The World Anti-Doping Code, the Athlete’s Duty of “Utmost Caution,” and the Elimination of Cheating

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I. INTRODUCTION

“When the public reads . . . that a nice kid gets banned for two years for a mistake in taking a cold medication, it undermines the credibility of the system.”1

The World Anti-Doping Code (WADC)2 embraces a strict liability standard for doping offences in sport (regardless of an athlete’s intent, fault, or negligence), disqualifying any associated sporting results and imposing a two-year suspension to protect “clean” athletes and “ensure the integrity of results.”3

In determining whether and to what extent a suspension period should be reduced, the WADC focuses on whether an athlete acted with the “utmost caution” in ensuring no prohibited substances entered his or her body. This involves “measuring the degree of culpability of the athlete in contributing to the analytical positive result.”4 However, in most inadvertent and innocent doping cases, suspensions will result.

The WADC should focus on whether the athlete intended to cheat using prohibited substances to enhance performance and on any likely future

2. See generally WORLD ANTI-DOPING CODE (2009) [hereinafter WADA CODE].
performance-enhancing effect. This approach, consistent with each athlete’s “fundamental right to participate in doping-free sport,” and objective to eliminate cheating distinguishes between intentional doping and, conversely, innocent or inadvertent doping.

II. BACKGROUND

Doping describes the use of substances or methods that enhance sporting performance, pose health risks to athletes, or violate the “spirit of sport.” Doping can occur in many ways. Substances such as anabolic steroids, human growth hormone (hGH), or erythropoietin (EPO) could be used intentionally for performance-enhancing purposes (intentional doping). Medication taken or administered for medical reasons or supplements complimenting an athlete’s training may contain prohibited substances. Prohibited substances may be ingested through kissing, drinking from someone’s water bottle, food or drink spiking, or even assaults.


7. WADA CODE art. 4.3.3.


10. Id. at 467–68.

11. See generally, e.g., WADA / Fédération Internationale de Gymnastique (FIG) & Melnychenko, CAS 2011/A/2403; S. / Fédération Internationale de Natation Amateur (FINA), CAS 2005/A/830; Baxter / IOC, CAS 2002/A/376; Raducan / IOC, CAS ad hoc Division 2000/011 (O.G. Sydney).

12. See generally, e.g., WADA / Hardy & U.S. Anti-Doping Agency (USADA), CAS 2009/A/1870; see also Michael S. Straubel, Lessons from USADA v. Jenkins: You Can’t Win When You Beat a Monopoly, 10 PEPP. DISP. RESOL. L.J. 119, 119–21 (2009) (discussing the case of LaTasha Jenkins, a former U.S. sprinter, who took over-the-counter supplements on advice from her coach and was unaware that they contained prohibited substances).


15. WADA CODE arts. 10.5.1 & 10.5.2 cmt. (2009).

16. See generally Adams / Canadian Ctr. for Ethics in Sport (CCES), CAS 2007/A/1312; see
Intention aside, it can occur inadvertently or innocently. Inadvertent doping describes when athletes ingest food, drink, medication, vitamins, or supplements without diligently examining whether it contains prohibited substances. Innocent doping describes when athletes take prohibited substances without any fault or negligence.

Although having characteristics akin to a criminal law regime, anti-doping law derives from various contractual arrangements between the governing bodies comprising the Olympic Movement (Movement). The Olympic Charter (Charter) is the key constitutional document that codifies the principles of “Olympism” and establishes the International Olympic Committee (IOC) as the supreme court for all disputes involving the Movement.


18. Id. The duty imposed on athletes is regularly referred to as the “Duty of Utmost Caution.” See, e.g., Fédération Internationale de Football Association (FIFA) & WADA, Advisory Opinion, CAS 2005/C/976 & 986, ¶ 73 (stating that “[t]he WADC imposes on the athlete a duty of utmost caution to avoid that a prohibited substance enters his or her body.”) (emphasis omitted).

19. Opie, supra note 17, at 343–44. For example, when athletes take prohibited substances through sabotage, contamination, or assault.

20. Doping violations are commonly referred to as “offences”; athletes caught doping are often said to have been found “guilty” of a doping offence; and, the underlying purposes behind the imposition of sanctions for doping involve the same considerations as in criminal sanctioning, being punishment and deterrence. Further, depending on the seriousness of the charged doping offence, the standard of proof required to satisfy CAS that a doping offence is proved is said to be “a very high standard almost approaching beyond reasonable doubt.” See French / Australian Sports Comm’n & Cycling Austl., CAS 2004/A/651, ¶ 42; see also Michael Straubel, Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better, 36 LOY. U. CHI. L.J. 1203, 1259–60 (2005). Finally, the criminal law principle nulla poena sine culpa has been held by sporting tribunals to apply to doping disputes. Gabrielle Kaufmann-Kohler et al., Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law, Feb. 26, 2003, ¶¶ 124–25, available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-Legal_Library/Advisory_and_Legal_Opinions/kaufmann-kohler-full.pdf.

21. OLYMPIC CHARTER: INTRODUCTION TO THE OLYMPIC CHARTER 8 (2011). The Olympic Charter, as a basic instrument of a constitutional nature, sets out the “Fundamental Principles” and essential values of Olympism, serves as a statute for the IOC, and defines the rights and obligations of the IOC, the International Federations (IFs) and the National Olympic Committees (NOCs).

22. Id. “Olympism” is defined as:
[A] philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy of effort, the educational value of good example, social responsibility and respect for universal fundamental ethical principles.

The goal of Olympism is to place sport at the service of the harmonious development of humankind, with a view to promoting a peaceful society concerned with the preservation of human dignity.
Committee (IOC) as the supreme authority and leader of the fight against doping. The IOC is empowered to recognise the International Federations (IFs) governing each sport internationally, the National Olympic Committees (NOCs) responsible for protecting the Movement nationally, and the National Governing Bodies (NGBs) governing individual sports nationally. All IFs, NOCs, and NGBs are bound to the Charter; failure to comply may result in exclusion from the Movement. Athletes, coaches, and officials are also bound to the Charter.

All Olympic participants must comply with the WADC. To be included and remain on the Olympic programme, sports must adopt the WADC. In addition to Olympic sports, however, the WADC is increasingly governing non-Olympic sports. Upon application to host the Olympics, states undertake measures to comply with and respect the Charter (and by extension the WADC). Moreover, most countries have ratified the International Convention against Doping in Sport, requiring compliance with the WADC.

OLYMPIC CHARTER: FUNDAMENTAL PRINCIPLES OF OLYMPISM 10.

