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John T. Wendt, *Toward Harmonization: British Olympic Ass'n v. World Anti-Doping Agency*, 23 Marq. Sports L. Rev. 155 (2012)
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol23/iss1/5>

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ESSAY

TOWARD HARMONIZATION: *BRITISH OLYMPIC ASS'N V. WORLD ANTI-DOPING AGENCY*

JOHN T. WENDT*

I. INTRODUCTION

The fight against doping in sport has been a priority for the International Olympic Committee (IOC). It has been a consistent theme of current president Jacques Rogge's administration.¹ However, the road toward a unified, harmonized approach has been truly challenging² and marked by growing pains. The World Anti-Doping Agency (WADA) has emerged as a power in sport, yet many forget that it was only created in 1999.³ WADA's mission is to lead a collaborative worldwide campaign for doping-free sport.⁴ *British Olympic Ass'n (BOA) v. WADA*⁵ is the culmination of a series of cases before the Court of Arbitration for Sport (CAS) that shows the attempt to consolidate and harmonize the fight to protect clean competition for athletes throughout the world. It is essential for the integrity of sport.

In response to the 1998 Tour de France doping scandal, there was a call for a coordinated independent body "to harmonize and marshal the global fight against doping in sport."⁶ The problem was that at the time there were a

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1. Alastair Himmer, *Rogge Pledges to Step up IOC Fight Against Doping*, REUTERS, (July 15, 2011), <http://www.reuters.com/article/2011/07/15/us-olympics-rogge-doping-idUSTRE76E1S720110715>.

2. See Dag Vidar Hanstad et al., *Harmonization of Anti-Doping Work: Myth or Realty*, 13 *SPORT IN SOC'Y* 418, 420–23 (2010).

3. *A Brief History of Anti-Doping*, WADA, <http://www.wada-ama.org/en/About-WADA/History/A-Brief-History-of-Anti-Doping/> (last updated June 2010).

4. *About WADA*, WADA, <http://www.wada-ama.org/en/About-WADA/> (last updated June 2011).

5. *British Olympic Ass'n (BOA) / World Anti-Doping Agency (WADA)*, CAS 2011/A/2658.

6. *Frequently Asked Questions*, WADA, <http://www.wada-ama.org/en/Footer-Links/FAQ/> (last updated Nov. 2011).

variety of sports disciplines, different national and international federation approaches to the fight against doping, and a complete lack of harmonization. The Lausanne World Conference on Doping in Sport adopted principles calling for the collaboration between the Olympic Movement and public authorities, which led to the creation of WADA.⁷ This independent international agency would reinforce the ethical principles described in the Olympic Charter.⁸ There was a recognition that the Olympic Movement would work with governments to harmonize national and international legislation on doping.⁹ WADA's priority is "a comprehensive approach to the fight against doping in sport."¹⁰

However, even from the beginning there was recognition of "the difficult problem of harmonisation of sanctions"¹¹ CAS recognized that in the past there were anti-doping rules of different international federations that varied considerably, especially regarding sanctions for violations.¹² Harmonizing the legal framework with uniform sanctions through the World Anti-Doping Code (WADA Code) would lead to a more effective fight against doping.¹³

For the last decade, CAS has repeatedly recognized that WADA is "the international independent organization that promotes, coordinates, and monitors the anti-doping programs in sports."¹⁴ It has also recognized that "[o]ne of the main intentions of the World-Anti-Doping Code (WADC) is the harmonisation of the worldwide fight against doping."¹⁵ The court also recognized that "[i]n order to achieve this goal, it is necessary to interpret anti-doping rules that have been established on the basis of the WADC in harmony with the WADC, the respective set of rules of other international sport

7. World Conference on Doping in Sport, *Lausanne Declaration on Doping in Sport*, LEISTUNGSKURS SPORT, (Feb. 4, 1999), available at http://www.sportunterricht.de/lksport/Declarati on_e.html.

8. See *Reflection of the Working Groups*, OLYMPIC REVIEW: DOPING, Feb.–Mar. 2009, at 15, 15–16.

9. *Id.* at 16.

10. *Frequently Asked Questions*, *supra* note 6.

11. Final Report of European Comm'n on the Harmonisation of Methods and Measurements in the Fight Against Doping, EUR 19076, at 5 (1999), available at <http://ec.europa.eu/research/smt/hardop-en.pdf>.

