
Note

Balancing the Justices in Anti-Doping Law:
The Need to Ensure Fair Athletic
Competition Through Effective Anti-Doping
Programs vs. the Protection of Rights of
Accused Athletes

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INTRODUCTION

The use of performance-enhancing substances in athletics is not merely a recent phenomenon. As far back as 3,000 years ago in Ancient Greece, naked athletes would reputedly step up to the starting line after ingesting anything from mushroom and plant seed extracts to stimulating potions.¹ Gaining an edge on one’s competitors was essential in pursuit of the ultimate goal – achieving victory. Triumphant athletes in ancient Greece were gazed upon as heroes and enjoyed the rewards and riches that came with this elevated social status.²

Little has changed over the past three millennia. Athletic competition continues to play a central role in nearly all societies. Victorious athletes are showered with praise and admiration while being rewarded with money and influence. The youth of the world aspire to accomplish the same objective – not just to compete, but to win. When viewed in light of this reality it is easy to see why so many of today’s athletes risk their health and their lives for a theoretically easy path to victory.

Thomas Murray, a renowned ethicist on the topic of performance-enhancing drug use in sport, has opined that the use of performance-enhancing substances undercuts the foundation of what gives sports meaning and value to society.³

1 History of Drugs in Sport, Australian Sports Drug Agency, <http://www.asda.org.au/media/history.htm> (on file with the Virginia Sports and Entertainment Law Journal); Mark Stuart, The war on drugs in sport – a perspective from the Athens Olympics, 273 *Pharmaceutical J.* 320, 320 available at http://www.pjonline.com/pdf/articles/pj_20040904olympic.pdf (Sept. 4, 2004).

2 See Cleanthis Palaelogos, The Position of the Athlete in Society in Ancient Greece. *International Olympic Academy 1967 Session 113* (1967), at http://www.ioa.org.gr/books/sessions/1967_113.pdf.

3 See Thomas H. Murray, The Athlete’s Challenge: Drugs, Sport, and Ethics, 3 *Play True* 6 (2004), available at http://www.wada-ama.org/rtecontent/document/dec_04.pdf.

After offering reasons why such drugs must be prohibited, he emphasizes that if we are going to ban these substances, “we owe it to the athletes to deter, detect and punish those who cheat.”⁴ So the question facing all levels of sport becomes how to best effectuate a successful anti-doping regime. This essay will examine the legal framework underlying current international anti-doping procedures and will focus on the competing interests of ensuring fair sport through effective anti-doping programs and safeguarding the rights of athletes suspected of doping. In order to add context to this discussion, this essay will first provide an overview of how international sport’s anti-doping system is structured and then explore some issues which increase its jurisprudential complexity.

I. STRUCTURE OF CURRENT INTERNATIONAL SYSTEM

The current international doping control system, like most aspects of international sport, has its roots in the modern Olympic movement. Since its creation in 1894, the International Olympic Committee (IOC) has been the “supreme authority” on all questions surrounding the Olympic movement.⁵ This means that all International Federations (IFs), National Olympic Committees (NOCs), and National Governing Bodies (NGBs) are subject to the IOC’s rules so long as their respective sport or team wishes to participate in the Olympic Games. IFs, such as the International Cycling Union (UCI), are organizations that govern a particular sport worldwide. NGBs, such as USA Cycling, are members of IFs and manage the particular sport on a national level while abiding by the laws of their respective IFs. NOCs, such as the US Olympic Committee, are responsible for choosing the athletes that will represent their country in the Olympic Games.

A. Court of Arbitration for Sport

With all of the complex relationships and diverse philosophies between the numerous organizations and individuals within the Olympic Family, disputes often arise. In 1983, responding to the need for an independent international tribunal specializing in settling sports-related disputes, the IOC created the Court of Arbitration for Sport (CAS – also known internationally by its French acronym, TAS). CAS is headquartered in the home city of the IOC – Lausanne, Switzerland. The disputes that CAS settles are contractual in nature. They range from litigation involving the commercial side of sports, such as sponsorship, to clashes over how the various organizations relate to each other and whose

⁴ *Id.* at 7.

⁵ David B. Mack, *Reynolds v. International Amateur Athletic Federation: The Need for an Independent Tribunal in International Athletic Disputes*, 10 *Conn. J. Int’l L.* 653, 656 (1995).

philosophy will govern in certain circumstances.⁶ In recent years, however, the most visible role of the CAS has been as the final arbiter of disputes involving athletes facing sanctions due to their alleged use of performance-enhancing drugs.

An arbitration agreement between an athlete and his or her governing body forms the basis of each arbitration procedure. The athlete and governing body agree to eschew any state court jurisdiction in favor of the jurisdiction of an arbitration panel.⁷ Article R47 of the Code of Sports Related Arbitration⁸ provides that the arbitration agreement may be contained within the statutes or regulations of the governing body.⁹ Nearly all governing bodies within the Olympic family include such a clause in their regulations that provides CAS with jurisdiction over appeals of the decisions of the governing body.¹⁰ Therefore, nearly all athletes that compete within the Olympic movement have agreed by their participation, which is subject to the rules of the governing body, that CAS will be the final arbiter of disputes regarding sanctions imposed by their governing bodies.

Courts in the United States have approved the submission of cases involving alleged doping by athletes to arbitration procedures established by sporting bodies specifically to settle such disputes.¹¹ International enforcement of arbitral awards handed out by CAS is guaranteed by the Convention on Recognition and Enforcement of Foreign Arbitral Awards,¹² better known as the New York Convention. The New York Convention is a treaty signed by nearly every

6 Mary K. FitzGerald, *The Court of Arbitration for Sport: Dealing with Doping and Due Process During the Olympics*, 7 *Sports Law J.* 213, 220 (2000).

7 Frank Oschütz, *Harmonization of Anti-Doping Code Through Arbitration: The Case Law of the Court of Arbitration for Sport*, 12 *Marq. Sports L. Rev.* 675, 677 (2002).

8 *Court Arbitration for Sport, Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-related Disputes*, at 17, at <http://www.tas-cas.org/en/code/frmco.htm>; (follow "PDF" hyperlink) (last visited May 16, 2006).

9 Oschütz, *supra* note 7, at 677.

10 *Id.*

11 See *Jacobs v. USA Track & Field*, 374 F.3d 85 (2d Cir. 2004) (affirming that the submission of doping cases to arbitration under the Supplemental Procedures established by USADA was proper and that athlete was not entitled to normal commercial arbitration rules of the AAA, where the athlete was bound to the USADA process by being a member of the NGB); see also *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580 (7th Cir. 2001) (affirming the dismissal of athlete's claims against IAAF because claims were already decided by IAAF's arbitration panel, and were therefore barred from re-litigation by 9 U.S.C. § 201, which provides that the United States Convention on the Recognition of Foreign Arbitral Awards of June 10, 1958 shall be enforced in United States courts).

12 Codified in U.S. law by 9 U.S.C. § 201 (2005).

country in the world,¹³ providing that signatories must give recognition to arbitration proceedings that take place in another signatory country.¹⁴

In 1993, in response to complaints that CAS was simply an alter ego of the IOC, the IOC restructured CAS in order to increase its independence. The IOC created the International Council of Arbitration for Sport (ICAS), an independent entity charged with carrying out the management functions of CAS (such as budgeting and appointing arbitrators), relieving the IOC of those tasks. The overarching purpose of the ICAS is to “safeguard the independence of the CAS and the rights of the parties.”¹⁵

By 1999, the IOC was under heavy fire for what many perceived to be a lack of dedication to the fight against performance-enhancing drug use in sport. The Salt Lake City bribery scandals had created an environment of general distrust of the IOC. In November of 1999, as a result of these doubts regarding the IOC’s commitment to drug-free sport and the commonly held belief that the IOC had no incentive to police its own athletes, the IOC established the World Anti-Doping Agency (WADA).¹⁶ WADA was created as an independent body whose mission is “to promote, coordinate, and monitor at the international level the fight against doping in sport in all its forms.”¹⁷ In its first few years of existence many questions have been raised about WADA’s legitimacy and the extent of its actual independence. Nevertheless, WADA has assumed its role as the coordinator of all anti-doping affairs within the Olympic family.

On March 5, 2003, the World Anti-Doping Code (WADC or “Code”) was adopted by WADA in Copenhagen, Denmark. By the time of the Athens Olympics in August 2004, the WADC had been accepted by all summer Olympic sports. The purpose of the Code was to adopt a uniform set of anti-doping policies, rules, and regulations across all sports and countries. CAS is to be the final arbiter of matters that fall under the Code.

B. U.S. Anti-Doping Agency

Meanwhile in the United States, the U.S. Olympic Committee (USOC) was

13 As of June 21, 2005 135 countries were signatories to the New York Convention. Parties to the Convention on the Recognition Enforcement of Foreign Arbitral Awards, at <http://arbitr.wipo.int/arbitration/ny-convention/parties.html>.

14 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). 9 U.S.C. §201 (2005).

15 Court Arbitration for Sport, Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-related Disputes, *supra* note 8, at 1.

16 See FitzGerald, *supra* note 6, at 231.

17 WADA Mission Statement (Nov. 1999), available at <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=255>.

facing criticism similar to that which had plagued the IOC. Critics were protesting that the United States should be taking a larger role in eradicating the perceived performance-enhancing drug problem among U.S. Olympic athletes. Charges were levied that the USOC had been involved in drug cover-ups.¹⁸ Although no cover-up was ever proven, concerns remained about the potential conflict of interest the USOC had in administering the drug testing program for the same athletes whom it was promoting. The USOC had numerous interests in fielding the best team of athletes possible, including financial. The NGBs under the USOC's umbrella also had similar potential conflicts of interest.¹⁹ As a result of this criticism, the USOC Select Task Force on Externalization determined that the United States should establish an independent, external entity to coordinate athletic drug testing and all other anti-doping efforts in the United States. Thus the U.S. Anti-Doping Agency (USADA) was born.²⁰

II. UNIQUE ISSUES CONTRIBUTING TO ANTI-DOPING'S JURISPRUDENTIAL COMPLEXITY

Many factors that on the surface seem to have no relationship to the legal standards to which athletes are held must first be understood to gain a fuller appreciation of the intricacies of anti-doping jurisprudence. Those who promote anti-doping efforts are handicapped by a number of realities that make the goal of eradicating performance-enhancing drug use in athletics markedly more difficult to attain. This section explores several of the most difficult issues currently complicating anti-doping's legal system.

A. Scientific Limitations

"You may think testing is great, but it is far from perfect. Athletes determined to cheat have little trouble beating the test..."²¹ This was the recent testimony in front of the U.S. Senate Commerce Committee of Don Catlin,

18 Travis Tygart, *Winners Never Dope and Finally, Dopers Never Win: USADA Takes Over Drug Testing of United States Olympic Athletes*, 1 DePaul J. Sports L. Cotemp. Probs. 124, 124 (2003).

19 *Id.* at 128.

20 USADA currently manages anti-doping activities for Olympic sports in the U.S., but not professional sports. The anti-doping legal system employed by sports within the Olympic family is markedly different than those used by professional sports. For example, the National Football League & Major League Baseball each have their own system of private hearings that take place out of the public eye. There are no public records of these hearings in contrast to the decisions that are written when the matter is settled by CAS. This essay focuses solely on the international anti-doping regime within the Olympic Movement.

21 Dr. Don Catlin, Testimony at U.S. Senate Committee on Commerce Science and Transportation (May 24, 2005) (transcript available at http://commerce.senate.gov/hearings/testimony.cfm?id=1511&wit_id=4278).

M.D.²², a renowned expert in anti-doping science and director of the world's largest WADA-accredited testing and research facility. Because of the serious consequences that result from anti-doping's strict liability regime the bar is set quite high for what constitutes a reliable test. For those involved on the scientific end of the anti-doping spectrum, this adds to the complexity of the research conducted to develop accurate detection methods.