23. OLYMPIC CHARTER R. 1.1.
24. Id. R. 2.8.
25. See id. R. 3.3, 25. Examples of IFs include FIFA (international governing body for soccer, or football as it is more commonly known around the world), FINA (international governing body for swimming), and the International Association of Athletics Federation (world governing body for track and field).
26. See id. R. 3.1–3.2, 27.1–27.2. Examples of NOCs include the Australian Olympic Committee, the U.S. Olympic Committee, and the British Olympic Association.
27. See id. R. 29. National Governing Bodies (NGBs) are also commonly referred to as National Federations. Examples of NGBs include U.S. Track & Field and Swimming Australia.
28. Id. R. 3.2.
29. Id. R. 40.
30. Id. R. 2.8 (the role of the IOC includes “leading the fight against doping in sport”), R. 25 (all IFs must adopt and implement the WADC), R. 27.2.6 (all NOCs must adopt and implement the WADC), R. 29 (all NGBs must “be governed by and comply in all aspects with the Olympic Charter and the rules of its IF”), R. 40 (“To be eligible for participation in the Olympic Games, a competitor, coach, trainer or other team official must comply with the Olympic Charter” and “respect and comply in all aspects” with the WADC), R. 43 (“The WADC is mandatory for the whole Olympic Movement.”).
33. OLYMPIC CHARTER R. 33.3.
34. UNESCO International Convention, supra note 6. By August 4, 2008, over ninety countries had ratified the International Convention against Doping in Sport (ICADS). See United
After “considerable pressure” from the Australian government, the Australian Football League adopted the WADC.35 The National Rugby League36 and the International Cricket Council have adopted it.37 The National Football League (NFL),38 National Basketball Association,39 National Hockey League,40 and Major League Baseball41 have yet to adopt it; however, this seems inevitable with increasing pressure from the IOC, World Anti-Doping Agency (WADA), and the U.S. government.42

Brief mention should be made of the Court of Arbitration for Sport (CAS), an arbitral tribunal established to adjudicate all Olympic-related disputes including doping cases.43 The developing body of CAS awards is

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36. Id. at 371.
43. OLYMPIC CHARTER R. 61.2; Matthew J. Mitten & Hayden Opie, “Sports Law”: Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution, 85 TUL. L. REV. 269, 285 (2010); WADA CODE art. 13. Further, Professor Mitten stated:

Like other arbitral bodies, the CAS’s jurisdiction is dependent upon the parties’ written agreement to submit their dispute to the CAS for final adjudication[,] . . . , which bars litigation arising out of the subject dispute in a judicial forum. The IOC and all Olympic IFs have agreed to CAS jurisdiction . . . . By rule, the IFs require their respective member NGBs and athletes to submit all disputes with the IF to CAS arbitration.
incrementally creating a sporting jurisprudence—“Lex Sportiva”—from which anti-doping law derives. CAS recently stated that “although a CAS panel in principle might end up deciding differently from a previous panel, it must accord to previous CAS awards a substantial precedential value and it is up to the party advocating a jurisprudential change to submit persuasive arguments and evidence to that effect.”

III. THE WORLD ANTI-DOPING CODE

Various high-profile doping incidents, perceptions of nonchalance by the IOC in fighting doping, and growing health concerns relating to substance abuse prompted the creation of WADA and the WADC. The WADC established a range of doping offences including the presence of prohibited substances or methods, refusing to submit samples, failing to file whereabouts information, tampering of doping controls, and possession, trafficking, and administration. The WADC embraces strict liability for all doping offences for various reasons.


44. Anderson / IOC, CAS 2008/A/1545, ¶ 118.


46. Connolly, supra note 31, at 165.

47. Hard, supra note 42, at 537–38.

48. Blumenthal, supra note 45, at 205; Connolly, supra note 31, at 165.

49. Connolly, supra note 31, at 165.

50. WADA CODE art. 2.1 (2009).

51. *Id*. art. 2.2 (attempting to use is also prohibited).

52. *Id*. art. 2.3 (failing to submit a “Sample” is also prohibited).

53. *Id*. art. 2.4 (relating to “Out-of-Competition” testing).

54. *Id*. art. 2.5 (attempting tampering is also prohibited).

55. *Id*. art. 2.6.

56. *Id*. art. 2.7 (attempting trafficking is also prohibited).

57. *Id*. art. 2.8 (attempting to administer is also prohibited).

58. See, e.g., *Id*. art. 2.1.1 (stating that “[i]t is each Athlete’s personal duty to ensure that no
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The pursuit of fairness in sport is said to outweigh the rights of a doping athlete. In Chagnaud v. Fédération Internationale de Natation Amateur, CAS stated:

[T]he system of strict liability of the athlete must prevail when sporting fairness is at stake. . . . [O]nce a banned substance is discovered . . . , [the athlete] must automatically be disqualified from the competition in question, without any possibility for him to rebut this presumption of guilt . . . . It would indeed be shocking to include in a ranking an athlete who had not competed using the same means as his opponents, for whatever reasons. 59

Similar comments were made in USA Shooting & Quigley v. International Shooting Union. 60 Moreover, any requirement to prove guilt may result in intentional dopers escaping sanction 61 and attract “costly litigation that may well cripple federations—particularly those run on modest budgets . . . .”62

Anti-doping organisations bear the onus of proving doping offences to the “comfortable satisfaction” standard.63 This standard is “greater than a mere

Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an anti-doping violation . . . .”) (emphasis omitted). WADC Comment to Article 2.1.1 provides that:

For purposes of anti-doping rule violations involving the presence of a Prohibited Substance (or its Metabolites or Markers), the Code adopts the rule of strict liability . . . .

Under the strict liability principle, an Athlete is responsible, and an anti-doping rule violation occurs, whenever a Prohibited Substance is found in an Athlete’s Sample. The violation occurs whether or not the Athlete intentionally or unintentionally Used a Prohibited Substance or was negligent or otherwise at fault.

Id. art. 2.1.1 cmt.

59. MITTEN ET AL., supra note 43, at 340 (quoting Chagnaud / FINA, CAS 95/141); see also Connolly, supra note 31, at 179 (quoting N. / Fédération Equestre Internationale (FEI), CAS 94/126, ¶¶ 141, 245) (where similar considerations were made albeit in the case of a doped horse: “the interests of the rider of a doped horse, even if he/she is totally innocent, must be weighed up against those of all the other competitors who entered the event ‘clean.’ . . . ‘[I]n order to preserve equality between competitors, the disqualification should stand even if the rider is innocent.’”).

60. In USA Shooting & Quigley v. International Shooting Union, CAS considered it “a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently.” CAS 94/129, ¶ 15.

61. CAS, in considering whether to apply a test of strict liability for doping offences, stated that “it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent.” Id.

