>

WADA recently increased the athlete's burden of proof. In the 2003 Code, an athlete successfully shifted the burden of proof "back" to the anti-doping agency if the athlete established (by a balance of probabilities) that a departure from an International Standard had occurred.<sup>165</sup> The anti-doping agency then had to prove to the "comfortable satisfaction of the hearing body" that the departure had not caused the adverse analytical finding.<sup>166</sup> Under the 2009 Code, the athlete must prove *both* a departure from the ISL *and* that the departure "could reasonably have caused the Adverse Analytical Finding."<sup>167</sup> Only then does the burden shift back to the ADO to prove to the comfortable satisfaction of the hearing body that the departure did not cause the Adverse Analytical Finding.

## 2. Lack of Discovery Rights

Although the accused athlete has the effective burden to establish laboratory testing error, the applicable rules do not provide the athlete with a right of access to the vast range of information, witnesses, and scientific expertise necessary to make that determination.<sup>168</sup> Athletes are only provided, as a matter of course, with a standard Laboratory Documentation Package, which provides basic information about test results.<sup>169</sup> Athletes are

163. Experienced counsel and scientific experts are generally needed to assess testing validity. See *Landis II*, *supra* note 20, at 3-5 (listing seventeen technical issues to determine ISL departure). In *Landis I*, the arbitral panel employed a "Panel Expert" to assist in explaining the complicated scientific information at issue. See *Landis I*, *supra* note 18, at 1, 14-15.

164. See also Andrew Goldstone, *Obstruction of Justice: The Arbitration Process for Anti-Doping Violations During the Olympic Games*, 7 CARDOZO J. CONFLICT RESOL. 361, 383 (2006) (noting that access to discovery and all relevant data and reports is not guaranteed by the governing rules).

165. WADC 2003, *supra* note 2, at art 3.2.1. Under the 2003 Code, the burden then shifted back to the ADO to show that any such departures "[d]id not cause the Adverse Analytical Finding." *Id.*

166. *Id.* at art. 3.1., 3.2, 3.2.1, 3.2.2.

167. WADC 2009, *supra* note 2, at art. 3.2.1.

168. See, e.g., *Landis II*, *supra* note 20, at n.7 (A laboratory "is not required to support an Adverse Analytical Finding by producing, either to the Testing Authority or in response to discovery requests related to the hearing, *standard operating procedures*, general quality management documents (e.g., ISO compliance documents) or any documents not specifically required by Technical Document on Laboratory Documentation Packages.") (emphasis in original).

169. See WADA PROJECT TEAM, WADA TECHNICAL DOCUMENT-TD2003LDOC 1 (2004) ("Laborator[ies] [are] not required to support an Adverse Analytical Finding by producing standard operating procedures, general quality management documents or any other documents not specifically [listed]."). The Documentation Package is to contain the 'A' and the 'B' Sample

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then beholden to the discretion of the arbitral panel to grant additional discovery and inspection. In the *Landis* case, USADA resisted a number of discovery requests and a battle ensued over turnover obligations, culminating in retaliatory motions, including a “Motion to Return the Urine” and USADA’s request to expand testing to ‘B’ samples from other stages of the Tour race where ‘A’ tests did not test positive.<sup>170</sup>

The doping rules do not provide opportunities to depose lay or expert witnesses. Of the fifteen expert witnesses who testified in the *Landis I* arbitration, none provided opinions in advance.<sup>171</sup> The inability to depose adverse witnesses also tests the power of the arbitration panel, which has subpoena but no contempt powers. Former three-time Tour de France winner Greg Lemond, who testified on behalf of USADA, but refused to answer questions on cross-examination, provoked this distressing statement from Howard Jacobs, one of Floyd Landis’ lead attorneys:

This is where arbitration, as a concept, fails in a case like this. Because in a civil lawsuit, we would have the right to depose a witness and find out what he’s going to answer and not answer, and then we would file a motion *in limine*, and this would be kept out, rather than having this type of thing happen in the middle of a hearing. This is completely unfair.<sup>172</sup>

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Confirmation Procedure Data. *Id.* at 3. See also *Landis I*, *supra* note 18, at 1, 13 (dissent) (citing ISL, sec. 7.0 “Requirements for supporting an Adverse Analytical Finding in the Adjudication Process,” which provides that “[i]n support of any [AAF,] the Laboratory is required to provide the Laboratory Documentation Package described in detail in the Technical Document on Laboratory Documentation Packages.”). Interestingly, USADA relied upon documents and testimony, which were not included in the document package, to rebut Landis’s chain of custody challenges. See WADA PROJECT TEAM, *supra*, at 3.

170. See *Landis I*, *supra* note 18, at 16. The majority ultimately relied upon this additional testing which indicated positive results as grounds to establish the doping violation. See *id.* at 10. See also *United States v. Thomas*, 545 F. Supp. 2d 1018 (N.D. Cal. 2008) (noting that USADA protocol provides that “urine samples remain the property of USADA.”).

171. See *Landis I*, *supra* note 18, at 15.

172. HOWARD JACOBS, TRANSCRIPT OF LANDIS I 637. LeMond provided almost surreal testimony in the course of this doping hearing. See Bonnie D. Simone, *LeMond Says He Was Threatened Not to Testify*, ESPN.com, May 18, 2007, <http://sports.espn.go.com/oly/cycling/news/story?id=2873907> (last visited Oct. 27, 2009).



Discovery in doping arbitration is intended to be limited.<sup>173</sup> However, neither CAS nor WADA rules guarantee discovery or require disclosure of or access to relevant data and witnesses, making it difficult to ascertain laboratory compliance. Limited discovery and opportunity to depose witnesses could streamline the hearing process and adherence to strict timelines in complex scientific cases.<sup>174</sup> In some cases, additional discovery is necessary to permit a fair hearing.