12. H. / Ass'n of Tennis Prof'ls (ATP), CAS 2004/A/690, ¶ 50; see also Knauss / Int'l Ski Fed'n (FIS), CAS 2005/A/847, ¶ 30.

13. *H.*, CAS 2004/A/690, ¶ 50.

14. WADA & Union Cycliste Internationale (UCI) / Valverde & Real Federación Española de Ciclismo (RFEC), CAS 2007/A/1396 & 1402, at 2.

15. Doping Auth. Neth. / N., CAS 2009/A/2012, ¶ 1.

federations and the respective CAS case law.”¹⁶ In fact, CAS has expressly recognized the importance of harmonization.¹⁷

II. JESSICA HARDY, U.S. ANTI-DOPING AGENCY (USADA), AND WADA

Jessica Hardy is a national swimming champion and world record holder. Hardy qualified for the Beijing 2008 Olympic Games in four events (50-meter freestyle, 100-meter breaststroke, 4x100-meter freestyle relay, and 4x100-meter medley relay). She then tested positive for clenbuterol, a banned substance.¹⁸ Hardy voluntarily withdrew from the U.S. Olympic Team, and at her hearing before the American Arbitration Association (AAA) panel, she argued that “‘truly exceptional’ circumstances” might reduce or eliminate the presumptive two-year period of ineligibility.¹⁹ The AAA panel provisionally reduced the period to one year pending the IOC’s grant of a waiver of Rule 45,²⁰ the Osaka Rule.

The IOC Executive Board’s Unpublished Memo addresses IOC Rule 45, also known as the Osaka Rule. On June 27, 2008, the Board enacted the “Regulations Regarding Participation in the Olympic Games.”²¹ The Unpublished Memo states:

The IOC Executive Board, in accordance with Rule 19.3.10 OC and pursuant to Rule 45 OC, hereby issues the following rules regarding participation in the Olympic Games:

1. Any person who has been sanctioned with a suspension of more than six months by any anti-doping organization for any violation of any anti-doping regulations may not participate, in any capacity, in the next edition of the Games of the Olympiad and of the Olympic Winter Games following the date of expiry of such suspension.
2. These Regulations apply to violations of any anti-doping regulations that are committed as of 1 July 2008. They are notified to all International Federations, to all National

16. *Id.* Note that CAS used the exact words earlier in *H.*, CAS 2004/A/690, ¶ 37.

17. Gatlin / U.S. Anti-Doping Agency (USADA), CAS 2008/A/1461, & Int’l Ass’n of Athletics Fed’ns (IAAF) / USA Track & Field (USATF) & Gatlin, CAS 2008/A/1462, ¶ 45.

18. USADA / Hardy, Am. Arbitration Ass’n: N. Am. CAS Panel, AAA No. 77 190 00288 08 (May 2, 2009), ¶ 1.5.

19. *See id.* ¶ 7.23.

20. *Id.* ¶ 8.2.

21. *See generally* Letter from Christophe De Kepper, Director General, Int’l Olympic Comm., to IOC Members et al. (Oct. 28, 2011), available at http://www.olympic.org/Documents/Fight_against_doping/Rules_and_regulations/Rule_45-eng-08-05-2008.pdf.

Olympic Committees and to all Organising Committees for the Olympic Games.²²

Under the Osaka Rule, if an athlete receives a ban of more than six months she cannot compete in the following Olympic Games. Because Hardy's ban was longer than six months, she would be ineligible to compete at the following Games, the 2012 Olympic Games in London.

Hardy argued that, under the doctrine of proportionality, the AAA panel's one-year ban would result in her inability to compete in two Olympic Games and that the "penalty is shockingly disproportionate to her degree of fault."²³ The panel agreed that the penalty was "grossly disproportionate" and "inconsistent with the provisions of . . . the Code."²⁴ The panel was "also concerned that rather than having an anti-doping system that reflects harmonized sanctions (a stated goal of the Code), a Signatory to the Code, the IOC, has unilaterally altered the sanctions imposed on athletes in contravention of the express language of the Code."²⁵

What is interesting is that the IOC was invited to be a party to the AAA hearing but refused. As a result, the AAA panel took the extraordinary step of retaining jurisdiction until either the IOC appealed the decision to CAS or Hardy applied to the IOC for a waiver under Rule 45 and the waiver was denied.²⁶ Moreover, the panel found that if the IOC denied Hardy's request for a waiver or did not respond, the panel reserved the right to reduce the sanction to six months, thereby bypassing the Osaka Rule.²⁷