62. Id.

63. WADA CODE art. 3.1.
balance of probability but less than proof beyond reasonable doubt;” 64 although, in *French v. Australian Sports Commission & Cycling Australia*, CAS accepted that for serious doping offences “comfortable satisfaction” requires “a very high standard almost approaching beyond reasonable doubt.” 65 Doping violations may be proven “by any reliable means.” 66

Once proven, any associated sporting results are disqualified automatically. 67 CAS considers it “perfectly proper”

[For the rules of a sporting federation to establish that the results achieved by a “doped athlete” at a competition during which he was under the influence of a prohibited substance must be cancelled irrespective of any guilt on the part of the athlete. . . . The interests of the athlete . . . in not being punished without being guilty must give way to the fundamental principle of sport that all competitors must have equal chances. 68

Automatic disqualifications protect the integrity of sporting results, and also the credibility of sporting icons by preventing question marks surrounding the legitimacy of sporting achievements. 69

In addition to disqualifications, where the violation relates to the presence or use of a prohibited substance or method, a two-year ineligibility period is imposed automatically 70 to prevent, deter, and punish cheating. 71

**IV. ELIMINATING OR REDUCING INELIGIBILITY**

Athletes may seek an elimination or reduction of the two-year suspension

64. *Id.*
66. WADA CODE art. 3.2. Any reliable means includes admissions of guilt, credible third party testimony, or reliable analytical data from athlete samples. See *id.* art. 3.2 cmt.
67. *Id.* art. 9.
68. *A. / Fédération Internationale de Luttes Associées (FILA)*, CAS 2001/A/317, ¶ 24 (citations omitted). See also Kaufmann-Kohler et al., *supra* note 20, ¶¶ 101–02 (noting that the appropriateness of the rule requiring automatic disqualifications of any connected competition results is unanimously shared).
70. WADA CODE art. 10.2. See also *id.* art. 10.3 (providing alternative ineligibility periods for other doping violations). Further, the two-year ineligibility period can be eliminated or reduced (discussed *infra* Part IV) or increased depending on the athlete’s individual circumstances: WADA CODE arts. 10.4, 10.5, 10.6, app. 1 at 128–29 (defining Ineligibility and Consequences of Anti-Doping Rules Violations).
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under WADC Articles 10.4 and 10.5.

A. Article 10.4

Where an athlete, committing a first offence, establishes (on the balance of probabilities) how the specified substance entered his or her body72 and (on the comfortable satisfaction standard) that the specified substance was not intended to enhance his or her sporting performance or mask the use of another performance-enhancing substance,73 the two-year suspension may be reduced to a reprimand.74 Article 10.4 applies only to specified substances75 because there is a greater likelihood that they could have been ingested for a “credible, non-doping explanation.”76

Under Article 10.4, the degree of the athlete’s fault is considered in determining the appropriate reduction,77 having regard to the “specific and relevant [circumstances that] explain the [a]thlete’s . . . departure from the expected standard of behavior.”78

In Union Cycliste Internationale (UCI) v. Kolobnev & Russian Cycling Federation, a Russian cyclist competing in the 2011 Tour de France tested positive for hydrochlorothiazide (HCT).79 The Russian Cycling Federation anti-doping commission determined that a doping violation had occurred,
however, it imposed a reprimand and no suspension.80

The UCI appealed unsuccessfully to CAS,81 which accepted that Kolobnev had been taking the supplement Natural Kapilyaroprotektor in treatment for a chronic vascular disease,82 he purchased it from a reliable drugstore,83 and he had never tested positive for prohibited substances.84 CAS was satisfied that Kolobnev did not intend to enhance sporting performance;85 the supplement was being used for “medical reasons totally unrelated to sport performance”86 with Kolobnev unaware that the supplement contained HCT.87

In upholding the reprimand, CAS considered that a sanction should only be reviewed if it was “evidently and grossly disproportionate to the offence,”88 stating that CAS must not “tinker with a well-reasoned sanction.”89

Notwithstanding Kolobnev, other CAS awards highlight the unfair outcomes available under Article 10.4.

In WADA v. Fédération Internationale de Gymnastique (FIG) & Melnychenko, a gymnast (age 15) tested positive for Furosemide after winning gold at the 2010 ACRO Championships.90 The International Gymnastics Federation disqualified the result but reduced her suspension to two-months.91 WADA appealed to CAS.

Melnychenko led evidence that prior to the championships she had been suffering with a furnace in her nose and was experiencing pain and high temperatures.92 Her father took her to a hospital and consented to her treating doctor administering Lasix, which contained Furosemide.93 Melnychenko had never previously tested positive for any prohibited substances.94 When asked,
her doctor erroneously advised that Lasix did not contain any prohibited substances. Both WADA and FIG conceded that Lasix was “justifiably prescribed” in treating her condition.

Overall, CAS deemed it appropriate to reduce the two-year suspension, taking account of Melnychenko’s age and inexperience; however, it increased her suspension to four months, noting that doping violations are “serious offence[s] for an athlete who bears the ultimate responsibility.”

In Drug Free Sport New Zealand v. Chalmers, a boxer tested positive for Furosemide after winning her division at the National Boxing Championships. The Sports Tribunal of New Zealand accepted that Chalmers took Furosemide on prescription of her doctor (an experienced sports medicine practitioner) for treatment of problems associated with menstruation. Her doctor erroneously advised her not to take Furosemide “‘close to’ or ‘around’ competition.” The tribunal reduced her suspension to three months, holding that she was a senior athlete who should have done more.

In Melnychenko, CAS increased the original sanction from two months to four months; however, as noted in Kolobnev, a sanction should be reviewed only if it was “‘evidently and grossly disproportionate to the offence.’” Moreover, it is difficult to rationalise imposing any suspension on a young athlete who honestly and in good faith took appropriately prescribed medication for a dangerous medical condition, having made due enquiries with her treating doctor that the medication did not contain any prohibited substances. Similarly with Chalmers, it was accepted that the substance was taken legitimately for a medical condition.

The Melnychenko award and Chalmers decision highlight an inherent inconsistency in the objects of the WADC, namely between the object of protecting the health and well-being of athletes (one of the underlying aims of

95. Id. ¶ 7.5.
96. Id, ¶ 6.4.
97. Id. ¶ 7.8; see also generally Foschi / FINA, CAS 96/156; S. / FINA, CAS 2005/A/830.
98. Melnychenko, CAS 2011/A/2403, ¶ 7.9.
100. Id. ¶ 7.
101. Id. ¶¶ 6–7, 19.
102. Id. ¶¶ 7–8.
103. Id. ¶¶ 21–24.
104. UCI / Kolobnev & Russian Cycling Fed’n, CAS 2011/A/2645, ¶ 94 (quoting WADA / Hardy & USADA, CAS 2009/A/1870, ¶ 125).
the WADC)\textsuperscript{105} and punishing and deterring athletes from taking appropriate medications for treatment purposes. For the above reasons, Article 10.4 fails to differentiate sufficiently between intentional cheating, and conversely, inadvertent or innocent doping.

B. Article 10.5

Article 10.5 may enable athletes to eliminate or reduce a two-year suspension period for “No Fault or Negligence” or, alternatively, “No Significant Fault or Negligence.”\textsuperscript{106} However, Article 10.5 can only be invoked in “truly exceptional” circumstances and “not in the vast majority of cases”\textsuperscript{107} and, similar to Article 10.4, tends to produce unsatisfactory outcomes.