### 3. Lack of Access to Expertise & the WADA “Code of Silence”

WADA laboratory directors have been regularly called to testify on behalf of the ADOs in numerous cases.<sup>175</sup> Under the WADA “Code of Ethics,” in effect until January 2009, laboratory directors were prohibited from testifying in defense of an athlete. This rule provided that:

The Laboratory should not engage in analytical activities or expert testimony that would intentionally question the integrity of the individual or the scientific validity of work performed in the anti-doping program . . . . The Laboratory should not provide [testing services in defense of an Athlete in a Doping Control Adjudication].<sup>176</sup>

Attorneys in *Landis I* characterized this rule as a “Code of Silence,” creating an impermissible conflict-of-interest. The rule does pose a significant restriction on an athlete’s ability to meet its burden of establishing testing errors. Under this rule, athletes are left to scour worldwide for expert witnesses who are not affiliated with WADA laboratories to

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173. See McLaren, *supra* note 8, at 5. See also Nathan Reierson, Comment, *Out of Bounds? Applicability of Federal Discovery Orders Under 28 U.S.C. Section 1782 by International Athletic Governing Bodies for Use in Internal Dispute Resolution Procedures*, 19 LOY. L.A. ENT. L. REV. 631 (1999) (contending that federal discovery statute applies in international arbitrations thus entitling parties to obtain evidence from third parties located within the United States). The FAA also contains an evidence-related provision which gives an arbitrator the right to direct witnesses to appear, produce documents for arbitration, or both, which applies to arbitrations held in the United States. *Id.* at 650. See 9 U.S.C. § 7 (2006) (“The arbitrators . . . may summon in writing any person to attend before them or any of them as a witness in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.”). See also *In re Medway Power Ltd.*, 985 F. Supp. 402 (S.D.N.Y. 1997); *In re National Broad. Co.*, No. 1998 WL 1994 at \*1, n.173 (S.D.N.Y. 1998) (citing *In re Wilander*, No. 1996 WL 421938 (E.D. Pa. 1996)).

174. One of the bases for the CAS panel’s decision to impose the \$100,000 penalty in *Landis II* was that he called French witnesses to appear but was unable to question them during the hearing due to insufficient time. *Landis II*, *supra* note 20, at 55. A pre-hearing telephone deposition of named witnesses could possibly obviate the need for calling unnecessary witnesses. See *id.*

175. See, e.g., *Landis I*, *supra* note 18 (Three WADA laboratory directors testified on behalf of USADA).

176. WORLD ANTI-DOPING AGENCY, INTERNATIONAL STANDARDS FOR LABORATORIES, Annex B, at 4.3, 4.4 (2008), [http://www.wada-ama.org/rtecontent/document/lab\\_08\\_V\\_05.pdf](http://www.wada-ama.org/rtecontent/document/lab_08_V_05.pdf).

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opine on the compliance of a particular WADA-accredited laboratory.<sup>177</sup> The opinions and credentials of such unaffiliated experts, however, are routinely criticized due to their lack of experience with WADA-specific practices, as compared to the vast experience and apparent credibility of the ADO's experts who head WADA-accredited laboratories.<sup>178</sup> After the *Landis* case, the rule was amended to state: "If Laboratory staff is requested by either party or the tribunal to appear before an arbitration or court hearing, they are expected to provide independent, scientifically valid expert testimony. Laboratory experts should not be an advocate to either party."<sup>179</sup> This amended rule recognizes that laboratory staff may be called as witnesses, but does not permit them to counsel or assist an athlete. The ability of an athlete to assess and meet his burden of establishing laboratory errors in analytical positive cases is thus nearly insurmountable, particularly without the ability to enlist the assistance of qualified experts.

#### 4. The "So What" Factor: ISL Errors Not Fatal

An accused athlete has the significant burden of establishing that his or her testing result involved a departure from International Standard practices. Yet even where this burden is met, victory is not assured. The majority in *Landis I* agreed that the Landis team demonstrated that the French laboratory's practices did not conform to International Standards. The Panel admonished the laboratory, that "if this happens next time . . ." such

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177. For example, the arbitral panel discounted the testimony of Landis' expert, Dr. Goldberger, who "had no experience with chain of custody requirements under the ISL, although he was familiar with the chain of custody in his own laboratory work which was mostly related to drunk driving (criminal law) and post-mortem work." *Landis II*, *supra* note 20, at 32.

178. *See id.* at 10;

According to the testimony of the Respondent's experts, the standards in [DUI and drug testing] labs appear to be of a higher and more rigorous basis than those of the WADA accredited labs. Such facilities also do not have the benefit of the presumption found in Article 18 of the UCI Regulations to the effect that they are presumed to have conducted the sample analysis in accordance with the ISL and other WADA documentation. The antidoping laboratories have a shelter from the standards of other types of labs in the form of this presumption. It may be that as a consequence some more relaxed procedures are acceptable. That is not a matter for this Panel to consider but for the WADA to contemplate.

*Landis I*, *supra* note 18, at 66.