Both the Fédération Internationale de Natation (FINA), the international governing body for swimming, and WADA appealed the interim award to CAS.²⁸ Hardy asked the AAA panel to issue a final award confirming the one-year suspension so that she could directly challenge IOC Rule 45 as a violation of Swiss law in general and as applied to the specific facts of her case.²⁹ The AAA panel issued such an award and relinquished its jurisdiction.³⁰ Hardy also advised CAS that the IOC had "declined to respond to the merits of her request for a waiver" of Rule 45 and requested that the

22. *Id.*

23. *Hardy*, AAA No. 77 190 00288 08, ¶ 7.38.

24. *Id.* ¶ 7.39. The Osaka Rule came into effect only three days prior to Hardy testing positive.

25. *Id.* ¶ 7.41.

26. *Id.* ¶ 7.45.

27. *Id.* ¶ 7.46.

28. *See generally* WADA / Hardy & USADA, CAS 2009/A/1870.

29. *Id.* at 7.

30. *Id.*

IOC be joined as a party to her appeal.³¹

The United States Olympic Committee (USOC) asked that the IOC be joined in the proceedings and that a ruling be made on Rule 45 that would “allow all [National Olympic Committees (NOCs)] and athletes appropriate time to plan for the Games with full knowledge of the applicable rules and implications.”³² The IOC refused to participate in the arbitration.³³ Hardy asked the CAS panel to reconsider joining the IOC, or in the alternative, whether Rule 45 is a disproportionate penalty; whether Rule 45 is a penalty rule or an entry rule; whether the application of Rule 45 would be a double penalty; and finally, whether the application of Rule 45 to athletes who have served or were currently serving suspensions violated any athletes’ rights.³⁴

In the CAS opinion on Hardy’s case, it was noted that there was an IOC Advisory Opinion³⁵ on Rule 45 that found that the regulation was valid as it was not a sanction, but rather an entry rule.³⁶ However, the CAS panel found that the IOC had not agreed to participate in the Hardy arbitration and that the IOC was not bound by the same arbitration agreement between the original parties.³⁷ Hence, the IOC could not be bound by the CAS panel’s decision without its participation,³⁸ nor could the IOC be forced to join in the arbitration.³⁹ The CAS panel agreed with the AAA panel that the circumstances of Hardy’s case were “truly exceptional,”⁴⁰ but decided not to issue a decision on Rule 45 because it lacked jurisdiction and dismissed her appeal.⁴¹ The IOC determined later that it would not apply Rule 45 to Hardy because of the timing of the enactment of the rule.⁴² Upon hearing the news, Hardy said,

I am ecstatic that the IOC has recognized my unique situation

31. *Id.* at 8.

32. *Id.*

33. *Id.* at 9.

34. *Id.*

35. *Id.* (discussing Int’l Olympic Comm. (IOC) Advisory Opinion, TAS 2009/C/1824 CIO). See also Paul J. Greene, *Is the International Olympic Committee Above the Law?*, 28 ENT. & SPORTS LAW. 1, 26 (2010) (“The Rule 45 Advisory Opinion reasoned that the IOC was not issuing a ‘sanction’ but was instead opting not to accept the registration of a group of athletes, those suspended for more than six months for doping, at the Olympic Games.”).

36. See *Hardy*, CAS 2009/A/1870, at 10.

37. *Id.* ¶ 24.

38. *Id.* ¶ 26.

39. *Id.*

40. *Id.* ¶¶ 41–42.

41. *Id.* ¶¶ 29, 63.

42. U.S. Olympic Comm. (USOC) / IOC, CAS 2011/O/2422, ¶ 2.5.

and that this rule does not apply to me. With this final hurdle now behind me, I can focus 100 percent of my efforts on preparing for and representing my country at next year's Olympic Games, a lifelong dream that was taken away from me in 2008.⁴³

III. LASHAWN MERRITT AND USADA⁴⁴

LaShawn Merritt is an outstanding track and field athlete with numerous accolades. His honors include 2008 Olympic Champion in the 400-meter and 4x400-meter and 2009 World Outdoor Champion in the 400-meter.⁴⁵ He also received a lucrative two million dollar endorsement contract from Nike.⁴⁶ Then, in 2010, Merritt tested positive in three out-of-competition tests.⁴⁷ He tested positive for dehydroepiandrosterone (DHEA), a banned steroid that he said "he consumed unknowingly in an over-the-counter 'male enhancement product'" (ExtenZe).⁴⁸

