PROBLEMS WITH STANDARDS IN SPORTS DOPING CONTROL: IMPROPER PROHIBITIONS, IMBALANCED PENALTIES

Jae Soog Lee
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When an athlete takes a prohibited drug, the offense is called “doping.” Anti-
doping regulations are imposed on athletes ostensibly to protect them from the health hazards of performance-enhancing drugs, the theory being that if athletes are not uniformly restricted from doping, competition could force them into a veritable arms race of drug use. Nearly all sports organizations have recently adopted or are preparing to adopt doping tests for their athletes under the World Anti-Doping Agency (WADA) Code of 2003. While its intentions are noble, the WADA Code is not without its problems. In particular, the Code exists outside of any national laws, imposing worldwide regulations on jurisdictions with dramatically different laws and cultures. It has also taken effect very quickly—in just slightly over four years—leaving athletes to suffer if their own sports organizations have not prepared thoroughly to apply it. Finally, some of its punishments are more severe than many criminal punishments, while it fails to guarantee basic due process protections. Thus, the solution is potentially far worse than the initial problem: athletes’ quality of life may be harmed much more if they are robbed of their livelihoods through overzealous anti-doping measures than if they had used substances that were potentially harmful to their health. It is thus important for entities considering adopting the WADA Code to seek legal revisions, and to develop clear and consistent doping controls that guarantee not only fair competition but also the protection of athletes’ rights.

Part I of this article describes the bases and standards of the WADA Code’s Prohibited Substances and Methods List and its included “Specified Substances.”

In Part II, I outline the problems inherent in WADA’s current methods for defining prohibited substances, urging greater transparency in the justification for including each substance as well as greater flexibility for arguing exceptions. I also explore imbalances between athletes’ human rights and the current system of penalization based on a strict liability standard. Finally, in III, I offer some suggestions for developing fairer anti-doping rules.
I. Bases and Standards of the Prohibitions and Specified Substances

A. History of Doping in Sports

The use of doping in sports dates back to the time of the ancient Greeks, who often used special diets and potions to enhance athletic performance. In the nineteenth century, other athletes in Europe used strychnine, caffeine, cocaine, and alcohol to enhance their performance.\(^1\) The first international sports organization to consider banning stimulating substances, however, was the International Amateur Athletic Federation (IAAF), in 1928.\(^2\) No official doping tests existed until 1966, when the International Cycling Union (UCI) and International Association of Federation Football (FIFA) took the first step towards implementation of doping tests.\(^3\) The first lists of prohibited substances were

\(^1\) http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=312 (last visited Feb. 11, 2008): “these drugs were often used by cyclists and other endurance athletes in the 19th century. Thomas Hicks ran to victory in the Olympic marathon of 1904 in Saint Louis with the help of raw egg, injections of strychnine, and doses of brandy administered to him during the race.”

\(^2\) Id. (“Meanwhile the problem was made worse by synthetic hormones, invented in the 1930s and in growing use for doping purposes since the 1950s. The death of Danish cyclist Knud Enemark Jensen during competition at the Olympic Games in Rome 1960 (the autopsy revealed traces of amphetamine) increased the pressure for sports authorities to introduce drug tests.”)

\(^3\) Id. “In the next year the International Olympic Committee (IOC) instituted its Medical Commission and set up its first list of prohibited substances. Drug tests were first introduced at the Olympic Winter Games in Grenoble and at the Olympic Games in Mexico in 1968. In the year before, the urgency of anti-doping
announced by the International Olympic Committee’s (IOC’s) Medical

Commission in 1967; anabolic steroids—the use of which was booming by the

1970s—were added to the banned list in 1976. The world was surprised when,

during the 1988 Seoul Olympics, authorities stripped Ben Johnson of his gold

medal for the 100-meter event after he tested positive for doping. Blood
doping—the process of removing and then re-injecting the athlete’s own blood to
boost hemoglobin levels—posed new challenges to regulation in the 1970s,

requiring the addition of prohibited practices to the existing tally of substances.

The IOC enacted and enforced doping regulations until 2001, when the World

Anti-Doping Administration (WADA) was formed to more specifically address

this issue. WADA’s roots can be traced back to a raid during the 1998 Tour de

France, when French police found a large number of banned substances and

linked them to employees of the Festina cycling team. This incident led the IOC

work had been highlighted by another tragic death, that of cyclist Tom Simpson
during the Tour de France.”

4 Id. “This resulted in a marked increase in the number of drugs disqualifications

in the late 1970s, notably in strength-related sports such as throwing events and

weightlifting.”