179. WORLD ANTI-DOPING AGENCY, INTERNATIONAL STANDARDS FOR LABORATORIES, *supra* note 120, at § 5.0.

practices and failures could warrant an acquittal for the athlete.<sup>180</sup> This seemed to provide an opening (or false hope) for Landis in seeking a *de novo* review to the international CAS panel, which ultimately regarded these practices as “less than ideal” or “minor procedural imperfections,” but insufficient to rebut the presumption that the lab conducted its analysis in accordance with ISL.<sup>181</sup> The 2009 Code cements the higher burden in requiring that the athlete prove not only ISL departures, but that such departures could “reasonably have caused the Adverse Analytical Finding.”<sup>182</sup>

The athlete’s experience in the sporting anti-doping adjudication system, was characterized by CAS arbitrator Jan Paulsson, as follows:

Typically, the exclusive jurisdiction of sporting authorities is set down in the by-laws of federations which grant licences to compete in the course of a season or admission to participate in specific events. The federation in question has generally existed for decades if not generations, and has, without any outside influence, developed a more or less complex and entirely inbred procedure for resolving disputes. The *accused participant, on the other hand, often faces the proceedings much as a tourist would experience a hurricane in Fiji: a frightening and isolated event in his life, and for which he is utterly unprepared.* The same may of course be said for most litigants in ordinary court proceedings. The difference is that whereas in the latter context the accused may be represented by experienced practitioners who appear as equals before the court, the procedures devised by most sports federations seem to be so connected to the

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180. See *Landis I*, *supra* note 18, at 77 (“The Panel . . . note[s] that the forensic corrections of the Lab reflect[s] sloppy practice on its part. If such practices continue, it may well be that in the future an error like this could result in the dismissal of an AAF finding by the Lab.”).

181. See *Landis II*, *supra* note 20, at 48, 53. See also *Landis I*, *supra* note 18, at 76 (acknowledging that the athlete demonstrated an ISL departure, but determining that such did not cause the AAF). The Panel in *Landis II* similarly acknowledged that there were errors in the Documentation Package, yet determined these “administrative” errors were insignificant or later corrected. See *Landis II*, *supra* note 20, at 34. The CAS Panel did not rule in Landis’ favor on the “minor procedural imperfections” it conceded existed (imperfections that gave the AAA significant pause); rather, it assessed a \$100,000 penalty against him, in part because he did not win on these issues. See *id.* at 53-54.

The Panel awards costs of USD 100,000 to Respondent because . . . [a]lthough the Appellant had the right to pursue a comprehensive *de novo* appeal in such an important matter, all of its multiple defenses have been rejected as unfounded. All that Appellant has established after a wide-ranging attack on LNDD is that there were some minor procedural imperfections.

*Id.*

An athlete should be able to rely on the accuracy of Documentation Package. Perhaps an athlete such as Landis would have not pursued costly challenges had he not been rightly suspicious of errors apparent in the initial documentation. That the errors were later explained in litigation should weigh against the party who provided the erroneous information.

182. WADC 2009, *supra* note 2, at art. 3.2.1.

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organisation that no outsider has the remotest chance of standing on an equal footing with his adversary—which is of course the federation itself.<sup>183</sup>

### B. Do Constitutional Protections Apply in Doping Proceedings?

The foregoing list of process concerns in doping adjudications is not exhaustive but provokes thought on what legal protections might apply in this area.<sup>184</sup> Sports governing bodies, which regulate participation in the Olympic movement, essentially “hold a monopolistic ‘quasi-public’ position in their relation with athletes.”<sup>185</sup> The doping control and private adjudicatory process in place to determine whether an athlete is “guilty of doping”<sup>186</sup> implicate a range of fundamental rights for athletes. An athlete’s right to work in his or her chosen profession,<sup>187</sup> economic and liberty rights, and potential exposure to criminal charges in domestic and foreign courts all are at stake in this process.

To date, these entities have been accorded legal treatment and status as private associations subject to private, rather than public or constitutional, standards of law where courts are reluctant to interfere.<sup>188</sup> Efforts to characterize the USOC as a “state actor” have been unsuccessful, despite significant interaction or “entwinement” between Congress and the USOC.<sup>189</sup> The debate is still relevant, particularly as USADA increases its

183. Jan Paulsson, *Arbitration of Sports Law Disputes*, 9(4), ARB. INT’L 359, 361 (1993) (emphasis added).

184. See *infra* Parts III.B-C. See also Hiltzik, *supra* note 8, at A1.

185. See Gabrielle Kaufmann-Kohler & Antonio Rigozzi, *Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with Fundamental Rights of Athletes 2.7*, Nov. 13, 2007, [http://www.wada-ama.org/rtecontent/document/Legal\\_Opinion\\_Conformity\\_10\\_6\\_complete\\_document.pdf](http://www.wada-ama.org/rtecontent/document/Legal_Opinion_Conformity_10_6_complete_document.pdf).

186. This is the term used in CAS arbitral rulings. See Connolly, *supra* note 8, at 182 (noting that the “guilty of doping” determination does not distinguish between intentional and unintentional violations).

187. See Straubel, *supra* note 16, at 546 (stating that “Olympic caliber athletes now earn a living and make a career of their sport.”). Athletes participating in Olympic and international-level sports are no longer limited to amateurs. See *id.* Nearly all federations have amended their eligibility rules to include professionals. See *id.*

188. See *Michels v. U.S. Olympic Comm.*, 741 F.2d 155 (7th Cir. 1984) (Posner, J., concurring) (“[T]here can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games.”).