Merritt apologized profusely to the public:

To know that I've tested positive as a result of product that I used for personal reasons is extremely difficult to wrap my hands around . . . I hope my sponsors, family, friends and the sport itself will forgive me for making such a foolish, immature and egotistical mistake. Any penalty that I may receive for my action will not overshadow the embarrassment and humiliation that I feel inside.⁴⁹

United States Track and Field is the National Governing Body, and then-Chief Executive Officer Doug Logan said that Merritt's actions

Put an unfortunate stigma on himself he is going to be living down the rest of his life.

43. Philip Hersh, *Common Sense Prevails in Doping Case of U.S. Swimmer Jessica Hardy*, CHI. TRIB. (Apr. 28, 2011, 5:52 PM), http://newsblogs.chicagotribune.com/sports_globetrotting/2011/04/us-swimmer-jessica-hardy-ioc-cleared-doping-2012-olympics.html.

44. See generally USADA / Merritt, Am. Arbitration Ass'n: N. Am. CAS Panel, AAA No. 77 190 00293 10 (Oct. 15, 2010).

45. LaShawn Merritt, USA TRACK & FIELD, <http://www.usatf.org/Athlete-Bios/LaShawn-Merritt.aspx> (last visited Oct. 22, 2012).

46. Larry Rubama, *And He Wasn't the Favorite*, VIRGINIAN-PILOT (Norfolk), Aug. 22, 2008, at A1.

47. *Merritt*, AAA No. 77 190 00293 10, ¶ 1.1

48. Amy Shipley, *Olympic Sprinter Merritt Tests Positive for Steroid*, WASH. POST, Apr. 23, 2010, at D03.

49. *Id.*

. . . [His actions] indicate an extraordinary lack of maturity and an absence of the responsibility necessary to be a world-class athlete.

. . . Thanks to his selfish actions, he has done damage to our efforts to fight the plague of performance-enhancing drugs in our sport.⁵⁰

Logan went on to say, “Any professional athlete in this sport knows that they are solely responsible for anything that goes into their bodies. For Mr. Merritt to claim inadvertent use of a banned substance due to the ingestion of over-the-counter supplements brings shame to himself and his teammates.”⁵¹ Logan also added, “He has now put his entire career under a cloud and in the process made himself the object of jokes. . . . In this day and age, a professional athlete should know better. Personally, I am disgusted by this entire episode.”⁵²

Merritt chose to appeal his suspension.⁵³ An athlete has the right to a hearing to determine whether he committed a doping offense before the AAA North American Court of Arbitration for Sport panel.⁵⁴ Prior to the hearing, Howard Jacobs, Merritt’s attorney, argued that Merritt had taken the supplement for personal reasons and did not intend to gain a competitive advantage.⁵⁵ The basic argument was that Merritt’s case involved exceptional circumstances that would show he demonstrated no significant fault or negligence, and hence, Merritt deserves a reduction in the standard two-year ban.⁵⁶

Merritt appeared before the AAA on July 12, 2010.⁵⁷ The AAA panel found that Merritt had proved that he tested positive as a result of taking

50. *US 400m Star LaShawn Merritt Fails Drug Test*, BBC (Apr. 22, 2010), <http://news.bbc.co.uk/sport2/hi/athletics/8638727.stm>.

51. *LaShawn Merritt Accepts Provisional Suspension for Illegal Substance*, WVEC.COM (Apr. 22, 2010), <http://www.wvec.com/sports/LaShawn-Merritt--91841859.html>.

52. *Olympian Merritt Faces Suspension over Steroids*, CNN (Apr. 22, 2010), <http://www.cnn.com/2010/SPORT/04/22/athletics.merritt.drugs.ban/index.html>.

53. USADA / Merritt, Am. Arbitration Ass’n: N. Am. CAS Panel, AAA No. 77 190 00293 10 (Oct. 15, 2010).

54. Travis T. Tygart, *Winners Never Dope and Finally, Dopers Never Win: USADA Takes Over Drug Testing of United States Olympic Athletes*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 124, 136 (2003).