1. No Fault or Negligence

Article 10.5.1 provides that where an athlete establishes that he or she bears “No Fault or Negligence,” the two-year ineligibility period is eliminated.\textsuperscript{108} “No Fault or Negligence” means an athlete does not know or suspect, or could not reasonably have known or suspected, that he or she used or administered a prohibited substance.\textsuperscript{109}

As an illustration, if a doping offence occurred due to rival sabotage, this constitutes “No Fault or Negligence.”\textsuperscript{110} However, if a doping offence occurred due to a supplement being contaminated or incorrectly labeled, medication being administered by a medical practitioner without disclosure to the athlete, or a spouse, coach, or associate spiking an athlete’s food or drink, “No Fault or Negligence” will not exist.\textsuperscript{111}

In \textit{International Tennis Federation v. Gasquet}, the athlete established “No Fault or Negligence” in ingesting a small quantity of cocaine from kissing a

\begin{itemize}
\item \textsuperscript{105} The Purpose, Scope and Organization of the World Anti-Doping Program and the Code provides that “[t]he purposes of the World Anti-Doping Code and the World Anti-Doping Program . . . are[] to . . . promote health . . . .” WADA Code: Purpose, Scope and Organization 11 (2009). Further, WADC Article 4.3 provides that, for a substance to be included on the Prohibited List, one of the criteria considered is whether there is medical or scientific evidence that use of the substance or method “represents an actual or potential health risk to the Athlete.” WADA Code art. 4.3.1.2 (emphasis omitted).
\item \textsuperscript{106} Id. arts. 10.5.1 & 10.5.2 cmt.
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Id. art. 10.5.1.
\item \textsuperscript{109} Id. app. 1 at 131 (defining “No Fault or Negligence”).
\item \textsuperscript{110} Id. arts. 10.5.1 & 10.5.2 cmt.
\item \textsuperscript{111} Although, these occurrences may constitute “No Significant Fault or Negligence.” See id.
\end{itemize}
stranger, as he did not know, and could not reasonably have suspected, that he
could be contaminated in this manner.\textsuperscript{112} CAS considered that the duty of
“utmost caution” does not require an athlete to refrain from “go[ing] out to a
restaurant where he might meet an attractive stranger whom he might later be
tempted to kiss,” because this sets “unrealistic and impractical
expectations.”\textsuperscript{113}

In \textit{Adams v. Canadian Centre for Ethics in Sport},\textsuperscript{114} a paraplegic track-
and-field athlete tested positive to a cocaine metabolite passed through a
catheter.\textsuperscript{115} An unknown woman placed cocaine on his lips while he
pretended to be sleeping at a bar.\textsuperscript{116} CAS held that Adams bore “No Fault or
Negligence” because cocaine entered his body through an assault committed
on him.\textsuperscript{117}

It seems that inadvertent or innocent dopers, absent exceptional
circumstances, cannot rely upon Article 10.5.1.

2. No Significant Fault or Negligence

Where an athlete establishes “No Significant Fault or Negligence,” the
two-year suspension may be reduced to one year.\textsuperscript{118} The appropriate
reduction is determined by “measuring the degree of [the athlete’s] culpability . . . in
contributing to the analytical positive result”\textsuperscript{119} and ensuring the
sanction is proportionate to the “seriousness of the infringements.”\textsuperscript{120}

In assessing whether an athlete’s fault or negligence was “significant,”
the WADC imposes an onerous “\textit{duty of utmost caution} to avoid [any] prohibited
substance enter[ing] his or her body.”\textsuperscript{121} This duty requires athletes to “leave
no reasonable stone unturned,”\textsuperscript{122} although the “taking [of] reasonable steps
should be sufficient [as] ‘one can always do more.’”\textsuperscript{123}

\begin{itemize}
\item \textsuperscript{112} ITF / Gasquet, CAS 2009/A/1926 & WADA / ITF & Gasquet, CAS 2009/A/1930, ¶ 5.31.
\item \textsuperscript{113} \textit{Id.} ¶ 5.32 (quoting FIFA & WADA, Advisory Opinion, CAS 2005/C/976 & 986, ¶ 73)
\item \textsuperscript{114} Adams / CCES, CAS 2007/A/1312.
\item \textsuperscript{115} White, \textit{supra} note 16, at 3.
\item \textsuperscript{116} Adams / CCES, CAS 2007/A/1312, ¶¶ 34–35.
\item \textsuperscript{117} \textit{Id.} ¶¶ 155, 159.
\item \textsuperscript{118} WADA CODE art. 10.5.2 (2009).
\item \textsuperscript{119} McLaren, \textit{supra} note 4, at 35.
\item \textsuperscript{120} S. / FINA, CAS 2005/A/830, ¶ 44 (quoting Ward / Fédération Equestre Internationale
(FEI), CAS 1999/A/246, ¶ 31) (emphasis omitted).
\item \textsuperscript{121} FIFA & WADA, Advisory Opinion, CAS 2005/C/976 & 986, ¶ 73.
\item \textsuperscript{122} Despres / Canadian Ctr. for Ethics in Sport (CCES), CAS 2008/A/1489 & WADA /
\item \textsuperscript{123} \textit{Id.}
\end{itemize}
The duty of “utmost caution” requires athletes to know what constitutes a doping offence and what substances and methods are included on the Prohibited List, follow health care and nutrition guidelines set by governing bodies, review a product’s packaging, refrain from ingesting any products without consulting a “competent medical professional,” refrain from ingesting products from “unreliable sources,” and avoid places with an “increased risk of contamination.”

Receiving erroneous medical advice or a prescription from a doctor does not excuse doping, because athletes are required to “investigate[e] to their fullest extent that the medication does not contain prohibited substances.” Athletes must enquire with their doctor about the composition of the prescribed medication and ask whether it is WADC compliant. Athletes must also make enquiries with manufacturers about the contents of products, conduct research into a product’s composition, seek advice from a nutritionist, and make use of telephone advice lines established to answer doping-related questions.

In Knauss v. International Ski Federation, a skier tested positive for Norandrosterone (contained in a supplement). He did not take the supplement for performance-enhancing purposes and was unaware that the

124. WADA CODE art. 2; FIFA, 2005/C/976 & 986, ¶ 73.
125. FIFA, 2005/C/976 & 986, ¶ 73.
126. S. / FINA, CAS 2005/A/830, ¶ 34.
127. Id., ¶ 73; see also INT’L TENNIS FED’N, TENNIS ANTI-DOPING PROGRAMME: DECISION IN THE CASE OF COURTNEY NAGEL (2009), available at http://www.itftennis.com/shared/medialibrary/pdf/original/I0_40207_original.PDF [hereinafter Decision Regarding Nagel].
128. Id., ¶ 73.
129. Id. For example, places where passive smoking of marijuana exists.
130. In P. v. International Tennis Federation, CAS stated that:
   In consideration of the fact that athletes are under a constant duty to personally manage and make certain that any medication being administered is permitted under the anti-doping rules, the prescription of a particular medicinal product by the athlete’s doctor does not excuse the athlete from investigating to their fullest extent that the medication does not contain prohibited substances.
CAS 2008/A/1488, ¶ 12.
131. Id.
132. Id., ¶ 15
134. Id., ¶ 7.9(b).
135. Id., ¶ 7.9(a).
136. Decision Regarding Nagel, supra note 127, ¶ 3.1.1.3.
supplement contained Norandrosterone.\textsuperscript{138} The supplement’s packaging did not indicate the presence of any prohibited substances;\textsuperscript{139} however, he undertook further enquiries with the distributor.