One of the most difficult issues facing scientists who research performance-enhancing drug detection methods is that many of the substances on the prohibited list are also produced endogenously – in other words, they are created naturally by the human body. Testosterone is an example of a substance whose use is banned by sport but is also produced endogenously. Until a few years ago it was not possible for doping laboratories to distinguish between endogenous and exogenous testosterone. However, researchers have since designed a method that can positively identify exogenous testosterone.²³ This detection method consistently has withstood legal scrutiny.²⁴

As of December 2005, there is no valid test to detect the presence of exogenous human growth hormone (hGH) in human biological samples.²⁵ Many officials in both Olympic and professional sports worry that hGH abuse is widespread, but without a valid test the prohibition cannot be enforced.

Despite the need to launch new methods as quickly as possible in order to thwart cheaters, WADA and other organizations must not prematurely introduce

22 Dr. Catlin is the founder and Director of the WADA-accredited UCLA Olympic Analytical Laboratory, which performs more athletic drug testing and detection method research than any other laboratory worldwide. Dr. Catlin has also served on the IOC Medical Commission for a number of years, as well as numerous other national and international committees concerned with drugs in sport.

23 For details on the Carbon Isotope Ratio test, see Rodrigue Aguilera, et al., Improved Method of Detection of Testosterone Abuse by Gas Chromatography/Combustion/Isotope Ratio Mass Spectrometry Analysis of Urinary Steroids, 31 *J. Mass Spectrometry*; 169-176 (1996) (Details on the Carbon Isotope Ratios Test).

24 *Susin v. FINA*, CAS 2000/A/274, Award of 19 October 2000, CAS Digest II at 389 (CAS panel stating that the new method, the Isotope Ratio Mass Spectrometer (IRMS) analysis, provides direct evidence of the exogenous administration of testosterone and therefore the athlete was not allowed to use the defense that physiological or pathological reasons were the cause of an elevated level of testosterone when compared with epitestosterone, as would have been allowed without the IRMS analysis).

25 Whether or not a test for hGH exists has been the subject of recent debate. WADA has claimed that there is a test for hGH that was conducted on an unspecified number of blood tests at the 2004 Olympic Games in Athens. Many knowledgeable scientists within the field do not believe that the test is robust enough to actually catch hGH users, and there is skepticism as to whether the results of a positive test would withstand legal scrutiny. As of December 2005, no athlete has been prosecuted for a positive exogenous hGH test or reported to have tested positive for hGH. No WADA-accredited laboratories are routinely screening samples for hGH.

new testing methods. They must exercise caution before approving a testing method because of the potentially devastating consequences to the image of anti-doping programs in general if an athlete were to be prosecuted on the basis of a false positive test resulting from an unreliable method.

For example, in recent months the reliability of one set of criteria that is often used to determine the potential presence of recombinant erythropoietin (rEPO) in urine has been called into question. Erythropoietin (“EPO”) is a natural human hormone which boosts endurance by stimulating the production of red blood cells, increasing the oxygen carrying capacity of blood. Artificial EPO (rEPO) is used therapeutically in patients with anemia or other diseases that interfere with red blood cell production. Before a test was developed in 2000, reports were rampant of widespread EPO abuse among athletes in endurance sports such as cycling and cross-country skiing.

The newly created test for rEPO was first accepted in a legal proceeding as validated by the scientific community in January 2002.²⁶ In *IAAF v. Boulami*, the panel found that the WADA criteria for establishing a positive test had a “reasonable cut-off point that largely eliminates the risk of false positives in urinary rEPO tests”.²⁷ But in August 2005, a Flemish government disciplinary commission overturned the suspension of Belgian triathlete Rutger Beke after he was able to show that strict application of the latest WADA criteria could result in a positive finding, even in cases where a true positive could not be scientifically verified. The laboratory performing the analysis on Beke’s sample was relatively inexperienced with the EPO test. EPO detection method technicians with greater experience would likely have known that the data from Beke’s test should not have been reported as positive, even though the data fit within WADA’s criteria for a positive result.²⁸ The following month, two Spanish triathletes were cleared of EPO use charges because of similar doubts about their positive tests.

Some laboratories more experienced with EPO testing (including the laboratory which routinely tests U.S. athletes) use a stricter set of criteria that conform to WADA standards but eliminate the possibility of prematurely reporting a positive result such as that which occurred in the Beke case.

26 *Meier v. Swiss Cycling*, CAS 2001/A/345, Award of 28 January 2002, CAS Digest III at 238 (establishing that the “direct test method”, which tries to directly detect the presence of rEPO, is sufficiently scientifically proven).

27 *IAAF v. MAR and Boulaimi*, CAS 2003/A/383, Award of 19 November 2003, CAS Digest III at 440 (describing in detail the basic area percentage (“BAP”) method of interpreting the EPO test).

28 Interview with Don Catlin, M.D., Founder and Director of the WADA-accredited UCLA Olympic Analytical Laboratory and a renowned expert in rEPO detection methodology, in Los Angeles, Cal. (Sep. 16, 2005).

Nonetheless, the Beke case and the others that followed have caused WADA to rethink its position on the EPO test.²⁹ Though publicly backing the reliability of the criteria that it uses, WADA is now requiring laboratories performing the EPO test to have the data reviewed by one of the six WADA-accredited laboratories in the world known for their expertise with the EPO test before reporting a positive EPO result.³⁰

There is certainly a delicate balance that must be reached when deciding at what point a new scientific technique should be put into use. The sporting world has a significant interest in implementing new testing techniques that will discourage the use of performance-enhancing substances and expose cheaters as quickly as possible. But sport also has an interest in making sure that the reliability of these testing methods is unquestionable. Sport authorities must ensure that the possibility of a false positive is virtually nonexistent.³¹

B. Pharmaceutical Innovations

Another issue adding to anti-doping's legal complexity is raised by the pharmaceutical industry's constant development of new medications. As is the case for EPO and hGH, many drugs originally developed to advance the medical treatment of bona fide patients are misused by athletes in order to achieve performance enhancement. Pharmaceutical companies constantly are creating new drugs and improving upon old drugs. While this research and development is a large benefit to society as a whole, it can be burdensome for those charged with maintaining reliable testing methods for the cornucopia of performance-enhancing drugs that may be available to athletes. However, when pharmaceutical companies work in tandem with anti-doping scientists to combat the unintended abuse of their new medicines the outcome can be advantageous for all.

Such was the case in the months leading up the 2002 Winter Olympics in Salt Lake City. A pharmaceutical company based in Southern California had recently created a new and improved form of artificial EPO, branded as

29 In November 2005, WADA convened a meeting of EPO detection method experts in Paris, France to discuss how to ensure that future test results would withstand legal challenge. WADA amended its criteria for calling an EPO test positive which avoids a false positive such as the one that occurred in the *Beke* case.

30 The six laboratories are the WADA-accredited facilities located in Los Angeles, Paris, Lausanne, Oslo, Sydney, and Barcelona.

31 The *Boulami* court recognized these competing interests and looked to find the "necessary balance between the needs of IOC laboratories to implement new, reliable testing methods as quickly as possible, on the one hand, and the interests of athletes and the sporting community in ensuring trustworthy results on the other."

darbepoetin, to help patients suffering from anemia and other similar diseases. The company shared the darbepoetin with the laboratory that was preparing to conduct the testing at the Olympic Games. The laboratory quickly and quietly developed a method to detect the presence of darbepoetin in urine. In dramatic fashion, on the final day of the Games, three medal winning cross-country skiers were announced as testing positive for darbepoetin. In the ensuing CAS proceedings the athletes claimed that the methodology of testing for darbepoetin was experimental and was neither legally nor scientifically accepted.³² CAS rejected the claim, in large part because of the studies that had been quietly performed by the laboratory in conjunction with the pharmaceutical company before the Games:

Those studies have confirmed the methodology and reliability of the tests for darbepoetin. In light of the evidence, the Panel has no hesitation in finding that the methodology of testing for erythropoietin and darbepoetin is scientifically sound, and that the results produced by the tests are reliable.³³

C. Dietary Supplements

The dietary supplement industry has an even greater influence on the legal complexities in the anti-doping world than the pharmaceutical industry. In the United States alone the dietary supplement industry brings in over \$20 billion per year in revenue. A study commissioned by the IOC analyzed 634 non-hormonal nutritional supplements bought from 215 different suppliers in thirteen different countries and found that 14.8% tested positive for at least one anabolic agent.³⁴ 18.8% of the supplements purchased in the U.S. tested positive for at least one anabolic agent. These anabolic agents were not listed on the label as ingredients. Currently there is a lack of studies showing how many dietary supplements contain banned substances other than anabolic agents.³⁵

32 *Muehleleg v. IOC*, CAS 2002/A/374, Award of 24 January, 2003, Digest of CAS Awards III, at 286; *Lazutina v. IOC*, CAS 2002/A/370, Award of 29 November 2002, Digest of CAS Awards III, at 273; *Danilova v. IOC*, CAS 2002/A/371, Award of 29 November, 2002 (heard at the same time as *Lazutina*, by same panel, with same issues raised).

33 *Lazutina*, supra note 32, at 284.

34 Hans Geyer , et al., Analysis of Non-Hormonal Nutritional Supplements for Anabolic-Androgenic Steroids - Results of an International Study (summary available at http://multimedia.olympic.org/pdf/en_report_324.pdf).

35 It seems likely that stimulants would also be found in a large number of dietary supplements. Ephedra, a prohibited stimulant, commonly was found (until recently) in many supplements claiming to promote weight loss or enhance energy levels. The FDA banned ephedra sales effective in April 2004, but a federal judge overturned the ban in April 2005 stating that the FDA had not met its burden of proving low quantities of the drug to be unsafe as required by the Dietary Supplement Health and

This potential mislabeling and contamination of dietary supplements presents difficult issues in anti-doping jurisprudence, particularly in the areas of proper notice and culpability of athletes. Should athletes be punished for using a product which they reasonably believed was free of banned substances? This issue will be explored later when this essay addresses the culpability standards to which athletes are held in effective anti-doping programs.

Until recently, the U.S. government has done little to help clean up the dietary supplement industry. The Dietary Supplement Health and Education Act of 1994 (DSHEA)³⁶ effectively prohibits the Food and Drug Administration (FDA) from regulating products that are intended to supplement the diet by placing the burden of proof on the FDA to show that the product creates an unreasonable risk of illness or injury. As was demonstrated in 2004 when the FDA attempted to ban ephedra only to have the ban subsequently overturned by a federal court,³⁷ this is a difficult burden for the FDA to meet. DSHEA was championed by Senator Orrin Hatch of Utah, a state that houses a large portion of all dietary supplement manufacturers. Senator Hatch receives significant campaign contributions from supplement manufacturers and has other close ties with the industry.³⁸ Many U.S. anti-doping officials feel that Senator Hatch's protection of this industry has significantly burdened U.S. anti-doping efforts. Under DSHEA, steroid precursors and other banned substances are allowed to masquerade as dietary supplements, resulting in numerous positive drug tests that raise complicated legal questions.

Responding to criticism that arose after it was revealed that Mark McGwire was taking androstenedione (a pro-hormone available over-the-counter as a dietary supplement that at the time was banned by most sports other than baseball) during his 1998 home run chase, Congress enacted the Anabolic Steroid Control Act of 2004.³⁹ This law affects dietary supplement manufacturers by banning the sale of most steroid precursors such as

Education Act of 1994 (DSHEA), discussed *infra*.

³⁶ 21 U.S.C. § 342(f) (2005).

³⁷ *Nutraceutical Corp. v. Crawford*, 364 F.Supp. 2d 1310 (D. Utah 2005).

³⁸ According to government watchdog [opensecrets.org](http://www.opensecrets.org), Senator Hatch has received over \$200,000 in campaign contributions directly from the dietary supplement industry – more than any other politician in history. In addition, two of Hatch's former chiefs of staff are now lobbyists for the dietary supplement industry. *Nutritional and Dietary Supplements: Money to Congress*, available at <http://www.opensecrets.org/industries/summary.asp?Ind=H4600&cycle=All&recipdetail=M&Mem=Y&sortorder=U> (last visited May 17, 2006). See also, Stephanie Mencimer, *Scorin' with Orrin: How the gentleman from Utah made it easier for kids to buy steroids, speed, and Spanish fly*, *Washington Monthly*, Sept. 2001, at 26, available at <http://www.washingtonmonthly.com/features/2001/0109.mencimer2.html>.