5 Id.

6 Id. “[W]hile the fight against stimulants and steroids was producing results, the

main front in the anti-doping war was rapidly shifting to blood doping. ‘Blood

boosting,’ removal and subsequent re-infusion of the athlete’s blood in order to

increase the level of oxygen-carrying haemoglobin, has been practiced since the

1970s.”
to conceive of an independent international agency with unified standards for anti-doping control, and to the 2001 incarnation of WADA, a Swiss private law foundation formally located in Lausanne, Switzerland, but operating out of Montreal, Canada.7

WADA’s mission is “to promote, coordinate, and monitor the global fight against doping in sport funded by the sports movements and governments of the world.”8 Its seven core activities include: (1) code adoption; (2) implementation and compliance; (3) science (to promote global research); (4) anti-doping coordination (to develop and maintain the Anti-doping Development Management System); (5) education (to coordinate effective anti-doping work); (6) athlete outreach (to educate athletes); and (7) out-of-competition testing (to assist stakeholders).9 The WADA Code summarizes the heart of the effort, providing the framework for harmonized anti-doping policies, rules, and regulations within

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9 Id.
sport organizations and among public authorities.\textsuperscript{10} Its four international standards deal with testing, laboratories, therapeutic use exemptions, and the List of Prohibited Substances and Methods.\textsuperscript{11}

The WADA made a full practice run at the Sydney Games in 2000, and in Copenhagen, on March 5, 2003, its anti-doping code was adopted worldwide by sports organizations and governments.\textsuperscript{12} The Code and its international standards were in force beginning January 1, 2004, and a revised Code was issued in November 2007 in Madrid. This revision included a commitment to full compliance by all international sports organizations and governments as well as a promise to protect athletes’ rights to safe and fair competition.\textsuperscript{13}

While the international superstructure of doping control is thus in place, the national, local, and private administration of standards is far from uniform. The history of doping in Korean sports, for example, is not well documented, as there was no regulation until the Korean Anti-Doping Agency (KADA) was established on June 22, 2007, pursuant to section 35 of the National Physical Exercise

\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{13} http://www.iihf.com/iihf-home/sport/anti-doping.html.
Promotion Act.\textsuperscript{14} This act granted KADA jurisdiction to carry on doping-related business and activities under the authority of Korea’s Ministry of Culture and Tourism.\textsuperscript{15} The KADA’s objectives include developing and implementing rules and procedures regarding the use and detection of banned substances and methods in Korean sports. The KADA is currently entirely funded by the Korean government and the National Sports Promotion Foundation.\textsuperscript{16}

Before its creation, the Korean National Training Center—a department of the Korea Olympics Committee—had administered doping controls against amateur national players.\textsuperscript{17}

Another limitation of the WADA Code is that it is meant to encompass all sports organizations including professional ones, but these latter have resisted WADA, as many contracts between professional sports organizations and their athletes contain their own provisions on doping. Furthermore, these organizations have vast resources and a loyal fan base, meaning that they do not depend on the Olympics for their popularity and revenue. The IOC is therefore rather powerless

\textsuperscript{14} http://www.kada-ad.or.kr/a03_job.asp; http://www.klaw.go.kr.
\textsuperscript{15} http://www.kada-ad.or.kr/a03_job.asp.
\textsuperscript{16} National Sports Promotion Act, art. 20, 22 (R.O.K) \textit{available at} http://www.klaw.go.kr/CNT2/LawContent/MCNT2LawIFrm.jsp (last visited Mar. 9, 2008).
\textsuperscript{17} http://www.sports.or.kr/player.
to enforce compliance.\textsuperscript{18} For example, when the IOC asked FIFA to adopt the code, it refused, and WADA and FIFA later reached an agreement allowing FIFA to “conduct an independent drug-testing regime and establish its own sanction schedule,” adopting the Code only when it sends players to compete in the Olympics.\textsuperscript{19} Overall, the Code was signed by about 570 sports organizations and 192 countries through the Copenhagen Declaration on Anti-Doping in Sport in 2003 and the General Conference of United Nations Educational, Scientific, and Cultural Organization (UNESCO) in October 2005. Many governments are still not legally bound by it, since it is a nongovernmental document.\textsuperscript{20}

\textbf{B. Definition of Doping}

There is no legal definition of doping. “Dope” originally signified “a stimulant drink used in tribal ceremonies in South Africa around the eighteenth century,” and the word first appeared in an English dictionary in 1889, defined as “a

\textsuperscript{19} Id. at 463-64.
narcotic potion for racehorses to reduce their performance.” The regulation of substance use has taken many forms throughout history, and the various purposes of this regulation have affected how agencies and groups have defined doping.