CAS held that his conduct would have constituted “Significant Fault or Negligence”\textsuperscript{140} if he had not made enquiries with the distributor. Overall, the athlete established “No Significant Fault or Negligence”\textsuperscript{141} because, notwithstanding enquiries with the distributor, he did not obtain independent expert advice or conduct his own investigations, which may have revealed the manufacturer being involved in lawsuits relating to certain products containing anabolic steroids.\textsuperscript{142} Further, CAS stated that a failure to test a supplement’s composition, or refrain from taking the supplement altogether, “give[s] rise to ordinary fault or negligence at most, but . . . not . . . ‘significant’ fault or negligence . . . .”\textsuperscript{143} CAS upheld the eighteen-month suspension.\textsuperscript{144}

The reasoning and outcome of this award is unpersuasive for various reasons. Knauss was entitled to a slight reduction of suspension, notwithstanding the fact that he did not know that the supplement contained a prohibited substance, did not take the prohibited substance for performance-enhancing purposes, and took steps to ensure that no prohibited substance was ingested. CAS considered that he should have undertaken further enquiries and investigations. This reasoning ignores the commercial reality that manufacturers stand to lose a substantial proportion of clientele (i.e., any athletes bound by the WADC) if their products contain prohibited substances. Moreover, manufacturers face the prospect of costly lawsuits at the hands of athletes who ingest any products containing prohibited substances.\textsuperscript{145} Athletes should therefore be able to rely reasonably on advice provided by manufacturers.

In Despres v. Canadian Center for Ethics in Sport, a Canadian bobsledder used a supplement to assist recovery from hip surgery unaware the supplement

\textsuperscript{138.} Id. ¶ 17.
\textsuperscript{139.} Id.
\textsuperscript{140.} Id.
\textsuperscript{141.} Id. ¶ 38.
\textsuperscript{142.} Id. ¶ 35.
\textsuperscript{143.} Id. ¶ 18.
\textsuperscript{144.} Id. ¶¶ 28, 39.
contained nandrolone.\textsuperscript{146} The supplement was recommended by a sports nutritionist contracted by Bobsleigh Canada to give advice to athletes.\textsuperscript{147} CAS stated that Despres’ reliance on the nutritionist’s advice did not amount to “No Significant Fault or Negligence”\textsuperscript{148} because he could have done more, including contacting the supplement’s manufacturer,\textsuperscript{149} checking with his doctor whether the product was trustworthy,\textsuperscript{150} or conducting further research.\textsuperscript{151} CAS further considered that Despres had taken the product for performance-enhancing purposes (to recover faster from surgery)\textsuperscript{152} and, therefore, did not reduce the two-year suspension.\textsuperscript{153}

To the extent that Despres stands for the proposition that athletes cannot reasonably rely on the advice of a sport nutritionist engaged by an NGB to provide athletes with advice on diet and nutrition, this lacks persuasive reasoning given a sports nutritionist’s supposed expertise, which would include providing doping-related advice.

In \textit{WADA v. Hardy & U.S. Anti-Doping Agency (USADA)}, a U.S. swimmer tested positive for Clenbuterol following the Beijing Olympic trials.\textsuperscript{154} The American Arbitration Association (AAA) reduced the two-year suspension to one year.\textsuperscript{155} WADA appealed to CAS.\textsuperscript{156} CAS accepted that Clenbuterol was ingested because of contaminated supplements produced by AdvoCare.\textsuperscript{157} Hardy had contacted various AdvoCare representatives, received advice that the supplements were independently tested and ‘‘formulated with quality ingredients,’’\textsuperscript{158} and obtained the supplement direct from AdvoCare.\textsuperscript{159} She consulted her coach, team nutritionist, and a sports psychologist from the U.S. Olympic Committee.

\begin{footnotes}
\footnote{146. Despres / CCES, CAS 2008/A/1489 & WADA / Despres, CCES & Bobsled Can. Skeleton, CAS 2008/A/1510, ¶¶ 2.2, 2.7.}
\footnote{147. Id. ¶ 2.8.}
\footnote{148. Id. ¶ 7.14.}
\footnote{149. Id. ¶ 7.6.}
\footnote{150. Id. ¶ 7.9(a).}
\footnote{151. Id. ¶ 7.9(b).}
\footnote{152. Id. ¶ 7.20.}
\footnote{153. Id. ¶ 7.21.}
\footnote{154. WADA / Hardy & USADA, CAS 2009/A/1870, ¶¶ 5–6.}
\footnote{155. Id. ¶¶ 9, 14.}
\footnote{156. Id. ¶ 22.}
\footnote{157. Id. ¶ 114.}
\footnote{158. Id. ¶ 119 (quoting AdvoCare’s website) (emphasis omitted); see also Blumenthal, supra note 45, at 216.}
\footnote{159. Hardy, CAS 2009/A/1870, ¶ 119.}
\end{footnotes}
about the quality of AdvoCare products.\footnote{160} Nothing on the supplement’s label “raised suspicions.”\footnote{161} She had also taken the supplement for eight months\footnote{162} and returned more than ten negative tests.\footnote{163} CAS held that she was negligent because she could have conducted further investigations or tested the supplement;\footnote{164} however, because she had shown “good faith efforts ‘to leave no reasonable stone unturned,’”\footnote{165} it considered the one-year suspension appropriate.\footnote{166}

Reporting on the AAA award upheld by CAS, Blumenthal commented that: “Hardy made tremendous efforts to ensure she was not taking a Prohibited Substance and still received a harsh penalty[, which ultimately] deprived her of the chance to compete in the [Olympic] Games.”\footnote{167} Given the lengths Hardy had taken in good faith towards complying with her duty of “utmost caution,” it seems unduly harsh to impose a one-year suspension; however, the WADC limits the potential reduction of any suspension to one year.

In \textit{Squizzato v. Fédération Internationale de Natation Amateur},\footnote{168} CAS made obiter remarks leaving open the possibility of a greater reduction; however, it is difficult to envisage an appropriate case. CAS considered that the mere adoption of the WADC “does not force the conclusion that there is no other possibility for greater or lesser reduction of a sanction than [one year].”\footnote{169} However, it held that unless a one-year suspension would be “serious[ly] and totally disproportionate,”\footnote{170} a “mere ‘uncomfortable feeling’” cannot justify a further reduction below one year.\footnote{171}

Therefore, notwithstanding \textit{Squizzato}, if an athlete establishes “No Significant Fault or Negligence,” an imposed suspension will unlikely fall below one year.

\footnotesize{160. \textit{Id.}} \\
\footnotesize{161. \textit{Id.}} \\
\footnotesize{162. \textit{Id.}} \\
\footnotesize{163. Blumenthal, \textit{supra} note 45, at 216–17.} \\
\footnotesize{164. \textit{Hardy}, CAS 2009/A/1870, ¶ 120.} \\
\footnotesize{165. \textit{Id.} (quoting Despres / CCES, CAS 2008/A/1489 & WADA / Despres, CCES & Bobsled Can. Skeleton, CAS 2008/A/1510, ¶ 7.8) (emphasis omitted).} \\
\footnotesize{166. \textit{Id.} ¶ 129.} \\
\footnotesize{167. Blumenthal, \textit{supra} note 45, at 217.} \\
\footnotesize{168. S. / FINA, CAS 2005/A/830.} \\
\footnotesize{169. \textit{Id.} ¶ 48.} \\
\footnotesize{170. \textit{Id.} ¶ 50.} \\
\footnotesize{171. \textit{Id.}}
To evaluate the WADC’s approach to doping, the justifications for prohibiting doping should be examined.