55. See Shipley, *supra* note 48.

56. See *Merritt Doped with Penis Enlargement Drugs*, IOL SPORT (Apr. 23, 2010), <http://www.iol.co.za/sport/merritt-doped-with-penis-enlargement-drugs-1.616208#.T9g6TrVDySo>.

57. *Merritt*, AAA No. 77 190 00293 10, at 1.

ExtenZe and that he did not do so to enhance his sports performance.⁵⁸ According to Article 10.2 of the WADA Code, the sanction for a doping offense calls for a maximum of a two-year period of ineligibility.⁵⁹ However, under Articles 10.5.1 and 10.5.2 of the WADA Code, an athlete may ask for the elimination or reduction of the period of ineligibility based on the exceptional circumstances that he bore “no fault or negligence” or “no significant fault or negligence” for the violation.⁶⁰ The panel found that Merritt was not significantly at fault when he bought the ExtenZe because “enhancing his sports performance was the last thing on Mr. Merritt’s mind.”⁶¹ Hence, in Merritt’s case, “there was a complete ‘absence of intention to gain [an] advantage [over] competitors.’”⁶² But, the AAA panel did note that Merritt’s “negligence necessitate[d] a serious consequence”⁶³ and imposed an ineligibility period of twenty-one months.⁶⁴ Similar to Jessica Hardy’s case, Merritt also asked the panel to look at Rule 45 because he, too, would be prohibited from competing in the 2012 Olympic Games in London.⁶⁵

In Merritt’s appeal to CAS, the CAS panel focused on the key issue of what the appropriate characterization of Rule 45 is: a sanction question or an eligibility question.⁶⁶ The CAS panel looked at a combination of the two points.⁶⁷ The first is that the WADA Code provides that ineligibility means that “the Athlete or other person is barred for a specified period of time from participating in any Competition”⁶⁸ “The IOC Regulation states that an athlete ‘may not participate, in any capacity, in the next edition of the Olympic Games.’”⁶⁹ The CAS panel found that “[t]he essence of both rules is clearly disbarment from participation”⁷⁰ The CAS panel also found that ineligibility is a sanction and that Rule 45, as it makes an athlete ineligible to

58. *Id.*

59. WORLD ANTI-DOPING CODE art. 10.2 (2009) [hereinafter WADA CODE].

60. *Id.* arts. 10.5.1–10.5.2.

61. *Merritt*, AAA No. 77 190 00293 10, ¶ 1.5.

62. *Id.* (quoting Squizzato / Fédération Internationale de Natation (FINA), CAS 2005/A/830, ¶10.14).

63. *Id.* ¶ 1.6

64. *Id.*

65. *Id.* ¶ 1.9.

66. *See generally* USOC / IOC, CAS 2011/O/2422.

67. *Id.* ¶¶ 8.7–8.19.

68. *Id.* ¶ 6.10 (quoting WADA CODE App. 1 128–29 (2009)) (emphasis omitted).

69. *Id.* ¶ 8.12(emphasis removed).

70. *Id.*

participate in the Olympic Games, is a sanction.⁷¹

The CAS panel also found that Rule 45 is an additional disciplinary sanction

After the [original] ineligibility sanction for an anti-doping rule violation under the WADA Code has been served. [Rule 45] thus provides for a period of ineligibility (non-participation) that is not provided for under Article 10 of the WADA Code. In so doing, the IOC Regulation constitutes a substantive change to the WADA Code, which the IOC has contractually committed itself not to do and which is prohibited by Article 23.2.2 WADA Code.⁷²

Because it is an “additional consequence that is over and above the consequences for a doping violation that are already provided for in the WADA Code[,]” the panel found that Rule 45 is not in compliance with the WADA Code itself⁷³ and that Rule 45 is invalid and unenforceable.⁷⁴

On October 28, 2011, the IOC Executive Board sent a letter signed by IOC President Jacques Rogge to all IOC Members, the NOCs, IOC Medical Commission Members, Olympic Games Organizing Committees, and others entitled “Regulations Regarding Participation in the Olympic Games.”⁷⁵ In that letter, the Board stated:

As you are probably aware, the Court of Arbitration for Sport (CAS) recently rendered an Arbitral Award, pursuant to which CAS held that the “Regulations regarding participation in the Olympic Games–Rule 45 of the Olympic Charter” are invalid and unenforceable.