For example, some definitions have targeted the use of unspecified doping substances and methods used to enhance athletic performance. In 1952, the Deutsche Sportarztebund defined doping as taking a drug during a match with the intention of enhancing performance, regardless of whether the drug was effective. Examples of doping with the intention to enhance performance were given in the 1963 Counsel of Europe, the French law of 1999 for the protection of athlete’s health and the fight against doping, and the Olympic Movement Anti-Doping Code (OMADC).

Others have banned the use of certain substances and methods even when they have not been scientifically proven to enhance performance. The regulations may include a broader list of methods and substances, not all of which are known to be effective.

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21 David R., Mottram, DRUGS IN SPORT, at 32 (4th ed. 2006).
24 Id.
25 Id. at 32-43.(quoting Loi no. 99-223 du 23 mars 1999 relative a la protection de la sante des sportifs a la lutte contre le dopage, Titre II B De la prevention et de la Lutte contre le dopage, Section 2 Des Agissements interdits., Art. 17).
performance-enhancing, such as the IOC’s 1968 doping list,\textsuperscript{26} most of the

Swedish Federation’s,\textsuperscript{27} and a Portuguese law enacted in 1997.\textsuperscript{28} Still others
define doping as the actual presence of a substance in an athlete’s body, as was
the approach taken in WADA’s 2003 Code.\textsuperscript{29} Currently, doping is described as
“not only the misuse of the drugs by sportsmen and women, but also the use of
other methods of improving performance or of attempting to manipulate the
test.”\textsuperscript{30}

According to the IOC and the WADA Code, doping is defined as “the
occurrence of one or more of the anti-doping rule violations set forth in Article
2.1 through Article 2.8 of the Code.”\textsuperscript{31} Current anti-doping rule violations are as
follows: presenting a prohibited substance or its metabolites or makers in an
athlete’s bodily specimen; using or attempting to use a prohibited substance or a
prohibited method; refusing or failing to provide a sample for testing without
compelling justification; refusing information about one’s whereabouts or missed

\textsuperscript{26} Id. at 34-35.(quoting Thomas Summerer, \textit{Internationales Sportrecht vor dem

staatlichen Richter} (Munich, Verlag V. Florenz 1990), pp144-145).
\textsuperscript{27} Id. at 38-39.
\textsuperscript{28} Id. at 39-40.(quoting Statue Law no. 183/97 of 26 July 1997).
\textsuperscript{29} Id. at 59; WADA Art. 2.1
\textsuperscript{30} Soek et al \textit{supra} 22 n at 59.
\textsuperscript{31} WADA Code art.1, available at http://www.wada-
amo.org/rtecontent/document/code_v3.pdf; The IOC anti-Doping Rules
applicable to the Games of the XXIX Olympiad Beijing 2008 article 1, available
tests; tampering or attempting to tamper with any part of doping control;

possession of prohibited substances and methods; trafficking any of the prohibited

substances and/or methods, and/or administering or encouraging the use of

prohibited substances to other athletes. Since not all prohibited substances are

readily detectable in the human body, the above extension of the definition of
doping to that which scientific evidence cannot yet substantiate faces a tough burden of providing sufficient proof.

C. Criteria for Inclusion on the WADA Code’s Lists

A list of prohibited substances and methods was first published in 1967 by the International Olympic Committee (IOC). Since 2004, as mandated by the WADA Code, WADA has been responsible for the preparation and publication of this list. The list is the international standard that identifies substances and methods prohibited in competition, out of competition, and in particular sports.

33 Mottram, supra note 21 at 34.
34 Mottram, supra note 21 at 34.
The three major criteria for determining whether a substance or method should be prohibited are whether it causes: (1) Actual or potential enhancing of performance using the substances or methods through medical or other scientific evidence, pharmacological effect or experience;\(^{37}\) (2) Actual or potential health risk to the athletes using the substances or methods through medical or other scientific evidence, pharmacological effect or experience;\(^{38}\) or (3) Violation of the spirit of sport by using the substances or methods through medical or other scientific evidence, pharmacological effect or experience.\(^{39}\) To be listed as a prohibited substance and/or method within the scope of the WADA Code, any two of the three categories conditions above must be met.\(^{40}\)

In 1974, the IOC first prohibited anabolic steroids and thereafter introduced detection tests for numerous chemicals including testosterone (1982), caffeine (1984), beta blockers (1985), masking agents and human chorionic gonadotrophin (hCG) (1987), and growth hormone (GH) and other peptide hormones (1989).\(^{41}\)