1. Performance Enhancement

Performance-enhancing substances are said to violate the principle of “fair play” in sport, because “clean” athletes relying on their natural potential are disadvantaged over “pharmacologically-enhanced rivals.” In Johnson v. Athletics Canada, the court held that every athlete has a right to “fair competition, to know that the race involves only his own skill, his own strength, his own spirit and not his own pharmacologist.”

Anabolic steroids and hGH can enhance performance in weightlifting and sprinting by allowing athletes to train longer and harder, recover faster, increase muscle size and strength, and decrease body fat. EPO (popular in cycling) increases red blood cell production, thereby enhancing endurance. Cocaine and caffeine heighten alertness and reduce fatigue. Codeine and morphine enable athletes to push through the pain barrier. Beta-blockers reduce anxiety, which may assist with shooting or archery.

However, this justification ignores the fact that performance-enhancing substances have been a part of sport for thousands of years. The ancient Greeks used ointments, rubs, and teas; an ancient Greek physician named Galen prescribed “[t]he rear hooves of an Abyssinian ass, ground up, boiled in oil, and flavored with rose hips and rose petals.”

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174. Anabolic steroids are “drug(s) . . . or hormonal substance(s), chemically related to [the male growth hormone] testosterone.” Anabolic Steroids, supra note 8.
175. Jurith & Beddoes, supra note 9, at 472.
176. Gandert & Ronisky, supra note 45, at 817; Opie, supra note 17, at 337.
177. Jurith & Beddoes, supra note 9, at 470.
178. Id.
179. Opie, supra note 17, at 336.
180. Id. at 337.
181. Jurith & Beddoes, supra note 9, at 472; Opie, supra note 17, 338.
182. Connolly, supra note 31, at 162.
184. BILL MALLON & JEROEN HEILMANS, HISTORICAL DICTIONARY OF THE OLYMPIC
Today, athletes combine diet and exercise with vitamins, supplements, medicine, specialised training techniques, and innovations in equipment. For example, a popular training technique is altitude training, which involves high-altitude training to produce hypoxia, thereby enhancing sporting performances while at sea level. Full-body swimsuits are worn to reduce water resistance. Sprinters wear specialised spikes. Tiger Woods even underwent laser-eye surgery to correct near-sightedness.

Drawing a line between acceptable and unacceptable forms of performance enhancement is a vexed question. As Hayden Opie opined, “[W]hat is the difference between an athlete who takes Vitamin B12 (not banned) and another who takes an anabolic steroid, when each does so with the intent of improving performance?”

Some commentators suggest that performance-enhancing substances and methods should be prohibited where they “disturb[] or obscure[] the hierarchies of “natural” talent that sports seek to exhibit”. [Steroids] permit athletes . . . to train harder and recover faster . . . than they ever could without their use. And they effect psychological changes that contribute to their users’ aggressiveness and confidence (grit and determination) in training and in competition. These two effects together offer the potential for exponential improvements . . . that would not be naturally possible without drugs.

Further consideration of these issues falls outside the scope of this Article.
For these purposes, the aforementioned discussion highlights that the use of performance-enhancing substances and methods is not inconsistent with sport, and intent to enhance performance is inherent in every athlete by virtue of their dedication to sport. The real concern is whether athletes use certain performance-enhancing substances to cheat or gain unnatural advantages over competitors or for fair and legitimate purposes.

2. Health Concerns

In the 1960 Rome Games, cyclist Knut Jensen died mid-race with amphetamines discovered in his body.\(^{193}\) During the 1967 Tour de France, a British cyclist died with amphetamines and cognac in his system.\(^{194}\) In 1987, heptathlete Birgit Dressel died of an acute allergy from “one of the many hundreds, possibly thousands, of drugs . . . voluntarily taken over the years.”\(^{195}\)

Various substances pose health risks to athletes. Anabolic steroids can cause heart disease, high cholesterol, liver damage,\(^{196}\) females to lose their femininity,\(^{197}\) and fetal malformation\(^{198}\) and has links to depression, addiction,\(^{199}\) and even murder\(^{200}\) and armed robberies.\(^{201}\) Amphetamines can cause irregular heartbeat and high blood pressure.\(^{202}\) Codeine or morphine may suppress serious injuries, thereby increasing the risk of aggravations.\(^{203}\)

However, some substances may assist in treating medical conditions.

\(^{193}\) Hard, supra note 42, at 537.

\(^{194}\) Id.

\(^{195}\) The Death of Birgit Dressel, ATHLETICS, Feb.–Mar. 1988, at 6, 10 (Can.).

\(^{196}\) Jurith & Beddoes, supra note 9, at 471.

\(^{197}\) Opie, supra note 17, at 332.

\(^{198}\) Jurith & Beddoes, supra note 9, at 471.


\(^{200}\) In June 2007, former World Wrestling Entertainment champion Chris Benoit murdered his wife and child before taking his own life. Toxicology reports indicated the presence of steroids and other drugs in his system, which have raised questions over whether the murder-suicide was a result of “roid-rage.” “Roid-Rage” Questions Surround Benoit Murder-Suicide, CNN U.S. (June 27, 2007), http://articles.cnn.com/2007-06-27/us/wrestler_1_roid-rage-athletes-use-steroids-nancy-and-daniel-benoit_s-PMUS; James Montgomery, Chris Benoit Had Steroids, Other Drugs in His System at Time of Murder-Suicide, MTV (July 17, 2007), http://www.mtv.com/news/articles/1564953/chris-benoit-had-steroids-his-system.jhtml. See also Opie, supra note 17, at 333.

\(^{201}\) Opie, supra note 17, at 333.

\(^{202}\) Jurith & Beddoes, supra note 9, at 472.

\(^{203}\) Opie, supra note 17, at 337.
Steroids can assist recovery from muscle injuries. The use of hGH helped NFL running back Abdul-Karim al-Jabbar regain function in his injured knee. Canadian bobsledder Serge Despres took a recommended supplement, which contained nandrolone, to assist recovery from hip surgery. Moreover, the “health protection” justification ignores the fact that many sports encourage athletes to put their bodies at risk, are inherently dangerous, and allow athletes to compete while injured.

Through its Therapeutic Use Exemptions (TUEs), the WADC recognises the benefits of some prohibited substances. This raises the question why the WADC allows athletes with TUEs to use prohibited substances, but without a TUE, an athlete faces unenviable prospects under Articles 10.4 and 10.5. The author suggests that the former is consistent with honest intentions, whereas the latter is suggestive of dishonesty.

On balance, without doping control, more tragedies will surely occur that could tarnish public perception of a sport. There exist strong reasons favouring prohibition; however, there should be increased flexibility to reflect the fact that athletes sometimes take prohibited substances for genuine reasons, albeit in a careless manner.