³⁹ Pub. L. No. 108-358, 118 Stat. 1661 (2004).

androstenedione (although it leaves in place an exception for a precursor known as DHEA).⁴⁰ Critics claim that the FDA is still not doing enough to enforce the Act, which went into effect in January 2005.⁴¹

Sport authorities vary considerably in their policies toward the use of supplements. Many within the anti-doping world take a 'just say no' approach and urge athletes to eschew the use of any dietary supplements, including vitamins, amino acids, and protein supplements. Many elite athletes feel that this is an unrealistic approach since these supplements are a vital part of their training regimen. This 'just say no' approach also ignores the fact that most manufacturers within the dietary supplement industry are responsible, honest, and legitimately concerned about the reputation of their industry amidst the media attention given to athletes who blame supplements for their positive tests. Instead of ostracizing the supplement industry because of a few unscrupulous manufacturers out to make a quick buck, sport authorities should work with the responsible supplement producers in programs designed to clearly distinguish between safe supplements and those contaminated with potentially dangerous banned substances.⁴²

D. Designer Steroids

The issues presented by designer steroids are more closely related to the problems associated with dietary supplements and scientific limitations than most people realize. Created specifically to avoid current detection methods, many designer steroids are initially represented by their creators as dietary supplements.⁴³ Designer steroids, however, generally do not present the same issues of notice and culpability as a contaminated or mislabeled dietary supplement since most designer steroid users are knowingly using a banned substance, albeit one that is currently unknown by sport authorities.

The idea behind the creation of designer steroids is straightforward: simple chemical alterations are made to a known steroid to create a new, unknown steroid that is undetectable by athletic drug testing laboratories (since they are

⁴⁰ Id.

⁴¹ Health Supplement Industry Challenges FDA to Enforce Laws Against Steroids in Supplements, Natural Newswire available at http://www.naturalnewswire.com/2005/09/health_suppleme.html (Sept. 20, 2005).

⁴² There are some programs taking small steps in this direction, such as the NSF-NFLPA Certification Program, ConsumerLab.com, and Banned Substances Control Group.

⁴³ For an example, see the FDA statement on THG, the designer steroid at the center of the BALCO scandal: "Although purveyors of THG may represent it as a dietary supplement, in fact it does not meet the dietary supplement definition." FDA, FDA Statement on THG, available at <http://www.fda.gov/bbs/topics/NEWS/2003/NEW00967.html> (Oct. 23, 2003).

unaware that they should be looking for it). The term ‘designer steroid’ was popularized by the ongoing BALCO scandal involving many high profile professional and Olympic athletes. One of the designer steroids at the heart of this scandal is tetrahydrogestrinone (THG). Like most designer steroids, THG is relatively easy to create for those with a rudimentary knowledge of chemistry. THG was allegedly synthesized from the known steroid gestrinone by Patrick Arnold, a chemist who was indicted in November 2005 for his role in the BALCO scandal.⁴⁴

The discovery of THG was made possible through a small stroke of luck. A U.S. track coach gave a nearly empty syringe of THG to a USADA official claiming that several top athletes were using the substance inside of the syringe. USADA passed the syringe along to the scientists at the UCLA Olympic Analytical Laboratory who synthesized the drug themselves and developed a method to detect its presence in urine. Nine athletes were caught and prosecuted for using THG as a result.⁴⁵ As of December 2005, some of the investigations involving athletes caught up in the BALCO scandals are ongoing.

Due to the ease with which new designer steroids can be created, there is a significant concern in the anti-doping community that the problem is widespread. Of course, since unknown designer steroids are undetectable by nature until their existence is discovered, it is difficult to be certain. Without the good fortune that occurred in the case of THG, detecting designer steroids is a very complicated proposition. Anti-doping scientists could theoretically conduct an enormous amount of research creating myriads of possible designer steroids themselves and subsequently develop detection methods for those steroids albeit without any knowledge of which ones, if any, are being abused by athletes. As of yet, the

44 Patrick Arnold was charged with conspiracy to distribute steroids, conspiracy to defraud consumers by bringing misbranded drugs into interstate commerce, and introduction of THG into interstate commerce with the intent to defraud and mislead. Mr. Arnold is also charged with conspiring to distribute other steroids including norbolethone and DMT (or “Madol”). Press Release, U.S. Dept. of Justice, Illinois Chemist Charged, (Nov. 3, 2005), available at http://www.usdoj.gov/usao/can/press/html/2005_11_03_arnold_indictment.htm.

45 Nine athletes tested positive for THG shortly after the introduction of the THG test – five athletes from Track & Field (4 Americans, 1 Britain), four athletes from the National Football League. Other Track & Field athletes who did not test positive have been prosecuted by USADA for THG use under the so-called “non-analytical positive” standard, wherein extrinsic circumstantial evidence is used to prove an athlete’s doping offense. Tim Montgomery and Chryste Gaines were banned from Track & Field competition for two years on December 13, 2005 as a result of being prosecuted under the “non-analytical positive” standard. See *USADA v. T. Montgomery*, CAS 2004/O/645, Award of 13 December 2005, available at <http://www.tas-cas.org/en/pdf/Montgomery.pdf>; *USADA v. Ch. Gaines*, CAS 2004/O/649, Award of 13 December 2005, available at <http://www.tas-cas.org/en/pdf/Gaines.pdf>.

sporting community has not taken action to fund such monumental efforts. Recently, some research funding has been made available for a more targeted approach which involves identifying suspicious athletes' urine samples during routine testing and subjecting them to customized analyses for steroids that are currently unknown. Although such efforts cannot catch all designer steroids and their users, making the funding available so that anti-doping researchers can try to keep pace with the underground scientists is a step in the right direction.

E. Effect on Anti-Doping Law

As the remainder of this essay will illustrate, the issues surrounding scientific limitations, pharmaceutical innovation, dietary supplements, and designer steroids have a profound impact on anti-doping jurisprudence. In order to properly evaluate the propriety of rules promulgated by the international anti-doping system, one must bear in mind the complexities caused by these outside influences.

III. ANTI-DOPING JURISPRUDENCE

The complex nature of anti-doping efforts requires a carefully crafted legal system to accomplish the dual goals of ensuring fair sport through effective anti-doping measures and assuring equity to individual athletes. Although procedural issues (e.g., the burden of proof and proportionality of punishments) often run together with substantive issues (e.g., the culpability of the accused athletes) in anti-doping jurisprudence, this section will address each of these issues separately. First, procedural issues such as the burden of proof and standard of proof will be examined. Second, this section will explore whether the athlete's level of culpability plays a role in the *disqualification* of an athlete from competition due to a doping offense. Third, this section will analyze how an athlete's culpability level is factored into the potential *suspension* of an athlete from future competition. Fourth, this section will examine whether notions of proportionality and equity are being adhered to by the anti-doping legal regime. Finally, the essay will discuss how confidence and trust in a fair and equitable system are required for the survival of anti-doping efforts.

A. Procedural Issues

A doping infraction is a creature of private contract law. By entering into competition an athlete agrees to be bound by the rules that govern the sport in which he or she participates.⁴⁶ The athlete agrees to compete without using

⁴⁶ This is a common attribute of the law of private associations. Many associations have to discipline their members when the associations' rules are broken. Athletes, in addition to being bound by virtue of entering into competition, must almost always also sign a document which states that the athlete

prohibited substances or methods. If the athlete breaches this provision and is deemed guilty of a doping violation, he or she has already agreed to face the punishments dictated by the governing body. Doping law is the enforcement of these private agreements.⁴⁷

The standard of proof in hearings involving alleged doping is higher than one would commonly find in breach of contract proceedings. CAS requires more than a simple *balance of probabilities*, the typical civil law standard, to prove particular elements of a doping offense. Instead, elements of the doping offense must be established to the *comfortable satisfaction* of the arbitration panel. The arbitrators in *De Bruin v. FINA* stated that they had “no doubt that the standard of proof required of [the sport’s governing body] is high: less than the criminal standard, but more than the ordinary civil standard.”⁴⁸ The panel went on to adopt the test set out in *Korneev and Ghouliev v. IOC*: “ingredients must be established to the comfortable satisfaction of the Court having in mind

agrees to be bound by the rules of the sporting body, including rules regarding the sport’s anti-doping policy.

47 Although doping law is a creature of contract law, some athletes who have been convicted of a doping offense have suggested that it is more akin to criminal law. As an example, one would refer to such an athlete as guilty, rather than a breaching party. Similarly, the suspension that follows is referred to as a punishment. Such terminology is a feature of criminal law, not contract law. Individual athletes cannot bargain to be held to unique anti-doping standards. They cannot negotiate a “better deal” for themselves on an individual basis. Instead, all athletes must follow the same anti-doping regulations, just as all people within a given jurisdiction follow the same criminal code. Additionally, arbitrators have found that a doping offense must be proven to a higher standard (to a “comfortable satisfaction” standard, discussed *infra*, note 52) than a breach of contract would have to be proven. (See *Pastorello v. U.S. Anti-Doping Agency*, CAS 2002/A/363, available at http://www.usantidoping.org/files/active/arbitration_rulings_6_28_2002_Pastorello.pdf; *Demetis v. FINA*, CAS 2002/A/432, available at <http://www.tas-cas.org/en/pdf/Demetis.pdf>. A criminal offense, similarly, must also be proven to a higher standard. The suggestion of those who claim that the current anti-doping regime is quasi-criminal cannot be summarily dismissed. The punitive anti-doping system, if not quasi-criminal outright, at least shares many characteristics with criminal law not normally found in contract law.

Perhaps there is not such a large distinction between the two areas of laws. Legal philosophers have long thought of criminal law as a form of a social contract. See, e.g., Arthur Ripstein, *Criminal Responsibility: In Extremis*, 2 Ohio St. J. Crim. L. 415, 417 (discussing Kant’s view of the social contract which protects private rights but necessitates executive power). See generally, Thomas Hobbes, *Leviathan* (1651). Just as a member of society breaches his end of the social contract by violating a criminal statute, perhaps a doping athlete can simply be thought of as breaching his contractual obligation to his governing body. But there also seems to be a moral culpability following the use of performance-enhancing substances that is more akin to a criminal action than a simple breach of contract. CAS arbitrators have recognized “that disciplinary sanctions in doping cases are similar to penalties in criminal proceedings.” *Demetis*, *supra* note 47, at 13.

48 *De Bruin v. FINA*, CAS 98/211, Award of 7 June 1999, CAS Digest II, at 266.

the seriousness of the allegation which is made.”⁴⁹ But the arbitrators did not want to go as far as using a reasonable doubt standard, explaining that “to adopt a criminal standard... is to confuse the public law of the state with the private law of an association.”⁵⁰

Some CAS arbitrators have implied that the more serious the allegations levied against the athlete, the higher the level of satisfaction to which the elements of the offense must be proven.⁵¹ The panel in *B. v. FINA*⁵² noted that when there is an allegation which attributes dishonesty to the athlete, the panel must keep in mind the “extremely high degree of seriousness” of the allegation.⁵³

The burden of proof to show that there is the presence of a banned substance in the athlete’s biological sample lies initially with the prosecuting sports body levying the accusation.⁵⁴ After this has been shown, the only recourse that an

49 *Id.* (quoting *Korneev and Ghouliev v. IOC*, CAS OG 96/003-004).