189. See, e.g. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 545 n.27 (1978); *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1194 (D.D.C. 1980) (holding that USOC is an independent body and facts did not support claim that the federal government has a right

efforts to work in tandem with federal and state law enforcement on anti-doping investigations and as the International Convention Against Doping in Sport (ICADIS), recognizing the WADC, has achieved treaty status.<sup>190</sup>

### 1. Are USADA Disciplinary Proceedings “State Action”?

U.S. Constitutional standards for due process apply in domestic doping arbitrations if these proceedings constitute “state action.” Under the three-part test in *Mathews v. Eldridge*, athletes may be fairly characterized to have a protected property and liberty interest in their participation in competitive sports as a profession as well as in endorsements and their reputation, which can be devastated by doping allegations.<sup>191</sup> Additionally, a significant risk of erroneous deprivation of an athlete’s right to compete arises because of the designated presumption of test validity and burden-shifting upon the athlete, without specific entitlement to discovery or scientific expertise, to impeach the results.<sup>192</sup>

The crux of a due process right depends upon USADA’s status as a “state actor.”<sup>193</sup> An ostensibly private actor can take on the status and

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to control it). These cases were decided years before *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 291 (2001).

190. See UNITED STATES ANTI-DOPING AGENCY, 2007 ANNUAL REPORT, *supra* note 13, at 1 (noting the agency’s increasing cooperation with law enforcement authorities as a new dimension in curtailing the use of performance-enhancing drugs and describing operational “raids”). The USADA’s nearly undefeated streak is likely to continue as it partners with pharmaceutical companies to create markers to identify for prohibited substances. See *Drug-Maker Cooperated with WADA*, VELO NEWS, July 23, 2008, available at <http://tour-de-france.velonews.com/article/80607>. Moreover, the USADA has worked with federal investigators on doping-related charges. See *United States v. Graham*, 555 F. Supp. 2d 1046, 1048 (N.D. Cal. 2008) (granting motion to compel documents from USADA). Antonio Pettigrew was subpoenaed and forced to testify under penalty of perjury at the trial of his former coach Trevor Graham. See Josh Dubow, *Jury Deliberates in Graham Steroids Case*, available at <http://www.signonsandiego.com/sports/20080527-1624-ca-athletessteroids.html> (stating that the government was forced to subpoena evidence in Graham’s case and that Antonio Pettigrew was one of the witnesses against Graham). Likewise, cyclist Joe Papp was asked to testify against Floyd Landis and has been the subject of ongoing Drug Enforcement Agency investigations. See Andrew Tilin, *Vanishing Point*, OUTSIDE MAGAZINE, June 2008, available at <http://outside.away.com/outside/culture/200806/joe-papp-cycling-doping-1.html>.

191. See *Mathews v. Eldridge*, 424 U.S. 319 (1976) (setting forth a three factor test for determining whether a particular procedure violated due process in a given situation: (1) identify the private interest to be affected; (2) determine the risk of erroneous deprivation with the existing procedures as well as the probable value of additional procedures; and (3) detail the governmental interest, including any fiscal or administrative burden on the government). See Straubel, *supra* note 16, at 546.

192. See *id.* at 548-51.

193. Compare McCaffrey, *supra* note 9, at 648 (arguing that current USADA doping adjudications using the ‘comfortable satisfaction’ standard of proof may be characterized as state action) with Dionne L. Koller, *Does The Constitution Apply to the Actions of the United States Anti-*

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obligations of a state actor. Various tests for defining governmental action consider the interdependence between the private and public entity.<sup>194</sup> Paul McCaffrey has argued that USADA qualifies as a “state actor” under the “state compulsion” test, which asks whether the government has coerced or encouraged the private entity to engage in the challenged conduct.<sup>195</sup> He asserts that the federal government encourages the doping policing activities by helping USADA to obtain information about its doping cases.<sup>196</sup> He cites the BALCO steroid scandal, where the Senate subpoenaed the Department of Justice to obtain its BALCO evidence and thereafter turned over that evidence to USADA to be used against athletes, such as Tim Montgomery.<sup>197</sup> Moreover, USADA has pledged its commitment to work with public authorities in anti-doping efforts.<sup>198</sup> The WADC reinforces this through its offer of potentially reduced sanctions to athletes who provide “substantial assistance” to an ADO, criminal authority, or professional disciplinary body which results in establishing a violation or criminal offense.<sup>199</sup> USADA was created by the Congressionally-chartered USOC as a private, non-profit corporation to manage the testing and adjudication of

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*Doping Agency?*, 50 ST. LOUIS U. L.J. 91 (2005) (arguing that the U.S. Constitution does not apply to USADA’s actions because USADA is not a state actor). Another obstacle is at the international federation or CAS level, where U.S. laws and procedural protections are not guaranteed.

194. See DeFrantz, 492 F. Supp. at 1192-93. An example of such test-defining government action is, whether:

(1) [T]he state has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant with the challenged activity”; or (2) “there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.

See DeFrantz, 492 F. Supp. at 193 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961), and *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

195. See McCaffrey, *supra* note 9, at 664, 673-74. Professor Straubel argues that state action by USADA may exist under a “joint activity” test because the U.S. government has created the legal framework requiring compliance with WADC and delegated ICADIS obligations to USADA. Straubel, *supra* note 190, at 72.

196. McCaffrey, *supra* note 9, at 657 n.92, 674.

197. *Id.* at 674.