3. The “Spirit of Sport”

The WADC stipulates that doping is “fundamentally contrary” to the...
“spirit of sport.” It is considered that prohibiting doping is justified to protect the integrity of Olympic competition, the political and social value placed on Olympic competition, the philosophy of Olympism, and the interests of stakeholders.

Doping threatens to undermine the credibility of sporting icons and the legitimacy of their accomplishments, and even the suggestion of doping threatens a sport or athlete’s integrity.

Following Usain Bolt’s performances at the 2008 Beijing Olympics, where he won three gold medals with world record times, the legitimacy of his achievements was brought into question (notwithstanding his history of never testing positive).

Cycling is a sport tainted by a long history of actual and rumoured performance-enhancing drug use. In February 2012, CAS found three-time Tour de France winner Alberto Contador guilty of a doping offence resulting from a positive test of Clenbuterol during the 2010 Tour. Contador’s

210. WADA CODE: FUNDAMENTAL RATIONALE FOR THE WORLD ANTI-DOPING CODE 14 (2009). The WADC defines the “spirit of sport” in broad terms as the celebration of the human spirit, body and mind . . . characterized by the . . . values of ethics, fair play and honesty, health, excellence in performance, character and education, fun and joy, teamwork, dedication and commitment, respect for rules and laws, respect for self and other Participants, courage, and community and solidarity.

Id. (emphasis omitted).

211. Hard, supra note 42, at 533.

212. In Johnson v. Athletics Canada, the court noted the interests of various stakeholders, stating that:

The public has an interest in the protection of the integrity of the sport. Governments around the world subsidize their elite athletes through carding systems. The public pays to attend the events. The elite athlete is viewed as a hero and his influence over the young athlete cannot be underestimated. Mr. Johnson became both rich and famous during his athlete career as a result of his athletic performances.


213. Jurith & Beddoes, supra note 9, at 462.


216. See Nicholas Hailey, Note, A False Start in the Race Against Doping in Sport: Concerns with Cycling’s Biological Passport, 61 DUKE L.J. 393, 393 (2011) (considering that “professional cycling has suffered from a number of doping scandals”).

winning result was disqualified, and a two-year suspension was imposed. In February 2012, CAS found retired Olympic gold medalist and 1997 Tour winner Jan Ullrich guilty of doping and imposed a “symbolic” two-year suspension. In June 2012, USADA brought doping charges against seven-time Tour winner Lance Armstrong for tests “fully consistent with blood manipulation, including EPO use and/or blood transfusions.”

On October 10, 2012, USADA handed down a “Reasoned Decision” that purports to prove “beyond any doubt that the US Postal Service Pro Cycling Team ran the most sophisticated, professionalized and successful doping program that sport has ever seen.” The lengthy decision (over 1000 pages long) paid regard to sworn witness testimony from twenty-six people (including fifteen riders and former teammates of Armstrong) that Armstrong (among other things) used, possessed, and trafficked in performance-enhancing substances, including EPO. In a statement released by USADA, it stated that: “Hopefully, the sport can unshackle itself from the past, and once and for all continue to move forward to a better future. Our mission is to protect “clean” athletes by preserving the integrity of competition not only for today’s athletes but also the athletes of tomorrow.”

While defining the “spirit of sport” is difficult, and further examination of this issue falls outside the scope of this Article, there is little doubt that doping leaves “a sour taste in peoples’ mouths,” which threatens to undermine and damage the integrity of sport. More importantly, serious question marks surround whether such stigma attaches to inadvertent or innocent dopers with no malicious intent to cheat.

220. Id. ¶ 78; Austen, supra note 217.
223. Id.
224. Id.
V. CRITIQUE

“[T]o catch the majority of the “guilty” parties while sacrificing a few “innocent” ones [is] a concept incompatible with the basic tenets of civilized societies.”225

As discussed herein, the imposition of an automatic disqualification and two-year suspension is justified where doping is proved to protect “clean” athletes and promote “clean” sport.226

Some commentators consider that where an athlete can establish that he or she did not intend to enhance performance and there was no actual performance-enhancing effect, his or her competition results could be allowed to stand.227 This approach, however, disregards the impact on sport where there is a mere suggestion of doping.228

With regard to suspensions, the Hardy, Melnychenko, Knauss, and Despres awards highlight the insufficient distinction made between “intentional” doping, and conversely “innocent” and “inadvertent” doping.

The purpose of imposing suspensions is to punish, deter, and prevent cheating.229 In BOA v. WADA,230 WADA submitted that BOA’s Bye-Law231 “has all the aims of a doping sanction . . . : (i) punishment for cheating; (ii) protection against/prevention of further cheating by the same athlete; (iii) deterrence from cheating by other athletes; and (iv) maintaining public confidence in the integrity of sport.”232

In their opinion on the WADC’s conformity with international law, Kaufmann-Kohler, Rigozzi, and Malinverni cited with apparent approval the following comments: “‘[I]f the rewards for a cheater even when caught are greater than for the [sic] obeying the rules, cheating will continue. . . . An effective penalty should ensure that there are greater disadvantages than advantages in cheating.’”233

229. See Kaufmann-Kohler et al., supra note 20, ¶ 102.
230. BOA / WADA, CAS 2011/A/2658.
231. The BOA Bye-Law in question deemed all athletes who had been found guilty of doping offences ineligible for any Olympic team.
232. BOA, CAS 2011/A/2658, ¶ 5.53 (emphasis added).
The above passages indicate that the elimination of “cheating” is the WADC’s primary objective. It follows that if an athlete has not cheated, no suspension should be imposed.

While developing a universal definition of “cheating” is difficult due to its subjective nature, it is clear that “cheating” examines an athlete’s mindset and the reasons why doping occurred. Intentional dopers take performance-enhancing substances to attain unnatural, exponential advantages over rivals, while “[a]rguably, an athlete who tests positive through inadvertent or innocent doping does not contravene the spirit of fair play.”

While inadvertent or innocent dopers may have been careless or failed to exercise the “utmost caution,” their behaviour falls well short of athletes who intentionally take performance-enhancing substances to gain unnatural competitive advantages.

Doubts surround whether suspensions provide any greater punishment or deterrent than the threat of disqualifications. Athletes dedicate substantial time and effort towards competing and succeeding at the Olympic Games; therefore, there is substantial weight to the argument that the threat of disqualifications, relinquishing medals, having one’s Olympic dreams destroyed, and being branded a cheat pose greater deterrents than any suspension ever could.

In order to comply with the principle nulla poena sine culpa, Article 10.5.1 should remain in the WADC to allow athletes bearing “No Fault or Negligence” the opportunity to avoid suspension.

However, with the objective of eliminating cheating in mind, Articles 10.4 and 10.5.2 should be replaced with a new Article:

Where an Athlete or other Person can establish:

(a) To the comfortable satisfaction of the hearing panel, that the use of a Prohibited Substance was not intended to enhance the

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234. Coleman & Coleman, Jr., supra note 191, at 1753 (stating that “like obscenity, child maltreatment, and torture—[drug cheating] is at least in some respects in the eye of the beholder”).