50 *Id.*

51 See *French v. Australian Sports Commission*, CAS 2004/A/651, Award of 11 July 2005, available at <http://www.tas-cas.org/en/pdf/French.pdf>. The panel overturned the conviction of a cyclist who was charged, as part of his doping offense, with trafficking a glucocorticosteroid and equine growth hormone (both prohibited substances) as well as knowingly assisting others in trafficking these substances. Much of the evidence presented by the prosecution was based on used injectable items and empty vials found in the athlete’s dormitory. The panel noted that the chain of custody for these items did not meet the usual standards that would be applicable for a urine sample to be sent to a laboratory, nor were standards of preserving evidence seized in an investigation which may lead to forensic testing and examination met. Although the panel would not go as far as finding that a standard approaching ‘beyond a reasonable doubt’ was required (as submitted by the cyclist), it did accept that the offenses were serious allegations which must be proven to a higher level of satisfaction. 52 *De Bruin*, supra note 48, at 266.

53 The recently decided cases of track & field athletes Tim Montgomery and Chryste Gaines may or may not have an effect on the standard of proof CAS requires in future cases. Citing an earlier decision, the arbitrators in both cases repeated, “It makes little, if indeed any, difference whether a ‘beyond reasonable doubt’ or ‘comfortable satisfaction’ standard is applied to determine the claims against the Respondents. This will become all the more manifest in due course, when the Panel renders its awards on the merits of USADA’s claims. Either way, USADA bears the burden of proving, by strong evidence commensurate with the serious claims it makes, that the Respondents committed the doping offences in question.” *T. Montgomery*, CAS 2004/O/645; *Ch. Gaines*, CAS 2004/O/649.

These cases arose out of the BALCO scandal and are the only cases as of December 2005 decided by CAS involving “non-analytical positives.” There was no positive drug test, but instead extrinsic evidence was admitted by USADA to suggest that doping had occurred. The arbitration panel did not seem to suggest that they were requiring a higher standard of proof than in previous cases, but did imply that the more serious the charge, the stronger the evidence must be in order to make the arbitration panel “comfortable.”

54 See *B. v. International Judo Federation*, CAS 98/214, Award of 17 March 1999, CAS Digest II, at 308 (“Every athlete enjoys the presumption of innocence until such time as the presence of a banned substance in his body is established. It is a matter for the sports organization to prove that presence...”); see also *DeBruin*, supra note 48, at 266 (“The panel is equally in no doubt that the

athlete has is to present affirmative evidence in his defense to combat the evidence of a positive test. Since most doping cases involve a positive drug test, it may seem that the burden is on the athlete to show his or her innocence. Despite this appearance, there is not a true reversal of the burden of proof in these cases. Every athlete is given the presumption of innocence.

As part of showing the presence of a banned substance in the athlete's biological sample, the sports body must show that the procedures for collecting, storing, and analyzing the biological samples were carried out correctly. The standard of proof that the sports body is required to meet when showing each of these elements is the aforementioned *comfortable satisfaction* standard.⁵⁵ When the analysis of a biological sample is conducted by a laboratory accredited by WADA, the laboratory is presumed to have conducted the analysis and other custodial procedures correctly.⁵⁶

If there is a discrepancy between the standards required for the collection, storing, and analysis of the biological samples, the discrepancy must be reasonably considered to have affected the results of an otherwise valid test to influence the ultimate finding of a doping offense. In a case arising out of the Olympic Games in Sydney⁵⁷, the amount of urine in the sample bottle indicated on the form at the time of collection was 62mL and the amount indicated on the laboratory form was 100mL. The CAS panel found that since the bottle contained sufficient urine to continue with the analysis and the same result was reached when analyzing both the 'A' and the 'B' bottle,⁵⁸ the irregularity in the

burden of proof lay upon FINA to establish that an offence has been committed.")

55 See *N.J.Y.W. v. FINA*, CAS 98/208, Award of 22 December 1998 (quoting *Korneev and Ghouliev v. IOC*) ("...ingredients must be established to the comfortable satisfaction of the Court having in mind the seriousness of the allegation which is made.").

56 WADC § 3.2.1 provides: "WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for laboratory analysis. The Athlete may rebut this presumption by establishing that a departure from the International Standard occurred. If the Athlete rebuts the preceding presumption by showing that a departure from the International Standard occurred, then the Anti-Doping Organization shall have the burden to establish that such departure did not cause the Adverse Analytical Finding." World Anti-Doping Code § 3.2.1 (March 2003), available at http://www.wada-ama.org/rtecontent/document/code_v3.pdf; see also *Poll v. FINA*, CAS 2002/A/399, Award of 31 January 2003 (confirming that since the athlete had produced no evidence that the laboratory's accreditation was in jeopardy, the presumption that the analysis was carried out properly was valid).

57 *Andreea Raducan v. IOC*, CAS OG 2000/011, Award of 28 September 2000, CAS Digest II, at 665.

58 When an athlete's urine sample is collected the specimen is immediately divided into two different bottles at the collection site while the athlete is present. These two bottles are known as the 'A' and the 'B' bottles. The bottles are then sealed in such a way that someone is unable to open the bottles without breaking the tamper-proof seal. (There are numerous designs of collection kits, but this is a

record showing the volume of urine taken could not reasonably be considered to have affected the results and therefore had no effect on the finding of a doping offense.

Once the prosecuting sports body has established that the analysis reveals the presence of a prohibited substance or its metabolites, the burden of proof shifts to the accused athlete to produce exculpatory counter evidence.⁵⁹ As one CAS panel framed it, “taking into account the seriousness of the measures which may be taken against [the athlete] and which are, moreover, akin to punitive sanctions, there is no doubt that, in application of the general principles of law, the person responsible has the right to discharge himself through counter-evidence.”⁶⁰

B. Culpability in Determining Disqualification: “Strict Liability” in Anti-Doping Law

One must keep in mind the two distinct consequences of a doping violation: disqualification from a particular competition and suspension from future competition. If a performance-enhancing substance is found in an athlete’s body during a competition the disqualification is automatic, regardless of the fault of the athlete, to ensure fairness for the other athletes taking part in the competition. If an athlete has a prohibited substance in his or her body, they ought to be disqualified since he or she potentially has an unfair competitive advantage over his or her opponents. It makes no difference to the other athletes whether the

common feature.) Both samples are sent to the laboratory for analysis, but the ‘A’ bottle is the only bottle opened and tested. If the specimen is found to contain a prohibited substance, the athlete has the opportunity to witness the opening and testing of the ‘B’ bottle. This process removes many of the doubts that may exist about whether the laboratory reported the results for the correct specimen.

59 The Seventh Circuit of the United States Court of Appeals opined on this burden shifting in *Slaney v. IAAF*, 244 F.3d 580 (7th Cir. 2001). The court rejected the athlete’s claim that the burden-shifting was violative of U.S. public policy, stating that the requirement within the arbitration proceeding that the athlete produce clear and convincing evidence that her positive doping test was due to something other than doping does not invoke a public policy violation. *Id.* at 593-94.

60 *G. v. FEI*, CAS 92/63, Award of 10 September 1992, CAS Digest I, at 115. The panel gave examples of such counter-evidence, including proof that the presence of a prohibited substance is the result of an act of malicious intent by a third party or that the result of the analyses performed is erroneous. Once the burden shifts to the athlete, the athlete must show both how the prohibited substance got into their body and that there was no negligence on the athlete’s part in allowing it to do so in order to be eligible for a reduced or eliminated sanction. In *Meca-Medina v. FINA*, a Spanish swimmer claimed that his positive test was the result of the consumption of boar meat. *Meca-Medina v. FINA*, CAS 99/A/234, Award of 29 February 2000. The panel found that the athlete had failed to prove that the source of the prohibited substance was the ingestion of the boar meat since the facts submitted by the swimmer were not verifiable and were based on unproven scientific theories. Therefore, the athlete’s sanction was upheld.

offending athlete obtained that illicit competitive advantage intentionally, negligently, or without fault. In *N. v. FEI*, an equestrian case involving a doped horse, the panel concluded that 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’.”⁶¹ The panel went on to follow precedent of prior hearings⁶² and concluded that “in order to preserve equality between competitors, the disqualification should stand even if the rider is innocent.”⁶³

CAS arbitrators have followed this same logic with human competitors as well. In *C. v. FINA*, the panel stated that “once a banned substance is discovered in the urine or blood of an athlete, he must automatically be disqualified from the competition in question, without any possibility for him to rebut the presumption of guilt.”⁶⁴

This concept of strict liability is widely thought of as the cornerstone of all anti-doping practices.⁶⁵ The World Anti-Doping Code (WADC) affirms this in its comment to Article 2.1.1:

For purposes of anti-doping violations involving the presence of a Prohibited Substance (or its Metabolites or Markers), the Code adopts the rule of strict liability which is found in the [Olympic Movement Anti-Doping Code, predecessor to the WADC] and the vast majority of existing anti-doping rules. Under the strict liability principle, an anti-doping rule violation occurs whenever a Prohibited Substance is found in an Athlete’s bodily Specimen. The violation occurs whether or not the Athlete intentionally or unintentionally used a Prohibited Substance or was negligent or otherwise at fault.⁶⁶

Essentially, the WADC has adopted the principle that has emerged over the years in case law espoused as strict liability.⁶⁷ The concept of strict liability in the context of anti-doping is triggered when an athlete’s biological sample (normally urine or blood) tests positive for the presence of a banned substance or

61 *N. v. FEI*, CAS 94/126, Award of 9 December 1998, CAS Digest II, at 141.

62 For other equestrian cases, see *G. v. FEI*, CAS 91/53, Award of 15 January 1992, CAS Digest I, at 79; *F. v. FEI*, CAS 95/147, Award of 22 April 1996, CAS Digest I, at 245; for an automatic disqualification of a human athlete, see *C. v. FINA*, CAS 95/141, Award of 22 April 1996, CAS Digest I, at 220.

63 *N. v. FEI*, supra note 61, at 141.

64 *C. v. FINA*, supra note 62, at 200.

65 WADA Report on ATP Cases (2004), available at http://www.wada-ama.org/rtecontent/document/wada_atp_report.pdf.

66 World Anti-Doping Code, Comment to Article 2.1.1, 8 (2003), available at http://www.wada-ama.org/rtecontent/document/code_v3.pdf.

67 Richard McLaren, Exceptional Circumstances: Is it Strict?, I.S.L.R. 2005, 2 (May), 32-37.

the metabolite of a banned substance. It would not matter how the banned substance made its way into the athlete's body or whether the athlete was negligent or reckless in allowing the substance to enter the athlete's body – the athlete is held strictly liable for the presence of that banned substance.

In *Baxter v. IOC*⁶⁸, a British alpine skier with a documented history of nasal congestion was stripped of his bronze medal won at the 2002 Winter Olympics in Salt Lake City. The athlete had ingested an over-the-counter medication containing the banned substance “levmetamfetamine” that he purchased while in Salt Lake City. The athlete had used this same product back home in the United Kingdom, unaware that the product had a different formulation when sold over-the-counter in the United States. Although the panel found that the athlete did not intend to ingest the substance, he was nevertheless found guilty of the doping offense and his disqualification was upheld.⁶⁹

An athlete need not ingest the prohibited substance to be guilty of a doping offense. A male athlete whose urine tested positive for traces of clostebol metabolites, claimed that he was contaminated as a result of sexual intercourse with a woman who had administered a medication containing clostebol for a vaginal affection.⁷⁰ Even though a WADA accredited laboratory proved that an athlete could test positive after sexual intercourse with a woman using this medication, the athlete was held strictly liable for having the steroid in his system.⁷¹

Obviously, intent is not an element of a doping offense. The mens rea of the athlete is of no consequence when assessing whether a doping violation has occurred. Even if an athlete can prove that the presence of a prohibited substance in their biological specimen exists through no fault or intent of his own, the athlete is disqualified – even in what seems like the most unjust of circumstances.

Few cases have elicited more heartfelt questioning of whether the strict liability doctrine produces too harsh of results than that of 16-year old Romanian gymnast Andreea Raducan.⁷² Raducan had been training as a gymnast since she was four years of age. On the biggest stage of all, Raducan won the gold medal

68 *Baxter v. IOC*, CAS 2002/A/376, Award of 15 October 2002, CAS Digest III, at 303.

69 *Baxter's* suspension was not at issue in the CAS appeal. Since only the disqualification was at issue, the panel did not reach whether *Baxter* exhibited “no significant fault or negligence,” a concept discussed *infra* at 38, 39 and note 120, at 44..