In view of the above-noted CAS Award, the IOC will abrogate such Regulations, and they will no longer apply. That being said, the IOC intends to come back to the subject matter of these Regulations in the context of the next revision of the World Anti-Doping Code in 2013.⁷⁶

71. *Id.* ¶ 8.14

72. *Id.* ¶ 8.24.

73. *Id.* ¶ 8.26.

74. *Id.* ¶ 8.34; *see also* Paul J. Greene, USOC v. IOC: *Olympic Bans for "Convicted" Dopers*, WORLD SPORTS L. REP., Nov. 2011, at 3, 3–5, *available at* <http://www.preti.com/World-Sports-Law-Report-November>.

75. *See generally* De Kepper, *supra* note 21.

76. *Id.* (parenthetical information omitted).

IV. BOA v. WADA

In 1992, the BOA adopted a bye-law that provided that:

Any British athlete “who has been found guilty of a doping offence . . . shall not . . . thereafter be eligible for consideration as a member of a Team GB or be considered eligible by the BOA to receive or to continue to benefit from any accreditation as a member of the Team GB delegation for or in relation to any Olympic Games, any Olympic Winter Games or any European Olympic Youth Festivals.”⁷⁷

Lord David Pannick, who represented the BOA, argued that the bye-law has been supported by ninety percent of Britain’s athletes and that “[t]he presence of athletes who deliberately cheat within TeamGB would damage team morale, atmosphere and cohesiveness. It would damage the credibility and reputation of the team in the eyes of the athletes and the public.”⁷⁸

Based on the *USOC* award, WADA challenged the bye-law because it too “changed the substance of the sanctions imposed in the WADA Code.”⁷⁹ On November 21, 2011, WADA advised the BOA in a letter that

[T]he British Olympic Association has been determined to be non-compliant with the (WADA) Code because [its] rule on selection for the Olympic Games is an extra sanction, and non-compliant for the same reason the IOC eligibility rule was deemed non-compliant by the Court of Arbitration for Sport.⁸⁰

WADA invited the BOA to consider the bye-law in light of the *USOC* award.

The CAS panel noted that both WADA and the BOA are pursuing the fight against doping but by different means.⁸¹ However, “[t]he core issue to be determined here [was] whether BOA may pursue that policy on its own or whether that policy must be pursued, if at all, through the *world-harmonized* WADA Code.”⁸² Similar to *USOC*, the issue was “whether the Bye-Law [was] not compliant with the WADA Code because it is an extra sanction, in the same way that [Rule 45] was held to be non-compliant in the *USOC*

77. British Olympic Ass’n (BOA) / WADA, CAS 2011/A/2658, ¶ 2.1 (quoting BRITISH OLYMPIC ASS’N bye-law 7.4 (2009)) (emphasis omitted).

78. James Coggins, *BOA to Meet with WADA to Discuss Lifetime Bans*, FRESHTIES (Dec. 14, 2011), <http://www.thefreshoutlook.com/?p=8622>.

79. *BOA*, CAS 2011/A/2658, ¶ 2.2.

80. *Id.* ¶ 2.4.

81. *See id.* ¶ 8.2.

82. *Id.* ¶ 8.2 (emphasis added).

Award.”⁸³ And, similar to *USOC*, the CAS panel ultimately concluded that because the BOA bye-Law was a doping sanction, it was not in compliance with the WADA Code. and the appeal of the BOA was rejected.⁸⁴

The discussion of *BOA* focuses on the tension between the autonomy of NOCs and the need for harmonization in the fight against doping. The CAS panel accepted BOA’s proposition that selection to an Olympic team “is generally separate and distinct from the imposition of a sanction for a doping offense.”⁸⁵ NOCs are allowed great autonomy to develop criteria for selection to their Olympic teams. At the same time, the WADA Code “establishes doping infractions and the consequent sanctions arising from such violations.”⁸⁶ The CAS panel noted that as a general rule, “the WADA Code does not and is not intended to intrude on the autonomy of an NOC” such as the BOA;⁸⁷ but, NOCs have agreed to limit their autonomy by accepting the WADA Code. This is especially true with Article 23.2.2 of the WADA Code, which requires that “its Signatories, including NOCs, do not make any additional provisions in their rules which would change the substantive effect to any enumerated provisions of the WADA Code, including its sanctions for doping.”⁸⁸

BOA represents the culmination of the question for harmonization. The CAS panel stressed this, saying:

The purpose of Article 23.2.2 WADA Code is indeed the very purpose of the WADA Code: the harmonization throughout the world of a doping code for use in the fight against doping. This worldwide harmony is crucial to the success of the fight against doping. The WADA Code is intended to be an all-encompassing code that directs affected organizations and athletes. The WADA Code ensures that, in principle, any athlete in any sport will not be exposed to a lesser or greater sanction than any other athlete; rather, they will be sanctioned equally. By requiring consistency in treatment of athletes who are charged with doping infractions or convicted of it—regardless of the athlete’s nationality or sport—fairness and proper enforcement are achieved. Any disharmony between different parties undermines the success of the fight against

83. *Id.* ¶ 8.7.