Currently, WADA’s prohibited substances are classified into five groups:

\(^{37}\) WADA Code art. 4.3. 1.
\(^{38}\) WADA Code art. 4.3.2.
\(^{39}\) WADA Code art. 4.3.3.
\(^{40}\) WADA Code art. 4.3.
\(^{41}\) Mottram, supra note 21 at 36.
anabolic agents, hormones, beta-2 agonists, anti-estrogenic agents, and diuretics and masking agents.\textsuperscript{42} In 2004, WADA actually withdrew some substances from the prohibited list, including a number of stimulants (e.g. caffeine and synephrine) and drugs commonly found in over-the-counter cough and cold medicines such as phenylephrine, phenylpropanolamine, and pseudoephedrine.\textsuperscript{43} At the same time, WADA established a monitoring program for substances not on the prohibited list but that WADA wished to monitor in order to detect patterns of misuse in sport.\textsuperscript{44}

In 2005, WADA added “Specified Substances” to the list, which includes substances such as over-the-counter stimulants, cannabinoids, inhaled beta 2 agonists, glucocorticosteroids, beta blockers, and alcohol.\textsuperscript{45} Sanctions may be reduced for the presence of specified substances if athletes are “particularly susceptible to unintentional violations” due to these substances’ “general availability in medicinal products” or if they are “less likely to be successfully abused as doping agents.”\textsuperscript{46} If athletes wish to contest violations involving these substances, they must satisfy two conditions: (1) the doping violation must have

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\textsuperscript{43} Mottram, \textit{supra} note 21 at 39.
\textsuperscript{44} WADA Code art. 4.5.
\textsuperscript{45} Mottram, \textit{supra} note 21 at 38.
involved these substances, and (2) the athlete must establish that there was no
intention to enhance sport performance by use of the specified substances.\textsuperscript{47}

While in theory this clause should protect athletes from punishment for
unintended violations, there is little rationale provided for the determination of
which substances require such flexibility.

II. Potential Problems in the Structure of Doping Rules

A. Definitional Trouble Spots

There are two main problems with WADA’s current system of determining
prohibitions. First, while—scientifically speaking—the effects of many
substances remain under debate, WADA exercises uncontestable authority to
determine whether they belong on the prohibited lists. Second, their definitions
remain both too vague and too rigid. There is, for example, no distinction drawn
in the assessment of penalties between performance-enhancing substance use and
non-performance-enhancing use. On the other hand, in its creation of the
“specified substances” list as a separate entity from the prohibited substances list,

\textsuperscript{47} Id.
WADA acknowledges that national and cultural differences may influence the presence of certain substances in a tested athlete. However, it is not always clear from the data what should be a prohibited and what should be a specified substance. The list should not be fixed; rather, exceptional cases should be defined by individual circumstances.

The WADA stipulates that a “substance or method shall also be included on the prohibited list if WADA determines there is medical or other scientific evidence, pharmacological effect, or experience that the substance or method has the potential to mask the use of other prohibited substances and methods.” Such a stipulation may cause undue harm to athletes as such a defined range is too broad and vague, affording the WADA considerable and excessive discretion. Even more problematically, the WADA Code states that all inclusion decisions regarding prohibited substances and methods “shall be final and shall not be subject to challenge by an athlete or other person based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk, or violate the spirit of sport.” As Srikumaran Melethil has argued, such banning of challenges raises the “threat of a

48 WADA Code art. 4.3.2.
49 WADA Code art. 4.3.3.
scientific monopoly by the IOC, and is a violation of the ‘spirit of science.’” A major problem lies in the fact that substances do not have uniform effects, and that, despite the use of sophisticated chemical analytical methods, the detection of substances is still problematic and inaccurate. In light of these facts, WADA’s unilateral power to decide the proper status of a substance is problematic.