70 Henrique Pereira, et. al., Incidental Clostebol Contamination in Athletes after Sexual Intercourse, 50 *Journal of Clinical Chemistry* 456 (2004), available at <http://www.clinchem.org/cgi/content/full/50/2/456> (last visited March 27, 2006).

71 *Id.*

72 *Raducan v. IOC*, CAS OG 2000/011, Award of 29 September 2000, CAS Digest II, at 673.

for the Gymnastics Women's Individual All-Around Event at the 2000 Olympic Games in Sydney. Before the competition she had visited her team doctor complaining of a headache, running nose, and congestion. The doctor gave her a standard cold medication tablet which contained pseudoephedrine, a banned substance. A urine sample, collected after her medal winning performance, revealed the presence of the decongestant.⁷³ Despite the fact that the panel felt sympathy for Andreea, it nonetheless found that a doping offense had occurred and forced the young athlete to surrender her gold medal. The panel further found that when "balancing the interests of Miss Raducan with the commitment of the Olympic Movement to drug-free sport, the Anti-Doping Code must be enforced without compromise."⁷⁴

Moreover, actual performance enhancement by the doping agent is not necessary for a finding of a doping violation.⁷⁵ In *Raducan*, the panel found that the small amount of pseudoephedrine could not have enhanced her performance, but disqualified the young gymnast anyway.⁷⁶ Another sympathetic case occurred at the 1992 Barcelona Paralympics in *National Wheelchair Basketball Association (NWBA) v. International Paralympic Committee (IPC)*.⁷⁷ A wheelchair basketball athlete had suffered a toe injury during a training session the week before the competition that had aggravated his ongoing nerve root pain problem. His coach gave him a single tablet of the painkiller Darvocet after checking with the Medical Controls Guide and finding Darvocet absent from the banned list. Unfortunately, one of the components of Darvocet, propoxyphene, was on the banned substance list. During the subsequent CAS hearing, the athlete argued that the painkiller was not performance-enhancing and since the applicable doping rules at the time did not provide for a complete definition of

⁷³ A urine sample taken from Andreea three days later after another event resulted in no positive finding for a prohibited substance. *Id.*

⁷⁴ *Id.* The *Raducan* panel also found that the athlete's young age, low weight (given the possibility that heavier athletes might not produce positive results if taking the same dosage of the cold medicine), the fact that Andreea was taking the pills to maintain her health, and the fact that she was given the pills by a trusted doctor did not have any bearing on the case and that the principle of strict liability must prevail when fairness to other competitors is at stake.

This case also raises the issue of whether actual performance enhancement should be taken into account in assessing whether a doping violation has occurred.

⁷⁵ One CAS arbitrator has even compared the objectives of anti-doping policy to those of the fight against drunk driving, where the presence of a certain amount of alcohol in a driver's body is sufficient to constitute an offense, regardless of whether the driver is actually impaired. See Denis Oswald, "Absolute and Strict Liability in the Fight Against Doping", CAS Seminar – 2001 Booklet, 77 (available from the Court of Arbitration for Sport upon request).

⁷⁶ *Raducan*, supra note 72, at 671.

⁷⁷ *NWBA v. IPC*, CAS 95/122, Award of 5 March 1996, CAS Digest I, at 173.

doping, the panel should decide on a case-by-case basis whether there was performance enhancement. The CAS panel stated that they were reluctant to hold that the applicable rules allowed the occurrence of a violation to be determined by reference to subjective determinations. Since the rules did not require a finding of intent to dope, the panel found that the strict liability standard was valid regardless of whether actual performance enhancement had occurred.⁷⁸ The panel expressed regret that the wording of the applicable rules labeled the athlete “guilty of doping”:

This is perhaps unfortunate phraseology, because the word “guilty” suggests reprehensible conduct and does not allow the outsider to distinguish between cheaters and inadvertent violators. There is no suggestion anywhere that [the athlete] was a cheater, in the sense of seeking an unfair advantage. He simply failed to keep his body free of banned substances. That is enough.⁷⁹

C. Necessity of the “Strict Liability” Standard in Anti-Doping Efforts

Critics have pointed to cases such as *Raducan*, *NWPA*, and *Baxter* to show how the current system is set up to be potentially unfair to individual athletes. Nevertheless, the “strict liability” regime has maintained its preeminence in anti-doping case law. Critics of the strict liability principle point to the fact that the athlete is not required to display any culpable negligence in order to be punished (referring to the principle of *nulla poena sine culpa*, which states that someone should not be punished unless they possess a guilty state of mind). However, any application of this principle is misplaced in the disqualification context because the interest in preserving fair competition is paramount in such cases. As one CAS panel has asserted, “too literal an application of the principle ‘Nulla poena sine culpa’ could have damaging consequences on the effectiveness of anti-doping measures. Indeed, if for each case the sports federations had to prove the intentional nature of the act (desire to dope to improve one’s performance) in order to be able to give it the force of an offence, the fight against doping would become practically impossible.”⁸⁰

⁷⁸ This case was decided in 1996, after *Quigley v. UIT* (discussed *infra*) where the wording of the applicable rules clearly required an intent to dope by the athlete, but years before *Hipperdinger v. ATP* and *Strahija v. FINA* (both discussed *infra*) where CAS required that the applicable anti-doping code (now the WADC) must provide that there is strict liability.

⁷⁹ *NWBA*, supra note 77, at 178.

⁸⁰ *C. v. FINA*, supra note 62, at 220. Alternatively, one might argue that an athlete should be exonerated where he or she can prove both; 1) that he or she did not intend to ingest the banned substance, and 2) that the ingestion of the substance had no performance-enhancing effect. However, issues of judicial efficiency and the scientific difficulty of establishing efficacy caution against such a rule. Actual performance enhancement is nearly impossible to conclusively prove or disprove.

One must keep in mind that anti-doping rules are not established to protect athletes who have been accused of doping, but rather to safeguard the integrity of the competition itself and protect those athletes who have not been accused of doping.⁸¹ But perhaps the best rationale for the necessity of the strict liability standard in anti-doping efforts was articulated by the arbitration panel in *Quigley v. UIT*:

It is true that a strict liability test is likely in some sense to be unfair in an individual case...where the Athlete may have taken medication as the result of mislabelling (sic) or faulty advice for which he or she is not responsible - particularly in the circumstances of sudden illness in a foreign country. But it is also in some sense "unfair" for an Athlete to get food poisoning on the eve of an important competition. Yet in neither case will the rules of the competition be altered to undo the unfairness. Just as the competition will not be postponed to await the Athlete's recovery, so the prohibition of banned substances will not be lifted in recognition of its accidental absorption. The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable Persons, which the law cannot repair.

Furthermore, it appears to be 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. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations - particularly those run on modest budgets - in their fight against doping.

[Information obtained from author's interview with Don H. Catlin, M.D.] Whether a substance of a given quantity actually enhances performance will depend on the unique physical characteristics of each athlete, how and when the substance was administered, and numerous other factors. Thus, if this defense were available, nearly every doping case would come down to a battle of experts. Even with the burden on the athlete to show no performance-enhancing effect, a panel may be persuaded by the athlete's expert's opinion. This could be the case even though the ability of any expert to definitively answer the question of performance enhancement is circumspect. A finding that no doping violation had occurred would likely open the floodgates for intentionally doping athletes who test positive to follow this same defense, undermining anti-doping efforts as a whole.

81 Canadian Olympic Committee & Beckie Scott v. International Olympic Committee, CAS 2002/O/373, Award of 18 December 2003, CAS Digest III, at 17 (CAS panel ordering the IOC to award the gold medal in a cross-country skiing event that took place during the 2002 Winter Olympics in Salt Lake City to Beckie Scott, who had originally placed 3rd in the event, after it was found that the two skiers who finished ahead of her were guilty of doping).

For these reasons, the Panel would as a matter of principle be prepared to apply a strict liability test. The Panel is aware that arguments have been raised that a strict liability standard is unreasonable, and indeed contrary to natural justice, because it does not permit the accused to establish moral innocence. It has even been argued that it is an excessive restraint of trade. The Panel is unconvinced by such objections and considers that in principle the high objectives and practical necessities of the fight against doping amply justify the application of a strict liability standard.⁸²

As was true over a decade ago when *Quigley* was decided, the fight against doping in athletics remains difficult and complex. The athletes themselves are the only ones who can properly take responsibility to proactively ensure that no banned substances enter their bodies. This duty is thrust upon them contractually and ethically by their participation in their sport. This burden on the athletes is essential to ensure the integrity of the sports in which they compete. A number of doping cases may produce outcomes that seem unjust, but the sum of these injustices is minor in comparison to the overall inequity that would result from a standard lower than strict liability. Any such standard would increase the probability that cheating athletes would be able to slip past anti-doping regulations. The fairness of sporting competitions would be vulnerable to increased questioning. Honest rule-abiding athletes would be unable to compete with those whose performance is enhanced by artificial and unethical means. In order to protect the integrity of sport, the strict liability standard needs to be enforced without compromise, as it has shown to be an effective tool in the fight against doping.

D. Notice: The Need for Athletes to Know the Rules vs. Need for Flexibility

An effective anti-doping regime must provide athletes with as much notice as possible of the rules that comprise the system. Even though some rules must be kept vague for purposes which are legitimate to anti-doping efforts, anti-doping jurisprudence should generally follow the *nullum crimen sine lege certa* principle. This principle prohibits determining offenses and punishments on the basis of unclear or undefined rules. Only sufficiently specified sanctions can instruct an arbiter precisely which particular behavior is punishable and how the behavior is to be punished. Ensuring that athletes have proper notice of precise rules whenever possible is essential to maintaining the trust and integrity of the system itself.

CAS has found that in order for a strict liability standard to be applied, it

⁸² USA Shooting & Quigley v. International Shooting Union (UIT), CAS 94/129, Award of 23 May 1995, CAS Digest I, at 187, 193-194.

must be clearly stated that the anti-doping program is one that adheres to strict liability. In *Quigley v. UIT*, a case that arose in the “pioneer days” of global anti-doping efforts, the arbitrators commented that “the fact that the Panel has sympathy for the principle of a strict liability rule obviously does not allow the Panel to create such a rule where it does not exist.”⁸³ The applicable UIT Anti-Doping Regulations at the time were drawn up long before anti-doping rules were unified among the various sports. Although the Regulations claimed to be based on strict liability, they defined doping as “the use of one or more [prohibited] substances...with the aim of attaining an increase in performance...” (emphasis added). The athlete claimed that he had been given a cold medication containing a banned substance by a doctor while at a shooting competition in Cairo, Egypt. Because UIT was unable to show that the athlete used this product with the aim of attaining an increase in performance (as required by UIT’s rules at the time), CAS overturned the doping offense and reinstated the athlete as the winner of the competition.⁸⁴ The panel stated:

If [the athlete] had been subject to a fundamentally different regime, i.e. that of strict liability, his understanding would have been different and his conduct might therefore have been different. He might have summoned the fortitude to eschew medications prescribed by a stranger. In other words, his conduct may have been responsive to his perception of a greater risk of sanction. This is a matter of legitimate expectations, and is crucial to any decent system of laws.

The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorised bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the *de facto* practice over the course of many years of a small group of insiders.⁸⁵

Perhaps in part because of *Quigley*, anti-doping rules have since provided clear notice to athletes that they will be held strictly liable for banned substances found in their body.

The doping resolution system, like many other legal systems, inherently has

83 Id. at 194.

84 After *Quigley*, CAS has not seen a case where the applicable anti-doping regulations required an intent element.

85 Id. at 197-8.

unpredictable elements.⁸⁶ Even though sport authorities should optimally provide the maximum possible notice of their rules, certain rules must be intentionally kept vague. For example, of particular importance on the prohibited lists of nearly all anti-doping programs is the "...and related substances" clause that can be found following the list of banned substances in each category (e.g. stimulants, anabolic agents, etc.).⁸⁷ This provision ensures that an athlete cannot ingest a substance that has been chemically altered in a minor way and subsequently claim that the "new" substance is not prohibited since it is not specifically enumerated on the banned list. If athletes were able to defend themselves successfully with such a claim, the fight against doping would be handicapped as wily athletes who associate with underground chemists would easily be able to escape sanction while using performance-enhancing substances.