235. Opie, supra note 17, at 346.

236. See Maureen A. Weston, Doping Control, Mandatory Arbitration, and Process Dangers for Accused Athletes in International Sports, 10 PEPP. DISP. RESOL. L.J. 5, 7 (2009) (noting that the mere accusation of doping “converts the admired athlete into an apparent pariah” and that years of “training, competing, and working with coaches and teammates hardly prepares him or her for the complex process involved in clearing his or her name”).

237. The principle nulla poena sine culpa, prominent in criminal law and doping law, provides that a person may only be punished for an offence if he or she knowingly or negligently committed such offence. Kaufmann-Kohler et al., supra note 20, ¶ 118.

238. Id. at ¶¶ 126–28.

239. UNESCO International Convention, supra note 6.
Athlete’s sporting performance, or mask the Use of another Prohibited Substance; and
(b) To the comfortable satisfaction of the hearing panel, that the presence of the Prohibited Substance in the Athlete’s body will not actually or potentially enhance the Athlete’s sporting performance in future competitions;

the period of Ineligibility found in Article 10.2 shall be replaced with the following:
First violation: A reprimand and no period of Ineligibility.

If the Athlete satisfies paragraph (a) only, then the period of Ineligibility shall be replaced with the following:
First violation: The lesser of:
(a) A period of Ineligibility commensurate with a period the hearing panel considers the prohibited substance will likely enhance the Athlete’s sporting performance in future competitions; or
(b) Two (2) years of Ineligibility.

To justify any elimination of sanction or imposition of any ineligibility period less than two (2) years, the Athlete or other Person must produce corroborating medical evidence in addition to his or her word, which establishes the above elements to the comfortable satisfaction of the hearing panel.

If the Prohibited Substance is not a “specified substance,” the “comfortable satisfaction” standard requires a very high standard almost approaching beyond reasonable doubt.

In determining whether the use of a Prohibited Substance was not intended to enhance the Athlete’s sporting performance, or mask the Use of another Prohibited Substance, the anti-doping organisation can have regard to the steps taken by the athlete in complying with his or her duty of “utmost caution.”

The above-proposed Article is justified for the following reasons:
1. The Article maintains strict liability, while affording athletes the opportunity to prove their innocence.
2. By eliminating the requirement of knowledge of how a prohibited substance entered his or her body, inadvertent dopers may avoid suspension if they can establish no intent to use prohibited substances for performance-enhancing purposes.
3. The Article applies to all prohibited substances, reflecting the

240. As opposed to Article 10.4, which applies solely to “Specified Substances.” WADA Code art. 10.4 (2009).
notion that products, which contain prohibited substances, may be used for legitimate purposes.

4. Athletes who ingest prohibited, non-specified substances must establish, to a higher standard of proof, the absence of a performance-enhancing purpose and no future performance-enhancing effect, reflecting the notion that prohibited substances are less likely to have a credible, non-doping explanation\textsuperscript{241} and are more likely to have future performance-enhancing effects.

5. In determining whether use of a prohibited substance was for a performance-enhancing purpose, the Article presumes that intentional dopers will face significant hurdles in demonstrating compliance with the duty of “utmost caution,” because this would require the collaboration of others, including treating doctors, sports physicians, and the product’s manufacturer. Conversely, inadvertent or innocent dopers should more readily establish no performance-enhancing purpose, because although an athlete would have been careless or less than diligent in some manner, he or she would presumably have taken some steps to ensure that no prohibited substance entered his or her body.

6. This Article provides that an athlete must establish that the prohibited substance was not taken for a performance-enhancing purpose (as opposed to the product). In Despres, CAS accepted that the athlete took a supplement for a performance-enhancing purpose (i.e., to recover faster from surgery), notwithstanding lack of knowledge that it contained a prohibited substance.\textsuperscript{242} Applying this approach, the two-year ineligibility period would have been eliminated if Despres could have established that the prohibited substance was not taken for a performance-enhancing purpose and that it was not likely to have a future performance-enhancing effect.

7. The Article omits any reference to a “reduction” of sanction, allowing for elimination or an imposed sanction less than two years. This reflects the rationale that any ineligibility period would be disproportionate and violate the principle of \textit{nulla poena sine culpa} if an athlete inadvertently or innocently dopes, with any period of ineligibility imposed reflecting the period of likely future performance-enhancing impact.

\textsuperscript{241} See, e.g., id. art. 10.4 cmt.

8. If the athlete can establish no future performance-enhancing effect, there will be no injustice in allowing the athlete to compete in future events. If there will be some future performance-enhancing effect, the suspension should reflect such unfairness to “clean” athletes.

Other amendments falling outside of the scope of detailed consideration include amending the criteria for inclusion onto the Prohibited List, reviewing the List to reflect sport-specific concerns, and amending the proposed re-inserted “Osaka Rule” to apply only to intentional dopers.

VI. CONCLUSION

Athletes who are intent on cheating will do so by taking steps to ensure their use of performance-enhancing substances goes undetected. Big pharmaceuticals are continuously creating new drugs that may be misused by cheating athletes, while “designer steroids” are created specifically to avoid detection. In these respects, anti-doping authorities are always one step behind. Moreover, there is a growing awareness of the health risks posed by many prohibited substances requiring combative action by sporting bodies. There are strong reasons supporting strict liability.

However, in adopting such a strict approach, the WADC has lost focus on its primary goal: to eliminate cheating in sport. Like match fixing, doping strikes at the heart of sport. The “use of banned substances damages the

243. To be included on the Prohibited List, a substance or method must satisfy at least two of the following: 1. It must actually or potentially enhance sporting performance; 2. It must present an actual or potential health risk to athletes; and 3. In WADA’s opinion, it must violate the “spirit of sport.” WADA CODE art. 4.3.1. The 2015 first draft proposes an amendment such that a substance or method must satisfy criteria 1, and either 2 or 3. WADA CODE: DRAFT VERSION 1.0 art. 4.3, available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/Code-Draft-1.0/WADA-Code-2015-Draft-1.0-redlined-to%202009-Code-EN.pdf [hereinafter WADA CODE DRAFT]. This amendment should be approved for the reasons outlined herein.

244. For example, anabolic steroids may enhance performance in sports requiring increased strength and power, such as weightlifting, sprinting, field events, and some swimming events. However, it is difficult to see how the use of anabolic steroids could enhance sporting performance in games that do not require elevated levels of physical strength, such as shooting, archery, or golf. See Opie, supra note 17, at 337–39.

245. WADA CODE DRAFT art. 10.15. As highlighted above with regard to the BOA Bye-Law, WADA submitted that it has the same purposes of suspension sanctions, being punishment, deterrence, and preventing cheating.


247. Id. at 172–74.

health of users, cheats, honest athletes, and makes fools of spectators.”

The WADC should be amended such that its focus is reformulated from whether the athlete complied with his or her duty of “utmost caution,” to whether the athlete intended to use a prohibited substance for a performance-enhancing purpose; and if so, whether there will be a future performance-enhancing effect. This amendment more appropriately balances the protection of “clean” sport by punishing and deterring intentional doping, while enabling innocent and inadvertent dopers to avoid suspension for careless (rather than malicious) actions.