198. See UNITED STATES ANTI-DOPING AGENCY, 2007 ANNUAL REPORT, *supra* note 13, at 1. The Mitchell Report has brought increased attention to the use of performance-enhancing drugs in sports. *Id.* The Mitchell Report also recommended that professional baseball use an anti-doping program administered by an independent organization much like what USADA does for the USOC. *Id.*

199. See WADC 2009, *supra* note 2, at art 10.5.3.

enforcement actions under the WADA Code.<sup>200</sup> USADA is funded by the USOC and U.S. government, which pays approximately sixty percent of its budget.<sup>201</sup> USADA has been endowed by the federal government, a signatory to the WADA Code, to serve as the exclusive power to implement the Code mandates upon U.S. athletes.<sup>202</sup>

Despite USADA's name—United States—and its prominent role in U.S. doping enforcement actions, it remains uncertain whether USADA will be held to governmental status and Constitutional constraints for standard doping proceedings.<sup>203</sup> Professor Koller articulates factors supporting the contention that USADA is not engaged in state action in the typical doping case.<sup>204</sup> First, USADA is a private entity incorporated under private articles of incorporation and operating under its own set of bylaws.<sup>205</sup> It ultimately operates separately from the government with no control coming from either the federal government or the individual states, and it performs a regulatory function that is not traditionally left to the states.<sup>206</sup> Although USADA received substantial government funding and is the official anti-doping agency of the United States,<sup>207</sup> USADA, not the government, is ultimately responsible for making agency decisions. It is thus argued that such a

200. USADA was created “as a result of recommendations set forth by the USOC’s Select Task Force on Externalization.” American Arbitration Association, Online Library, *supra* note 141, at 3. USADA began operations in October 2000 with full authority for drug testing, education, research, and adjudication for U.S. Olympic, Pan American, and Paralympic athletes.” *Id.*

201. See UNITED STATES ANTI-DOPING AGENCY, 2007 ANNUAL REPORT, *supra* note 13 (noting USADA received \$8 million in federal grants and \$4 million from the USOC in 2007). See also McCaffrey, *supra* note 9, at 650.

202. See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 555-57 (1987) (Brennan, J., dissenting) (believing there was a symbiotic relationship between the government and USOC, and stating that “the USOC has been endowed by the Federal Government with the exclusive power to serve a unique national, administrative, adjudicative, and representational role . . . in the eye of the public . . . the connection between the decisions of the United States Government and those of the [USOC] is profound.”).

203. Courts are highly reluctant to interfere in matters of private sporting associations that are part of the international Olympic structure. *De Frantz v. U.S. Olympic Comm.*, 492 F.Supp. 1181 (D.D.C. 1980); *Slaney v. Int’l Amateur Athletic Fed’n*, 244 F.3d 580 (7th Cir. 2001).

204. Koller, *supra* note 193, at 113 (acknowledging unique circumstances for a stronger case that USADA’s conduct amounts to state action, such as when the federal government does intervene, as it did in the months leading up to the 2004 Athens Olympic Games).

205. United States Anti-Doping Agency, Bylaws, [http://www.usantidoping.org/files/active/policies\\_active/policies\\_procedures/usada\\_bylaws\\_2009.pdf](http://www.usantidoping.org/files/active/policies_active/policies_procedures/usada_bylaws_2009.pdf); Koller, *supra* note 193, at 113-14. See also Sarah L. Horvitz, Travis Tygart, & Paul Turbow, *Dopers Are Not Duped: USADA’s Assistance to Federal Prosecutors Ultimately Protecting Clean Athletes Is Not State Action*, 19 MARQ. SPORTS L. REV. 39, 44 (2008). See also *id.* at 47 (acknowledging that “USADA regularly cooperates with the federal government in its information gathering.”).

206. Koller, *supra* note 193, at 120-21.

207. *Id.* at 122.

passive governmental role in the functioning of USADA cannot translate into state action.<sup>208</sup> Professor Straubel posits, however, that the case for state action and potential criminalization of doping violations becomes more compelling with the recent adoption of ICADIS.<sup>209</sup> The debate of whether doping disciplinary proceedings are a matter of private associational law or state action thus persists.

## 2. Should Criminal Law and the Sixth Amendment Apply to Doping Cases?

Doping adjudications share many characteristics of criminal proceedings, without the attendant protections of criminal procedure.<sup>210</sup> For example, the 2009 WADA Code now provides that an athlete may be eligible for a reduced sanction for making an “admission” to doping where the ADO lacks other evidence, or for (snitch) activity in cooperating with the ADO or criminal authorities in the conviction of other anti-doping cases. The Code also authorizes increased sanctions for “aggravating circumstances.”<sup>211</sup> If this were a judicial criminal proceeding, such provisions would raise Constitutional concerns regarding a defendant’s right against self-incrimination and challenges to the sanctions as impermissibly vague. The panoply of Constitutional protections would apply. Among these, the rights against self-incrimination, to remain silent, to effective assistance of counsel, and standards of proof beyond reasonable doubt would be implicated.<sup>212</sup>

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208. *Id.* at 124. This “final [private] act” analysis seems consistent with other “non state-actor” holdings. *See supra* note 58 (describing *DeFrantz and San Francisco* cases). *Cf. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288 (2001). *See also* Horvitz, et. al., *supra* note 205, at 55-57 (arguing that USADA is not a state actor under either the public function, entanglement, or entwinement tests for state action).

209. *See* Straubel, *supra* note 109 at 63 (stating that ICADIS “[c]ould lead to, among other things, the [USADA] being declared a state actor [and] the criminalization of doping offenses within the United States . . .”).

210. *See* Straubel, *supra* note 69, at 1261 (characterizing doping hearings as “quasi-criminal.”).

211. *See supra* Part II.B.5; WADC 2009, *supra* note 2, at art. 10.6.