Designer steroids, such as THG, are a classic example of the need for the "...and related substances" clause. Nobody disputes that THG is a powerful steroid, but it would have been impossible to add it to the prohibited list before the BALCO scandal because its existence was unknown. It also would have been unfair (and also terrible policy) to allow the nefarious athletes who used THG to avoid disqualification and suspension simply because they found and administered a previously unknown steroid.

The classic definition of a "related substance" is one that has a "similar chemical structure or similar pharmacological effect(s)" as those substances on the prohibited list. In the aforementioned cases that arose on the final day of the 2002 Winter Olympic Games in Salt Lake City after three cross-country skiers tested positive for the newly marketed pharmaceutical, darbepoetin, the athletes claimed that darbepoetin was not actually a banned substance. The CAS panel rejected this claim by recognizing that "[a]lthough darbepoetin is not specifically listed as a prohibited substance...it is an analogue or mimetic of erythropoietin," and, therefore, a prohibited substance."⁸⁸ This finding was based on the testimony of the Scientific Director at the pharmaceutical company which developed darbepoetin and the Scientific Director at the laboratory that had performed the doping analyses.

86 See Written Testimony of Richard W. Pound, Vice President, International Olympic Committee and Current Chairman of the World Anti-Doping Agency, before the U.S. Senate Committee on Commerce, Science, and Transportation (Oct. 20, 1999), available at <http://commerce.senate.gov/hearings/1020pou.pdf>.

87 The 2005 Prohibited List lists examples of types of substances for each panel that is banned and contains the phrase "...and other substances with a similar chemical structure or similar biological effect(s)" at the end of each list. The 2005 Prohibited List, available at <http://www.wada-ama.org/en/prohibitedlist.ch2>.

88 *Lazutina*, supra note 32, at 277.

Although proceedings that turn on the "...and related substances" clause are rare, a complex case arising from the 2004 Olympic Games in Athens that was decided by CAS in October of 2005 could have a profound effect on whether a compound not specifically enumerated is considered a prohibited substance. In *Calle Williams v. IOC*⁸⁹, a bronze medal winning cyclist from Colombia tested positive after ingesting pills prescribed by a doctor affiliated with the Colombian National Olympic Committee. The pills contained isometheptene, a substance not specifically enumerated as prohibited. The IOC submitted evidence that WADA considered isometheptene to be a prohibited substance and claimed that such a finding by WADA was not challengeable by an athlete. The CAS panel found that although a substance specifically enumerated was not subject to challenge by an athlete, "a WADA determination to treat a substance as 'similar' to a listed substance can be challenged by athletes." The panel went on to find that the IOC has the burden to specify the particular substance or substances to which the purported "related substance" is similar:

The Panel is unanimously of the view that the classification of a substance as having "a similar chemical structure or similar pharmacological effect(s)" requires a similarity to one or several of the particular substances on the list. It is not sufficient for WADA or the IOC, or any other anti-doping agency, simply to assert that a substance, such as Isometheptene, is "a stimulant" and thus a prohibited substance (when that assertion is disputed by an athlete) without specifying the particular substance on the List with which similarity is supposed to exist.⁹⁰

Because the IOC had not met its burden of specifying the enumerated substance to which isometheptene was similar, the panel was unable to find that a doping offense had been committed.⁹¹ Despite the acknowledgment that some

89 Maria Luisa Calle Williams v. IOC, CAS 2005/A/726, Award of 19 October 2005.

90 Id. at 14.

91 The *Williams* case was further complicated by the fact that the athlete had actually tested positive for heptaminol, which had formerly been specifically enumerated as a banned stimulant but had been taken off the list before the 2004 Olympics. Isometheptene is a similar substance to heptaminol. Isometheptene metabolizes into desmethyl-isometheptene, which transforms during a laboratory analysis (because of chemicals used) into heptaminol. During the first CAS hearing the parties took no issue with an expert's conclusion that both heptaminol and isometheptene had a similar chemical structure or similar pharmacological effect as those substances expressly named as stimulants on the WADA Prohibited List. After the hearing, but before CAS had completed the award, the athlete and her advisors became aware that there was another expert who disagreed with this conclusion. CAS decided to re-open the proceedings under Article R44.1 of the CAS Code as this constituted an exceptional circumstance. As of January 1, 2006, both heptaminol and isometheptene will be specifically added to the WADA list of prohibited stimulants.

rules must be kept vague for purposes which are legitimate to anti-doping efforts, the *Williams* case has proven to be an example of anti-doping jurisprudence following the *nullum crimen sine lege certa* principle.

E. Culpability when Determining Suspension: Reducing or Eliminating Suspension in Exceptional Circumstances

The other consequence of a doping offense, suspension, is often a greater punishment for the athlete than disqualification. Unlike a disqualification, a suspension from future competition is based on some level of culpability of the accused athlete. This is true despite the notion that strict liability is the bedrock principle upon which a finding of a doping offense is based.

The WADC follows this idea of strict liability for the initial finding of a doping offense, but it does soften its standards slightly if exceptional circumstances exist and “the Athlete can demonstrate that he or she was not at fault or significant fault.”⁹² It is important to distinguish fault from intent. Simply because an athlete did not *intend* to ingest a prohibited substance does not mean that he or she does not possess some level of culpability or blame for the ingestion of the substance. Although the doping offense still occurs in a circumstance in which the athlete does not intend to ingest a banned substance, the athlete will have the opportunity to have his or her sanction reduced or potentially even eliminated by showing that he or she bears “no fault or liability” or “no *significant* fault or liability.” The athlete still faces disqualification as a result of the doping offense, regardless of fault, but has a limited opportunity to have his or her suspension reduced or eliminated.

This leaves the question of what burden the athlete must meet to show either “no fault or liability” or “no *significant* fault or liability.” Following the definitions established by the WADC, arbitrators have defined “no fault or negligence” as occurring when the athlete *could not*, even with the exercise of the *utmost caution, reasonably have suspected*, that he had been administered a prohibited substance.⁹³ CAS panels have defined this as a very high standard

The *Williams* panel also stated that for a substance to be treated as prohibited two out of the following three criteria must be present even if a similarity with a specified substance exists: potential performance enhancement, a health risk, and violation of the spirit of sport. The panel conceded that a substance which passes the test of similarity will almost definitely meet at least two of these criteria.

92 World Anti-Doping Code, Comment to Art. 2.1.1, 8(2003), available at http://www.wada-ama.org/rtecontent/document/code_v3.pdf.

93 World Anti-Doping Code, app. 1 (2003); See also *Knauss v. FIS*, CAS 2005/A/847, Award of 20 July 2005; *Squizzato v. FINA*, CAS 2005/A/830, Award of 15 July 2005 available at <http://www.tas-cas.org/en/pdf/squizzato.pdf>; *Hipperdinger v. ATP*, CAS 2004/A/690, Award of 24 March 2005; *Vencill v. USADA*, CAS 2003/A/484, Award of 11 March 2004.

that will only be met in exceptional circumstances.⁹⁴ The anti-doping rules of the International Amateur Athletic Federation (IAAF), the international federation for track and field, specifically carve out situations which will *not* be considered exceptional circumstances:

[T]he following will not be regarded as cases which are exceptional: an allegation that the prohibited substance or prohibited method was given to an athlete by another person without his knowledge, an allegation that the prohibited substance was taken by mistake, an allegation that the prohibited substance was due to the taking of contaminated food supplements or an allegation that medication was prescribed by athlete support personnel in ignorance of the fact that it contained a prohibited substance.⁹⁵

It seems that the IAAF may only consider the circumstances exceptional, and therefore rising to the level of “no fault or liability” in narrow circumstances where the athlete can offer evidence of a competitor’s violation of anti-doping policy. This most likely includes the situation where an athlete was intentionally doped by one of the athlete’s competitors:

[E]xceptional circumstances may however exist where an athlete has provided substantial evidence or assistance to the IAAF, his National Federation or other relevant body which has resulted in the IAAF, his National Federation or other relevant body discovering or establishing an anti-doping rule violation by another person involving possession trafficking or administration to an athlete.⁹⁶

It seems likely that CAS would follow this same logic. As of December 2005, no adjudicated case using the WADC’s rules has been found to fall under the “no fault or liability” category.

For an athlete to bear “no *significant* fault or liability,” the athlete must establish that his or her negligence, when viewed in the totality of the circumstances, was not significant in relationship to the anti-doping rule violation.⁹⁷ If the athlete can meet this lesser standard, he or she is eligible to have his or her sanction reduced by up to one half of the minimum suspension period under the applicable rules. A CAS panel found that this standard was met in *Squizzato v. FINA*,⁹⁸ decided in July 2005. There, a 17-year old swimmer had

94 As evidenced by *Knauss*, inquiring with and receiving false information from a supplement distributor about a product’s contents falls well short of an exercise of the utmost caution. *Knauss*, supra note 93, at 10.

95 IAAF Anti-Doping Rules, R. 38 (12)(iii) (2006), available at <http://www.iaaf.org/newsfiles/25519.pdf>.

96 IAAF Anti-Doping Rules, R. 38 (12)(iv) (2006) (internal citations omitted).

97 World Anti-Doping Code, app. 1 (2003).

98 *Squizzato*, supra note 93, at 4.

been given a cream containing clostebol by her mother to help fight a skin affection between her toes. The panel found that although the athlete had failed to abide by her duty of diligence and was negligent in using a medical product without the advice of a doctor, her negligence was mild.⁹⁹ Therefore, the athlete bore no significant fault or negligence and was eligible to have her sanction reduced.¹⁰⁰

Contrast this result with that in *Hipperdinger v. ATP*,¹⁰¹ decided in March 2005. A Spanish tennis player tested positive for cocaine while at a tournament in Chile. The athlete claimed that his positive test was the result of drinking coca tea and chewing coca leaves that he was given by a Chilean friend in order to combat symptoms of altitude sickness. The panel stated that since drinking herbal tea is a common means of soothing the effects of high altitude, the athlete had no reason to have been particularly vigilant before drinking some tea prepared by a friend. If he had only consumed the tea, the panel stated that it might have agreed with the athlete that he bore no significant fault or negligence. However, since the athlete also chewed leaves of an unknown origin, which is a rather unusual way of curing illnesses, the athlete should have been alert and inquired further about the leaves. Therefore his negligence, when viewed in the totality of the circumstances, was significant and his sanction was not eligible for reduction.

As previously discussed, dietary supplements can be the cause of positive doping test results. It is almost always impossible to distinguish between positive tests caused by supplements and those caused by intentional steroid use.¹⁰² In nearly all cases, the athlete bears significant negligence even if he or she is able to establish that the cause of his or her positive test was a poorly labeled, contaminated supplement.

99 The panel also noted that the athlete had not gained any competitive advantage from such a small amount of clostebol, even though actual performance enhancement should not be considered a criteria for determining whether a doping offense has occurred or whether the athlete possesses some level of fault. *Id.*

100 The panel was specific to note that the age of the athlete was not a factor in determining whether the athlete bore any significant fault or liability. “[T]he age of the appellant does not absolve her from responsibility because the Appellant had been competing for 10 years at that time, and in swimming it is not uncommon to have 17-year old athletes compete at the highest level.” *Id.* at 11; See also *Stylianou v. FINA, CAS 2003/A/447, Award of 20 January 2004*, at 2 (stating that “...age does not fall within the category of ‘Exceptional Circumstances.’”)

101 *Hipperdinger*, *supra* note 93, at 12-15.

102 See Don H. Catlin, MD, et al., Trace Contamination of Over-the-Counter Androstenedione and Positive Urine Test Results for a Nandrolone Metabolite, 284 *JAMA* 2618, 2620-21 (2000) (reporting that several anabolic steroids that can cause positive urine tests for the metabolites of nandrolone are sold over-the-counter in the U.S. as dietary supplements).