84. *Id.* ¶ 9.1.

85. *Id.* ¶ 8.10.

86. *Id.*

87. *Id.* ¶ 8.11.

88. *Id.* ¶ 8.12 (citing WADA CODE art. 23.2.2 (2009)).

doping. For these good reasons, NOCs and other Signatories agreed to limit their autonomy to act within their own spheres with respect to activities covered by the WADA Code.⁸⁹

The CAS panel continued to discuss the tension between autonomy and harmonization, stressing that the BOA is a Signatory to the WADA Code, and as such, agreed not to add any additional provisions to its “*rules which changes the effect of the Articles enumerated in this Article* [being 23.2.2].”⁹⁰ The CAS panel pointed out that “[w]hen the BOA *chose* to become a Signatory of the WADA Code, it in fact gave up—like any other Signatory—some of its autonomy, including agreeing not to impose a sanction other than those imposed by Article 10 WADA Code.”⁹¹

The CAS panel emphasized what it decided in *USOC* and reiterated that it was not opposed to the sanctions of either Rule 45 or the BOA bye-Law. Rather, both cases involve stakeholders relinquishing some autonomy in return for harmonization. As the CAS panel stated:

[T]he awards in both cases simply reflect the fact that the international anti-doping movement has recognized the crucial importance of a worldwide harmonized and consistent fight against doping in sport, and it has agreed (in Article 23.2.2 WADA Code) to comply with such a principle, without any substantial deviation in any direction.⁹²

The remedy that both the IOC and the BOA have suggested instead lies with changing the WADA Code.

V. REACTION TO THE *BOA* DECISION AND BEYOND

BOA Chairman Colin Moynihan sharply criticized the decision again on autonomy grounds, saying:

It’s wrong that national Olympic committees now have to hand over their selection policy to drugs cheats or face court action.

. . . .

We have to protect the autonomy of teams to determine their own selection policies. We must now move the discussion forward and we will engage and lead in a global campaign to

89. *Id.*

90. *Id.* ¶ 8.38 (quoting WADA CODE art. 23.2.2).

91. *Id.* ¶ 8.40 (emphasis added).

92. *Id.* ¶ 8.41.

bring fundamental and far-reaching reforms to [WADA].

... We want tougher and more realistic sanctions for serious first time doping offences.

Cheating to deny a clean athlete the chance to participate in the greatest event in sports cannot merit a sanction so light as a two-year ban and the chance you would never even miss a Games.

... We will call for the autonomy of national Olympic committees to be respected.⁹³

On the other hand, WADA President John Fahey stressed the importance of harmonization:

WADA has spent the last decade harmonizing the fight against doping in sport across the world by creating one set of rules in consultation and in accordance with the wishes of all its stakeholders, both sport and government.

In order to achieve this harmonization, the rules have had to be proportionate and respectful of the rights of individuals within the framework of international law. They are not based on emotive arguments or the wishes of any one signatory or individual.

As with all signatories, the BOA has the right to make submissions to amend the Code through the Code Review Process that is currently ongoing.⁹⁴

The concerted fight now moves to the third and current review of the WADA Code. WADA realized that the WADA Code was always intended to be “a living document,” evolving to meet needs.⁹⁵ Based on experiences gained with the original application of the WADA Code, a revision was first initiated in 2006.⁹⁶ Throughout the revision process, WADA has encouraged comments from all stakeholders throughout the global community of sport.

93. Sportsbeat, *London 2012: BOA Claim CAS Ruling is "Hollow Victory" for WADA*, THE SPORT REV. (Apr. 30, 2012), <http://www.thesportreview.com/tsr/2012/04/london-2012-boa-claim-cas-ruling-is-hollow-victory-for-wada/>.