212. McCaffrey, *supra* note 9, at 648 (noting that Marion Jones, under investigation by USADA, called the agency a “secret kangaroo court,” and surmising that such “dissatisfaction is attributable in part to the similarities between criminal proceedings and doping adjudications . . . [A]n athlete might argue that constitutional due process demands the protection of the reasonable doubt standard . . . [but] for due process protections to apply, the athlete must show that the USADA is a state actor, and that its proceedings are not merely private conduct.”). *See also* Straubel, *supra*



CAS “case law,” or *lex sportiva*, also authorizes an adverse inference to be made from an athlete’s decision not to testify.<sup>213</sup> For example, Tim Montgomery was found guilty of doping, based not upon a positive test, but upon “non-analytical positive” evidence of doping. USADA offered “Seven Types of Evidence” of Montgomery’s alleged participation in the BALCO conspiracy and trading in doping substances.<sup>214</sup> This included documents from files seized from BALCO, an alleged admission to a teammate that he had used a prohibited substance, and reports in the San Francisco Chronicle supposedly based on secret grand jury testimony by Montgomery in which he admitted using various prohibited substances. Although it admitted seemingly inadmissible evidence,<sup>215</sup> the CAS panel announced it based Montgomery’s conviction solely upon the teammate’s testimony that Montgomery had asked her at a party: “Does it make your calves tight?”<sup>216</sup> The CAS panel announced it took a negative inference from the athlete’s decision not to testify and that “it would have made a real difference if he had said when I said ‘it’ I meant something else.”<sup>217</sup> Under the U.S. criminal justice system, the fact that a defendant seems guilty does not excuse a process that does not comport with the law. The rationale that, absent a state action, the doping disciplinary process is simply a matter of private contract resolved in *arbitration*, does not acknowledge the reality of the mandatory and punitive powers of the process. As Professor Straubel has argued, doping cases do not fit within the commercial arbitration model.<sup>218</sup> The quasi-criminal nature of doping hearings and sanctions warrants a process that comports with the principles underlying Constitutional protections for defendants in criminal cases.

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note 190, at 75 (arguing that criminal sanctions aspect of drug testing could warrant protections under the Fourth Amendment).

213. See USADA v. Collins, AAA No. 30 190 00658 04 (2004), available at [http://www.usantidoping.org/files/active/arbitration\\_rulings/aaa%20cas%20decision%20-%20collins.pdf](http://www.usantidoping.org/files/active/arbitration_rulings/aaa%20cas%20decision%20-%20collins.pdf); USADA v. Montgomery, CAS 2004/O/645 (2004). In *lex sportiva*, arbitrators quote themselves and other arbitrators from prior opinions. Where arbitrators can also be in the role of advocate in separate cases, what is “law” versus advocacy?

214. See USADA v. Montgomery, CAS 2004/O/645 (2004).

215. Arbitrators, not bound by rules of evidence or obligations to follow law, regularly admit clearly inadmissible evidence “for what it’s worth.” See USADA v. Montgomery, CAS 2004/O/645 (2004).

216. *Id.* at 8.

217. *Id.* The panel interpreted “it” to mean the prohibited substance.

218. See Straubel, *supra* note 69, at 1215. See also Goldstone, *supra* note 16, at 388 (“While the IOC is willing to apply the criminal law concepts of guilt and intent and use these concepts in imposing punishment, it is unwilling to apply the corresponding procedural protection, choosing to operate under private law instead.”).

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*C. The Right to a “Fair Hearing” and How Doping Arbitrations Fall Short*

Irrespective of the state action element and application of Constitutional due process standards, the WADA Code provides that an athlete who is accused of doping is entitled to a fair hearing.<sup>219</sup> Individual prosecuting anti-doping organizations are responsible for providing a hearing process to determine whether a doping violation was committed and to impose appropriate consequences.<sup>220</sup> The Code provides that the hearing process respect fundamental principles, such as the athlete’s right to be fairly and timely informed of the asserted anti-doping rule violation, and a chance to respond to such allegations; the right of each party to present evidence, including the right to call and question witnesses (subject to the hearing body’s discretion to accept testimony by telephone or written submission); a fair and impartial hearing panel; and a timely, written, and reasoned decision.<sup>221</sup> The absence of clear procedural rules, disclosure obligations, and institutional support for accused athletes undercuts the viability of a fair hearing.

1. Represented by Counsel at Athlete’s Expense

Accused athletes have “the right to be represented by counsel at the Person’s own expense.”<sup>222</sup> This one provision, amid a process where anti-doping authorities are securely funded, can conceivably gut the fair hearing guarantee. As a practical matter, an athlete, on the eve or in the throes of competition, is rarely equipped to hire competent counsel and scientific experts to defend against a doping charge. Athletes typically rely on recommendations from teammates or search the internet for an attorney.<sup>223</sup>

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219. WADC 2009, *supra* note 2, at art. 8.

220. *Id.* See, e.g., United States Anti-Doping Agency, Protocol for Olympic Movement Testing, *supra* note 44, at 41.

221. WADC 2009, *supra* note 2, at art. 8 (providing that each ADO may adopt its own protocol for a hearing process consistent with these principles).

222. *Id.*

223. E-mail from Howard Jacobs, Esq., to Kirk Pearson, Student, Pepperdine University School of Law (Sept. 24, 2008, 17:31 PST) (on file with author). The USOC Athlete Ombudsman is able to provide independent advice to athletes about applicable procedures, but cannot represent the athlete or render legal advice. See *supra* note 42. The Sports Law Clinic at Valparaiso University School of Law, directed by Professor Michael Straubel and assisted by third-year law students has provided pro bono assistance to athletes accused of doping. See Valparaiso University School of Law, Sports Law Clinic, <http://www.valpo.edu/law/clinic/sportslawclinic/index.php> (last visited Oct. 27, 2009).