CAS arbitrators have recognized that the athlete has a duty to make certain that nothing containing a banned substance enters his or her body. A positive test indicates a failure to abide by that duty. Such was the case of U.S. swimmer Kicker Vencill who tested positive after ingesting a multi-vitamin contaminated with androstenediol, androstenedione, and norandrostenedione.¹⁰³ The CAS arbitrators were “satisfied that the athlete did not ‘know or suspect’ that his supplements were contaminated,” but nonetheless found the athlete’s conduct “amount[ed] to a total disregard of his positive duty to ensure that no prohibited substance enter[ed] his body.”¹⁰⁴ The panel rejected Vencill’s claim that he bore “no significant fault or negligence” and upheld his full two-year suspension costing the swimmer a chance to participate in the 2004 Olympics.¹⁰⁵

However, compare this finding with *Knauss v. FIS*, decided in July 2005.¹⁰⁶ In *Knauss*, a downhill skier tested positive for low levels of norandrosterone and presented evidence that the positive test was caused by a poorly labeled dietary supplement (coincidentally, the same multi-vitamin that Kicker Vencill had taken).¹⁰⁷ The panel easily found that the athlete did not meet the standard of bearing “no fault or negligence” as he could have taken further steps to ensure that a banned substance did not enter his body, such as not taking the dietary supplement. But the panel found that since he had read the package label and inquired with the product’s distributor about the potential banned substance content, the athlete bore “no *significant* fault or liability” (emphasis added). However, the panel noted that the athlete *barely* met this threshold, and therefore he was not eligible for a further reduction of the length of his suspension than

103 The product causing the positive test was *Super Complete Capsules* manufactured by Ultimate Nutrition. *Vencill*, supra note 93, at 9. This is the same product that caused Hans Knauss’ positive test in the recently decided *Knauss v. FIS*, discussed *infra*.

104 *Vencill*, supra note 93, at 21, 25.

105 Vencill was subsequently successful in suing the manufacturer of the supplement for over half a million dollars. Ben Fox, Banned Swimmer Wins Case over Supplements, USA Today, available at http://www.usatoday.com/news/health/2005-05-13-swimmer_x.htm (May 13, 2005); Skier Hans Knauss, case discussed *infra*, has recently obtained the same attorney as Kicker Vencill and is initiating a similar lawsuit against the supplement manufacturer. Nathaniel Vinton, Hans Knauss Hires American Lawyer and Vows to Sue Connecticut Supplement Producer, Ski Racing, at http://www.skiracing.com/news/news_display.php/2618/ALPINE (Oct. 20, 2005).

106 *Knauss v. FIS*, CAS 2005/A/847, at 9.

107 The dietary supplement which Knauss blamed his positive test on was *Super Complete Capsules* produced by Ultimate Nutrition. Swimmer Kicker Vencill (discussed supra note 93, at 39) presented evidence that the same product caused his positive test in *Vencill*, but was found to bear significant fault or negligence because the “circumstances amounted to a total disregard of his positive duty to ensure that no prohibited substance entered his body.” *Vencill*, supra note 93, at 7, 9 and 25. The cases are apparently distinguishable because Vencill had not inquired with the product’s distributor regarding potential banned substance content.

that which had already been granted to him by his federation.¹⁰⁸

In another case where an athlete was sanctioned as the result of a positive test caused by a mislabeled supplement, the CAS panel laid out policy reasons why this mislabeling should not constitute an excuse for a doping violation:

[A]n athlete cannot exculpate himself/herself by simply stating that the container of the particular product taken by him/her did not specify that it contained a prohibited substance. It is obvious that the sale of nutritional supplements, many of which are available over the internet and thus sold without an effective governmental control, would go down dramatically if they properly declared that they contain (or could contain) substances prohibited under the rules governing certain sports. Therefore, to allow athletes the excuse that a nutritional supplement was mislabelled [sic] would provide an additional incentive for the producers to continue that practice.¹⁰⁹

An athlete is similarly unable to successfully claim that his or her culpability is reduced because the product listed the herbal name of a substance rather than the chemical name (as would be found on the prohibited list). In *Haga v. Federation Internationale de Motocyclisme*,¹¹⁰ a motorcyclist had been taking a product containing the herbal substance MaHuang in an effort to support weight loss. He was apparently unaware that the active ingredient in MaHuang is the banned stimulant ephedrine. The CAS panel found this to be irrelevant and stated that herbal substances need to be examined with great care by athletes.

Arbitrators have made clear that it is neither the duty of the sports organizations nor the federations to warn athletes against the use of herbal remedies, medications, supplements, and similar substances.¹¹¹ Over the past few years, sports governing bodies have done a much better job educating athletes about the possibility that dietary supplements may contain banned substances even if those substances are not listed on the label. The athlete is not able to successfully claim that they did not have proper notice from their governing body of this potentiality.

It is also not a valid excuse for an athlete to claim that they were given a

108 FIS had reduced the athlete's penalty from 2 years to 18 months based on a finding that the totality of the circumstances provided that the athlete was not significantly at fault for the doping violation. The panel noted that even if FIS had given a lesser reduction than the six months, the panel would have still upheld the smaller reduction. *Knauss*, supra note 106, at 3-4.

109 *A. v. Federation Internationale de Lutttes Associees*, CAS 2000/A/317, Award of 9 July 2001, CAS Digest III, at 159, 171.

110 *H. v. Federation Internationale de Motocyclisme*, CAS 2000/A/281, Award of 22 December 2000, CAS Digest II, at 410.

111 *Squizzato*, supra note 93, at 11; *Hipperdinger*, supra note 93, at 15, 18; Meri-Jo Borzilleri, "Trouble Comes in a Bottle for Some Athletes," *The Gazette* (Colorado Springs), Aug. 15, 2005.

medication, supplement, or other product by someone who should have known better than to give the athlete such a product. It is solely the athlete's duty to keep their body free of banned substances, and they cannot be allowed to escape liability by shifting the blame to someone else. In *Edwards v. IAAF*¹¹², the fact that the athlete was given glucose pills by her chiropractor did not remove the athlete's negligence. The panel stated that "...such a negligence must be attributed to the athlete who uses [the chiropractor] in supplying the athlete either a food source or a supplement. It would put an end to any meaningful fight against doping if an athlete was able to shift his/her responsibility with respect to substances which enter the body to someone else and avoid being sanctioned because the athlete himself/herself did not know of that substance."¹¹³

The complexity of the contents of many products (ranging from vitamins to herbal preparations to protein shakes) requires that the burden must be on each individual athlete to ensure that their body remains free of banned substances. Generally, athletes are unable to successfully claim to be free of significant liability in situations where they have not met this burden.¹¹⁴

Arbitrators have found that even after they have inquired into whether the athlete bears "no fault or liability" or "no significant fault or liability," a separate inquiry should be made to assess whether the punishment is proportional.¹¹⁵ Before the acceptance of the WADC, when there was generally no specifically enumerated mechanism for a reduction or elimination of a sanction based on such exceptional circumstances, CAS repeatedly recognized that "a sanction may

112 *Edwards v. IAAF and USATF*, CAS OG 04/003, Award of 17 August 2004, at 16, available at http://www.usantidoping.org/files/active/arbitration_rulings/TFedwardsfinalCAS081704.pdf.

113 *Id.*

114 It has become quite common for athletes in professional, amateur, and Olympic sports to blame their positive tests on supplements. Even though this normally does not liberate them from legal sanctions, the athlete's public image seems to suffer less when they effectively shift the blame to supplement manufacturers. This is unfortunate. Although there are athletes such as Kicker Vencill and Hans Knauss whose level of culpability could perhaps invoke sympathy, the vast majority of athletes who blame positive tests on contaminated supplements are probably either lying about the source of the positive test or have recklessly consumed products whose safety was less than reliable.

As an example, professional baseball star Rafael Palmeiro was recently suspended for violation of Major League Baseball's steroid policy and implied that his positive test was the result of a vitamin injection. However, it was later revealed that the anabolic agent found in the player's urine was stanozolol, a heavy duty steroid which is extremely unlikely to ever be found in contaminated dietary supplements. Although Palmeiro's image has certainly suffered as a result of the scandal, some sports journalists sympathized with him and implied that there should be no doping violation if intent to enhance performance could not be shown. See *Borzilleri*, supra note 111. However, this implication, as previously noted, is short-sighted and would likely be so burdensome on anti-doping authorities that it would put an end to any meaningful fight against doping.

115 *Squizzato*, supra note 93 at 11-12; *Hipperdinger*, supra note 93 at 18.

not be disproportionate and must always reflect the extent of the athlete's guilt."¹¹⁶ At least one panel since the widespread adoption of the WADC has held that simply because a federation has adopted the WADC with its provisions for exceptional circumstances "does not force the conclusion that there is no other possibility for greater or less reduction a sanction" than allowed by the rules.¹¹⁷ The panel went on to note that the rules are still "regulations of an association which cannot (directly or indirectly) replace fundamental and general legal principles like the doctrine of proportionality *a priori* for every thinkable case."¹¹⁸ The panel concluded that "the principle of proportionality would apply if the award were to constitute an attack on personal rights which was serious and totally disproportionate to the behaviour penalized."¹¹⁹

Although the extent to which anti-doping's punitive system is similar in nature to punishment in criminal justice systems is arguable, most observers of CAS doping arbitrations would agree that there is at least some correlation between the two systems. This begs the question of whether the punitive system in doping law complies with fundamental legal principles regarding personal freedom and the protection of personal rights.

This question was analyzed by the Federal Tribunal of Switzerland in 1999. Four members of the Chinese national swimming team brought an action¹²⁰ claiming that a CAS decision to suspend the four swimmers for the presence of triamterene¹²¹ in their urine samples constituted "a serious and unwarranted violation of their personal liberties and personal rights."¹²² The swimmers claimed that the penalty they were given (a two-year ban which was the maximum allowed for a first time doping offense by FINA, the international swimming federation) did not comply with the principle of proportionality. They maintained that since top level athletes have brief periods of peak athletic performance, this suspension effectively ended their careers.¹²³ Although the

116 *A. v. Federation Internationale de Lutttes Associees*, CAS 2000/A/317, at 159; see also *C. v. FINA*, supra note 62, at 141; *N. v. FEI*, supra note 62, at 73; *F. v. FINA*, CAS 96/156.

117 *Squizzato*, supra note 93 at 13.

118 *Id.*

119 *Id.* at 14.

120 As the Court of Arbitration for Sport has its seat in Lausanne, Switzerland, the Federal Tribunal of Switzerland is the only state court with jurisdiction on matters related to the legitimacy of awards rendered by CAS.

121 Triamterene is a diuretic whose use is prohibited by FINA and is used by athletes to mask the presence of other banned substances in urine samples. Sports Medicine Australia, *Drugs in Sport*, at <http://www.sma.org.au/information/dis.asp> (last visited May 14, 2005).

122 *N., J., Y., W. v. FINA*, 2nd Civil Division of the Swiss Federal Tribunal, 5P. 83/1999 (31 March 1999), CAS Digest II, at 775.

123 The swimmers also argued that the amount of the diuretic found in their urine samples was so low

court recognized that the suspension would seriously burden the athletes' careers, the court rejected the notion that the CAS award was in violation of the doctrine of proportionality since the suspension was the result of a proven violation of an anti-doping rule, whose application the swimmers had accepted and agreed to as members of a national federation affiliated with FINA.