94. *WADA Statement on CAS Decision for BOA By-Law*, WADA (Apr. 30, 2012), <http://www.wada-ama.org/en/Media-Center/Archives/Articles/WADA-statement-on-CAS-decision-for-BOA-by-law/>.

95. *Questions & Answers on the Code*, WADA, <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/QA-on-the-Code/> (last updated Sept. 2011).

96. *World-Anti Doping Code*, WADA, <http://www.wada-ama.org/en/world-anti-doping-program/sports-and-anti-doping-organizations/the-code/> (last updated May 2011).

The new 2015 WADA Code is expected to be passed at the Fourth World Conference on Doping in Sport in Johannesburg, South Africa, in November 2013.⁹⁷

Again, there are opportunities for all stakeholders to have input. There have been suggestions and comments including sanctions.⁹⁸ For example, there has been a call for increasing automatic suspensions from two years to four years.⁹⁹ Another suggestion could be that competitors would automatically be excluded from the subsequent Olympic Games, which would be another form of the Osaka Rule.¹⁰⁰ Both USADA and United Kingdom Anti-Doping may be proposing a nuanced approach giving longer bans to intentional doping violations while making sure that inadvertent dopers (such as Jessica Hardy) are not “overpunished.”¹⁰¹

If these sanctions were incorporated into the WADA Code, based on the decisions in both *USOC* and *BOA*, they may be upheld by CAS. Again, in the press release for *BOA*, CAS stated:

The CAS Panel also noted that the BOA and the IOC were free, as are others, to persuade other stakeholders that an additional sanction of inability to participate in the Olympic Games may be a proportionate, appropriate sanction of an anti-doping offence and may therefore form part of a revised World Anti-[D]oping Code.¹⁰²

97. *Code Review*, WADA, <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/Code-Review/> (last updated Nov. 2011); *see also Dates Confirmed for 2013 World Conference on Doping in Sport*, WADA (Mar. 23, 2012), <http://www.wada-ama.org/en/Media-Center/Archives/Articles/Dates-confirmed-for-2013-World-Conference-in-Doping-in-Sport/>.

98. *Americans Applaud Drug Ruling*, ONENEWS (May 1, 2012), <http://tvnz.co.nz/content/4859961/2422056/article.html>.

99. Sven Busch, *IOC President Rogge Has Plenty to Do in Last 17 Months*, DEUTSCHE PRESSE-AGENTUR GMBH (Hamburg, Ger.), May 25 2012 (on file with law review); *see also World Anti-Doping Agency Reviewing Length of Bans*, BBC (May 1, 2012), <http://www.bbc.co.uk/sport/0/olympics/17907844>.

100. Nicole Jeffery, *Doping Agency Resurrects "Osaka Rule,"* THE AUSTRALIAN (June 2, 2012), <http://www.theaustralian.com.au/sport/london-games/doping-agency-resurrects-osaka-rule/story-e6frgdg6-1226381246050>.

101. Paul Kelso, *London 2012 Olympics: Anti-Doping Chief Andy Parkinson Warns Lifetime Bans for First-Time Drug Cheats are Too Harsh*, THE TELEGRAPH (Apr. 24, 2012), <http://www.telegraph.co.uk/sport/olympics/9224659/London-2012-Olympics-Anti-doping-chief-Andy-Parkinson-warns-lifetime-bans-for-first-time-drug-cheats-are-too-harsh.html>; *see also Americans Applaud Drug Ruling*, *supra* note 98.

102. Media Release, CAS, Arbitration BOA / WADA: The BOA Bye-Law is Not in Compliance with the World Anti-Doping Code (Apr. 30, 2012) (on file with law review).

VI. CONCLUSION

Anyone who has worked on legislation on the local, state, or national level knows how difficult it is to get something agreed upon and passed. To achieve a harmonized approach on a global level is staggering in and of itself. As seen in *USOC* and *BOA*, WADA's authority to lead a global harmonized approach in the war against doping has now been firmly recognized and solidified. Remember, WADA was established only in 1999, and the fact that it has achieved this status in less than fifteen years is quite remarkable. As for the future, the next two years will be marked by significant change. First, the revisions to the WADA Code, in the wake of *USOC* and *BOA*, will be formally presented. Second, IOC President, Jacques Rogge, will be retiring. He has been a leader in the anti-doping crusade, had a significant role in the 2009 revisions to the WADA Code, and will no doubt have a role in the 2015 revision. It will be exciting!