Floyd Landis went to the virtual public, mounting a “Wiki Defense” and seeking financial assistance for his defense.<sup>224</sup> Considering the presumption of test validity and guilt, athletes cannot realistically avail themselves of the fair hearing procedures without legal advice.<sup>225</sup> With the substantial funding, experience, and resources garnered by the ADOs and CAS, an accused athlete is at a distinct information and resource disadvantage.

The guarantee of a fair hearing rings hollow where the underlying process rules do not guarantee access to representation, discovery, scientific expertise, or an impartial panel. An essential component of a fair trial in a doping disciplinary proceeding, under the Convention Against Doping of the Council of Europe, is the right to an independent and impartial tribunal, which means, among other things:

(a) to distinguish the suing authority from the instruction authority and from the judgment authority; (b) to express your point of view orally and enter into a debate; (c) to have the right of a public or private hearing; (d) to have the knowledge and right to contest the presence of some members of the disciplinary commission when not having the guarantees of independence and impartiality.<sup>226</sup>

Simply applying subsection (a) to doping adjudications leaves one confounded. The process set forth by the WADA Code has been criticized for regulating all aspects of the anti-doping disciplinary regime, such that the suing, instruction, and judgment authority are essentially one.<sup>227</sup>

## 2. Arbitrator Conflicts

In his petition to vacate the CAS decision, Landis cited instances where panel arbitrators had concomitantly served as advocates before party attorneys, who served as CAS arbitrators on a separate matter.<sup>228</sup> The

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224. Hughes, *supra* note 18, at 20; Darcy C. Plymire, *The Wiki Defense: Contesting the Status of Knowledge in the Floyd Landis Doping Case*, 1 INT’L J. SPORT COMM. 307, 314 (2008).

225. McCaffrey, *supra* note 9, at n.62 (stating that, “As a practical matter, the estimated cost of a legal challenge is \$60,000 to \$80,000.”). This may not seem like an unfair price to pay in order to salvage a career, but one must consider that the “USADA has never lost a case.” Amy Shipley, *Caught Cheating, or Was She Cheated?*, WASH. POST, Nov. 8, 2004, at D01.

226. Nathalie Korchia, Symposium, *Int’l Sports Law & Business in the 21st Century, Fundamental Guarantees with Respect to Disciplinary Proceedings—Some Reflections*, 15 MARQ. SPORTS L. REV. 29, 33 (2004).

227. What evolved to protect competitive purity since then is a closed, quasi-judicial system without American-style checks and balances. Anti-doping authorities act as prosecutor, judge and jury, enforcing rules that they have written, punishing violations based on sometimes questionable scientific tests that they develop and certify themselves, while barring virtually all outside appeals or challenges. See Hiltzik, *supra* note 8.

228. See Landis v. USADA, Amended Motion to Vacate Arbitration Award, No. CV-08-06330 (C.D. Cal. filed Nov. 3, 2008) (asserting that “the CAS system is an insider’s club, favoring repeat

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guarantees of arbitral independence and impartiality become blurred where arbitrators are free to, and in fact do, serve as advocates representing anti-doping organizations, sports bodies, and, occasionally, an athlete on each other's panels.<sup>229</sup> The CAS procedural rules require arbitrators to remain independent and to disclose circumstances likely to affect his independence, yet the rules do not specifically require arbitral disclosure of conflicts of interest or previous business relationships with the advocates or parties that would apprise a party selecting an arbitrator of its nominee or which could provide a basis to seek removal of an arbitrator prior to a hearing. CAS has responded to the "double hat" problem highlighted by Landis. However, that only fifteen percent of the CAS arbitrators are selected "with a view to safeguard the interests of the athletes" may not provide assurance of impartiality from an athlete's perspective.<sup>230</sup> As argued by a Landis attorney, "[b]ecause arbitrators have a free rein to decide the law as well as the facts, and because their decisions are accorded a high degree of deference, the impartiality of those arbitrators must be scrupulously safeguarded."<sup>231</sup>

#### IV. PROVIDING MEANINGFUL HEARING RIGHTS

Doping adjudications are imbued with many of the elements of a civil and quasi-criminal proceeding, without corresponding process protections.<sup>232</sup> Arbitration, a recognized form of private dispute resolution, can be an efficient and effective means to adjudicate disputes among consenting parties and subject only to self-imposed rules (or lack thereof). But the doping adjudicatory process in international sports has a tremendous impact on the life, career, and reputation of an accused athlete. The war against drugs and desire for expediency cannot be at the expense of fundamental fairness. The fiction of athlete consent to this process can only

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players at the expense of athletes, a disadvantage that is only exacerbated when the arbitrators on a particular panel continue to represent clients before the CAS or seek to do so.")

229. See also Gubi, *supra* note 55, at 11.

230. Court of Arbitration for Sport (CAS), Arbitration Statutes, at S14, [http://www.tas-cas.org/en/arbitrage\\_statuts.asp/4-0-1075-4-1-1/5-0-1089-7-1-1](http://www.tas-cas.org/en/arbitrage_statuts.asp/4-0-1075-4-1-1/5-0-1089-7-1-1) (last visited Oct. 27, 2009). See also Part II.B.2.

231. See Landis, No. CV-08-06330, at 26 (citing *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968)); Straubel, *supra* note 69, at 1237-38 (asserting failings in the selection process).

232. See Straubel, *supra* note 69.

have credence where the process is accessible and accountable.<sup>233</sup> As one CAS arbitrator noted, “[t]he fight against doping is arduous, and it may require strict rules. But the rule-makers and rule-appliers must begin by being strict with themselves.”<sup>234</sup> A “fair hearing” in this regulatory environment should include elements of the following proposals.