Other legal scholars have agreed with the Swiss court that the punitive system in anti-doping law, specifically the system proliferated recently by the WADC, complies with commonly accepted principles of international law.¹²⁴ In a legal analysis commissioned by WADA, Professor Gabrielle Kaufmann-Kohler finds that the WADC conforms with basic notions of human rights and general principles of law with respect to its strict liability regime, the proportionality of its punishments, and the legal presumptions that exist within the system.¹²⁵

IV. NEED FOR CLARITY, CERTAINTY, AND TRUST IN THE SYSTEM

Doubts about both the legitimacy and fairness of a sport's anti-doping

that a two-year suspension was a violation of the proportionality doctrine and therefore violative of fundamental international legal principles. The Swiss court, however, found that the suspension imposed on the swimmers involved "only a moderate restriction on their freedom of movement," and was therefore proportional. *Id.*

The swimmers further argued that the application of FINA's Anti-Doping rules by CAS amounted to a criminal law penalty and should therefore be subject to compliance with the minimal procedural guarantees provided by criminal law. The swimmers also claimed that "only the most extreme custodial sentences that can be pronounced by the state courts are capable of producing such effects." The court rejected this position, stating that this was a matter of private law and the decisions reached by CAS regarding procedural issues such as the burden of proof and assessment of evidence should not be regulated on the basis of concepts specific to criminal law. *Id.*

¹²⁴Gabrielle Kaufmann-Kohler, Legal Opinion of the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law, (WADA 2003), available at <http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf>.

¹²⁵ However, as this analysis was commissioned by WADA, the same organization that created and continues to promote the WADC, the legal analysis must be viewed with this potential conflict of interest in mind. Such conflicts of interest have become a hallmark of the world surrounding Olympic sport.

The debate over whether the WADC complies with fundamental principles of proportionality is far from over. In September 2005, a dispute between FIFA (soccer's governing body) and WADA erupted over whether FIFA should be forced to accept WADA's punishment structure. FIFA claimed that WADA's punishments might be out of line with notions of proportionality and pointed to *Squizzato*, where the CAS panel found that a provision of the WADC which mandates that the "mandatory" 2-year suspension be reduced by no more than one half when the athlete is found to bear "no significant fault or negligence" was not in line with the doctrine of proportionality. See Reuters, No End to WADA Doping Dispute, Sept. 10, 2005, available at <http://www5.sbs.com.au/wview/index.php3?id=62910>.

system can have damaging consequences to the sport itself.¹²⁶ For an anti-doping system to work properly, the athletes, sporting bodies, and fans must all be able to trust in the system. The people who run the system must do so justly, fairly, and with integrity in order to achieve this level of faith. Because of the serious consequences of a doping charge, there is also a need for clarity, certainty, and consistency in the rules. In order to maintain the trust of the parties who look to anti-doping rules to resolve their disputes, these rules must be applied consistently and clearly by anti-doping authorities and tribunals.

A. Authorities Must Abide By the Rules They Promulgate

Those in charge of anti-doping efforts must be careful to follow their own rules if they want others to trust in the legitimacy of the system they orchestrate. The accusations levied at seven-time Tour de France champion Lance Armstrong during August 2005 are an example of how anti-doping authorities can sometimes unethically exceed their boundaries. A French sports newspaper somehow obtained what was purported to be data from research performed on Armstrong's urine sample from seven years before. This data suggested that Armstrong had used EPO and the newspaper printed this information. There was no suggestion that any proper chain-of-custody procedures had been followed, no evidence that proper specimen storage and handling had occurred, no B-sample to permit Armstrong the retesting rights that any accused athlete would normally have, and no proof that the information was legitimate. The leak of this information to a newspaper and the laboratory's breach of anonymity of the research specimen were, alone, major breaches of WADA protocol. Instead of denouncing the newspaper's tactics and assigning fault to the laboratory for these breaches, WADA's Chairman, Richard Pound, unwisely implied support¹²⁷ for the accusations that other sport organizations, such as USA Cycling, described as "completely without credibility."¹²⁸ The International Cycling Union (UCI) also condemned WADA for not taking a stronger stand that its own guidelines should be followed. This failure of an anti-doping organization's leadership to support

126 A December 2004 poll conducted by USA Today showed that 61% of baseball fans were less enthusiastic about the sport due to its steroid problems. See Mel Antonen, Poll: Baseball Fans Back Tougher Drug Policy, USA Today, available at http://www.usatoday.com/sports/2004-12-10-steroid-gallup-poll_x.htm (Dec. 10, 2004).

127 Shortly after the story broke, Richard Pound is quoted as saying "...it's a case that has to be answered." See Elliot Almond, Lance Armstrong Denies He Cheated in Tour de France, San Jose Mercury News, available at http://www.mercurynews.com/ml/mercurynews/sports/other_sports/12461120.htm (Aug. 24, 2005).

128 See Associated Press, USA Cycling Strongly Backs Armstrong, at <http://msnbc.msn.com/id/9050722/> (Aug. 27, 2005).

and follow the organization's own rules cannot be repeated if the organization wishes to promote trust and legitimacy in the system over which it presides.

B. Enhancing Clarity & Consistency: CAS's Recent Use of Precedent

An athlete who is already burdened by the strict liability principle must not only be able to rely on those who oversee anti-doping efforts to do so with impartiality and consistency. The athlete must also be able to count on the fact that anti-doping law will not be a source of ambiguity through which he or she is unable to clearly navigate. The principle of *nullum crimen sine lege certa* must be followed.¹²⁹

Like most arbitration panels, a CAS panel is not bound by the precedent of prior arbitration proceedings or obliged to obey the rules of *stare decisis*.¹³⁰ However, over the past decade there has been general agreement among CAS arbitrators that panels should generally follow the reasoning of previous tribunals unless there are compelling reasons in the interest of justice not to do so.¹³¹ In this regard CAS has developed its own body of case law, referred to by some as *lex sportiva*,¹³² that brings a needed sense of predictability and certainty to many of the disputes that come before CAS – especially cases involving doping.

While this relatively recent tendency of CAS panels to rely on precedent has promoted the consistency and clarity of anti-doping rules, situations still occur where arbitration panels disagree with each other.¹³³ The predictability and clarity of anti-doping law could be improved if CAS were to take steps to resolve such disagreements. This could be in the form of simple advisory opinions that would help guide athletes and governing bodies as to the current status of the

129 This principle means that rules which lack clarity or certainty must not be enforced, or, at a minimum, must only be enforced after interpreting any uncertainties against the drafter. See *Aanes v. FILA*, CAS 2001/A/317, Award of 9 July 2001, Digest of CAS Awards III, at 159, (panel observing that clarity and certainty were desirable in an area as sensitive as doping, but the lack of clarity in this case did “not go quite far enough to justify rejecting them as a whole”; the panel therefore applied any uncertainties *contra stipulatorem*, i.e. against the governing body).

130 *Stare decisis* means “to stand by things decided.” Black's Law Dictionary, Second Pocket Edition, (Bryan A. Garner, ed. 1996). The principal means that decisions of prior cases shall be used as precedent for future cases.

131 See *A.C. v. FINA*, CAS 96/149, Award of 13 March 1997, CAS Digest I, at 251.

132 See Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World's Sport Disputes*, 35 Val. U. L. Rev. 379, (2001) (noting that the term *lex sportiva* was coined by the Acting Secretary General of CAS Matthieu Reeb at the time of the publishing of the first digest of CAS decisions).

133 As an example, compare *Pastorello v. USADA*, CAS 2002/A/363, supra note 47 (panel states that an athlete's period of suspension can be increased upon an appeal) with *Demetis v. FINA*, CAS 2002/A/432, Award of 27 May 2003, CAS Digest III, at 419 (panel found that a suspension cannot be increased).

law. CAS could also initiate the development of a more formal “supreme” arbitration panel that would conclusively resolve such questions.

To continue to settle doping cases fairly, CAS must ensure that all parties who come before its arbitration panels trust in both the clarity of anti-doping rules and the consistency in their application. The uniform application of clear and certain rules in the anti-doping context is essential to maintain the trust of athletes, sport organizations, and spectators. Without this trust, doubt will cloud the results of competitions, the outcomes of doping cases, and the integrity of sport as a whole.

CONCLUSION

The goals of those who promote anti-doping efforts are difficult to achieve. At a time when Congress is calling for professional sports in the United States to be held to Olympic standards, it is incumbent upon us to first ask whether the Olympic model is the ideal standard that professional sports should look to.¹³⁴ While the international Olympic system is better than most other programs at balancing the competing justices,¹³⁵ there are tangible areas where improvements can be made.

One of these areas is encouraging a larger effort dedicated to improving scientific study in anti-doping detection methodology. Increased funding, devoted specifically to research for improvement and advancement of doping detection methods, is crucial to the long-term success of any effort aimed at eradicating performance-enhancing drugs from sport. Cheaters will continue to discover new methods and substances to use and anti-doping scientists must be

134 On November 3rd, 2005 the Senate Committee on Commerce, Science, and Transportation introduced the Integrity in Professional Sports Act, which requires professional sports (Major League Baseball, Minor League Baseball, National Football League, National Basketball Association, and National Hockey League) to have anti-doping programs with stricter standards and harsher sanctions akin to those set forth by the WADC. The Bill’s sponsor, Sen. Jim Bunning, had said all along that he “would rather the leagues come up with a tough new drug testing standard on their own. But all I have heard so far is a lot of talk. The leagues have had their chance and they have failed to lead, so now we will do it for them.” Press Release, U.S. Senator Jim Bunning, Bunning Leads Bipartisan Effort on Tougher Drug Testing Standards for Professional Sports (Nov. 3, 2005), available at http://bunning.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1398&Month=11&Year=2005 (last visited May 17, 2006).

These comments were likely primarily directed at Major League Baseball, whose steroid policy has been heavily criticized by both houses of Congress. On November 15, 2005, Major League Baseball and the Players’ Association agreed to a stricter steroid policy including harsher sanctions. As of December 2005, it is unknown what effect, if any, this new agreement will have on the proposed legislation.

135 The competing justices are the need to run effective anti-doping programs that catch as many cheaters as possible vs. the protection of the rights of athletes who have been accused of doping.

fully equipped to catch them. Furthermore, scientific advancement can simplify complex legal issues by showing more convincingly the guilt or innocence of an accused athlete.

In addition to scientific advancement, anti-doping authorities should also promote increased collaboration with the dietary supplement and pharmaceutical industries. Such cooperation will lead to a stronger, more united front in the fight against drugs in sport.

Also crucial to the improvement of the international anti-doping system are continued efforts aimed at increasing the predictability, clarity, and certainty of the rules that are in place. By creating a mechanism for resolving unsettled law and making greater efforts at educating athletes, trainers, and sport organizations about the current status of the law, anti-doping authorities could significantly level the playing field in regards to awareness of the rules. The valid concerns about unjust individual consequences in a strict liability system may fade away as the responsibilities of athletes, trainers, and sport organizations are further clarified and understood.

International sport must also continue to arm itself with a system of strict liability where the burden is placed on the athlete to ensure that his or her body remains free of banned substances. While the athletes must recognize and adhere to this ethical responsibility, the sporting bodies must remain mindful of the serious consequences that inevitably result from such a system. The livelihood and reputation of athletes are at stake when doping accusations are levied. Therefore it is incumbent upon the sporting bodies to do everything in their power to promote a fair, transparent, and trustworthy system.¹³⁶

As is the case with most legal systems, anti-doping jurisprudence is not perfect. Some consequences of the strict liability system, while promoting the integrity of athletics as a whole, may lead to individual injustices. However, promoting the eradication of performance-enhancing drug use in sport is both a virtuous and arduous task with inherent complexities and competing justices that require sacrifices. It is our duty to ensure that these sacrifices are minimized to

136 Many steps taken in recent years by the Olympic family with regard to its anti-doping programs have yielded beneficial results. The externalization of doping programs to organizations such as WADA & USADA, although not a perfect solution, has contributed to the decline of the conflict of interest concerns that plagued the Olympic family's anti-doping efforts only a few years ago. The balance recently struck in the WADC codifying the "no fault" and "no *significant* fault" provisions has brought anti-doping sanctions more in line with generally accepted principles of proportionality. The recent tendency of CAS to rely on the precedent of previous doping cases had added to the clarity and predictability that is vital to assure a fair and just system. The increasing independence of CAS from sport organizations has increased the legitimacy of its decisions and the anti-doping regime in Olympic sports as a whole.

the fullest extent possible. For sport as we know it to continue to thrive, we must encourage vigilance in constantly improving the world's anti-doping regime so that fairness and competitive spirit remain paramount.