#### A. Procedure and Discovery Protocols

The CAS procedural rules applicable in doping arbitration hearings should make specific provisions regarding discovery and disclosure obligations.<sup>235</sup> Further, the rules should address the use of a Panel expert and provide the right of the parties to examine the Panel expert and reports made to the Panel.<sup>236</sup> The CAS rules should set forth specific requirements for arbitral disclosure of potential conflicts of interest, as well as address the “revolving door” concern about arbitrators also representing clients as advocates in this forum. Further, the provisions permitting arbitral panels to impose costs upon athletes should be explicit or eliminated. Athletes, such as Floyd Landis, should not be penalized for availing themselves of the adjudicatory process. Further, athletes as a client should not be sanctioned for the legal arguments or strategy of their counsel. Civil procedural rules authorize sanctions against the lawyer, where warranted, for alleged frivolous legal assertions.<sup>237</sup> Although not binding upon CAS, the Rule 11 analogy and prohibitions on fee-shifting in civil rights cases have force here as well.

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These fundamental guarantees are what can be considered as the price of the security, of the credibility, of the legitimacy and somehow, of the price of the right to make decisions. Why should private commissions be entitled to judge and sometimes cause very important injuries to individuals if they do not have any legitimacy or are not recognized by the recipients for such a policy as a legitimate authority?

Korchia, *supra* note 225, at 35.

234. *Landis I*, *supra* note 18, at 13 (Campbell J., dissenting) (quoting Quigley v. Int’l Shooting Union, CAS 94/129 (1995)) (stating, “Any anti-doping system must be held accountable, like the athletes . . . . Drug testing agencies should not be playing hide the ball when athletes’ careers are on the line.”).

235. See Straubel, *supra* note 69, at 1216 (noting the ambiguity in availability of pre-hearing discovery).

236. In *Landis I*, Dr. Francisco Botre served as the Panel Expert, with the consent of the parties. He was present throughout the hearing, with certain exceptions, and provided the panel an extensive report but was not called for cross-examination by the parties. See *Landis I*, *supra* note 18, at 18, 20, 68.

237. FED. R. CIV. P. 11(b).

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*B. Access to Qualified Athlete Legal Advocates*

Athletes who are required to submit to mandatory drug testing, with attendant potential criminal liability, and to mandatory arbitration should be provided meaningful access to competent legal representation when their athletic careers are in jeopardy. Accused athletes cannot realistically assess whether to pursue challenges in this process without competent legal counsel and scientific expertise. Most athletes do not have the financial resources to do this on their own. Although there is no general “right” to counsel in civil cases or doping adjudications,<sup>238</sup> the fact that all other organizations within the Olympic Movement are funded compels the suggestion for establishing a fund, insurance, or program to assist accused athletes. Perhaps this can be coordinated through efforts of the IOC, individual federations, or the USOC. The resources appear available, considering the vast sums spent on staging the Olympic Games and millions garnered from broadcast, sponsorship, and trademark rights.<sup>239</sup>

A proposed model of athlete advisors or legal representatives can mirror the roster system used for CAS arbitrators. So that athlete advocates can adequately advise athletes and avoid unwarranted challenges, the athlete advocates should receive specialized training regarding the science of testing and doping, similar to that provided to arbitrators and doping authorities.<sup>240</sup>

*C. Athletes Unite?*

The high stakes and visibility of athlete doping cases has raised public scrutiny and increased concern for fair process assurances. Many athletes who compete in professional leagues in the United States are protected by U.S. laws and represented through a player’s association. Ironically, athletes who represent the United States in international sports lack similar protections.<sup>241</sup> The formation of associations to provide for representation

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238. See Bitting, *supra* note 45, at 677.

239. See *supra* Part II.A.2.

240. The function of an Athlete Advisory Council at the international level or the role of the USOC Ombudsman could be expanded to provide access to qualified legal advisors for concerned athletes.

241. Bitting, *supra* note 45, at 663. See also *Martin v. Int’l Olympic Comm.*, 740 F.2d 670 (9th Cir. 1984) (agreeing that plaintiff, women runners from twenty-seven countries, had demonstrated a historical pattern of gender discrimination by the IOC in failing to hold comparable events for women but declining to impose U.S. constitutional or state laws on an international athletic event and deferring to procedures under the Olympic Charter).

for international sporting athlete remains an option warranting consideration.<sup>242</sup> A recent study commissioned by the IAAF also proposed further consideration of unionizing international athletes.<sup>243</sup> Many details remain, and the logistics of organizing athletes competing internationally and across sports is complex.<sup>244</sup> However, means are available within the current regulatory structure to provide guidance to concerned athletes while further efforts warranted.

## V. CONCLUSION

The timing and nature of international sporting competition often necessitates swift resolution of eligibility disputes. CAS is logically designed to respond. With the viability of judicial recourse extremely limited, athletes with disciplinary and eligibility disputes must submit to CAS arbitration. But with the power to test, sanction, and deny an athlete of his or her sporting career, comes the obligation to provide a fair hearing process, including assurances of impartiality, access to information, and to legal advisors. It is about the athletes. It is about playing and judging true, clean, and fair.

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242. Straubel, *supra* note 69, at 1234 (“One unique solution which would require more analysis . . . is the creation of monitoring groups comprised of athletes or athletes’ attorneys, perhaps akin to a union.”).

243. See PROJECT 30, TASK FORCE REPORT 1, 60 (2009), <http://www.scribd.com/doc/12025159/Project-30> (encouraging promotion of self-sustaining professional athlete’s union).

244. For example, the longer career of U.S. professional athletes may make unionizing more practical than for athletes who may compete once in the Olympics, yet the national sports governing body can operate as a resource for the athletes.