For example, the most popular doping agent, Erythropoietin (EPO), is a “naturally occurring hormone produced by the kidneys in low oxygen conditions.” Health risks rise as hematocrit (the proportion of red blood cells compared to total blood volume) values increase over fifty percent (Normal hematocrit values range between forty and fifty percent) and increased hematocrit, coupled with hypertension, increases nine-fold the risk of a stroke. Dehydration during exercise, as in endurance sports, exacerbates this risk by increasing blood viscosity (the reduction of blood’s ability to flow) and blood pressure. Use of EPO was suspected in the death of eighteen Dutch and Belgian

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51 Id. at 84-87.
52 Id. at 78.
53 Id. at 78-79.
cyclists and twelve Scandinavian orienteers in the late 1980s and early 1990s.\textsuperscript{54}

But various problems have been raised with respect to EPO’s placement on the prohibited list. First, there is an issue of proper testing methods, as hematocrit levels are more accurately tested using urinalysis than blood tests, but only if the drug has been used within 48 hours of the urinalysis.\textsuperscript{55} For example, Olga Yegerova tested positive for EPO use in 2001 at the Paris Grand Prix 5000m event as a result of her urine test. The International Association of Athletics Federations (IAAF) claimed that a blood test was needed as conclusive proof. A few weeks later, Yegerova was tested again and, although her blood test indicated EPO use, her urine test was negative, as such tests can only detect EPO when the drug has been used within forty eight hours prior to testing.\textsuperscript{56} A second problem is that EPO is listed under prohibited methods for enhancement of oxygen transfer only, not to increase hematocrit.\textsuperscript{57} Finally, hematocrit levels vary depending on the individual. The International Cycling Union (ICU) has established a limit on an athlete's hematocrit level of fifty percent to compete.\textsuperscript{58} However, about five


\textsuperscript{55} Melethil, supra n 50 at 79.

\textsuperscript{56} Id.

\textsuperscript{57} Id.

\textsuperscript{58} Id.
percent of the population has hematocrit levels totaling over fifty percent as a
natural level. Therefore, it is crucial that additional method(s) be adopted to
establish conclusive proof of EPO use.

The WADA does not currently disclose information concerning the prohibited
list explaining why each substance and method is included and what scientific
support exists for its inclusion. Providing this information would be an initial step
towards a public review of WADA’s policies, and may allow greater fairness for
athletes wishing to mount challenges to WADA’s accusations of doping. WADA
has also actively refused to disclose information on multiple occasions. For
example, Srikumaran Melethil phoned WADA officials to find the rationale
behind the decision to drop caffeine from the Prohibited List in 2004, but could
not obtain an answer. Several unsuccessful attempts have also been made by this
author, through e-mail and telephone calls, to procure information from WADA,
such as whether an athlete who never competed in international events or as a
national player would be included in the WADA Code, whether an athlete who
has never been educated about doping was covered by the Code, and what

59 Id.
60 Melethil, supra n 50 at 86.
penalties or responsibilities exist for sports organizations’ violation of athletes’ due process rights.

This lack of disclosure is troubling and disconcerting to say the least. The WADA must achieve informational transparency—namely, in all informational data supporting its prohibitions—for the benefit of athletes and the public so that affected parties could understand, research, and accept the list. However, WADA also must be open to challenges to the list based on research and other relevant legal contest. When enforcing such a list, the organization must leave channels open to receive reliable information that will help it to correct and update the list, as well as avoid victimizing innocent athletes.

A further complication arises since the WADA Code applies to countries worldwide, each of which has different domestic laws and cultures, countries or sports organizations considering adoption of the WADA Code must take responsibility to ensure that the Code doesn’t conflict with domestic laws or cultures, such as national constitutional due process standards, other related laws, and generally accepted law principles. Since it is likely too difficult to adapt the international WADA Code to each country’s culture and laws, the WADA should be flexible and allow countries to adapt its Code to fit their local contexts.
Application of the Prohibited Substances and Methods List should also be interpreted and applied on a case-by-case basis, with consideration given to whether an athlete displayed intent or negligence in using a banned substance. Additional consideration should be given to whether a drug is actually performance-enhancing.

Clearly, the WADA invests heavily in research on drug detection. In 2005, WADA used 25% of its $6.5 million budget on oxygen-delivery enhancement, gene therapy and cellular technologies (erythropoietin, myostatin, insulin-like growth factor 1), and growth enhancement.61 In the United States, $7 million each fiscal year from 2002 through 2006 was spent to direct the National Institute of Standards and Technology to establish a program to support research and training in methods of detecting the use of performance-enhancing drugs by athletes.62 However, WADA should instead be directing more research towards determining which drugs are actually harmful to athletes. Srikumaran Melethil has argued that “the mere listing of a substance or method in such a list is misinterpreted by most athletes that the substance or method offers an advantage,” and recommended that

WADA “convene a panel consisting primarily of clinical and basic pharmacologists, exercise physiologists and sports medicine researchers, and bioanalytical chemists to reconsider […] central and related questions.” To improve the application of the Code, the WADA should provide reliable scientific data to the athletes and to the public before or even during the enforcement of the prohibited list. More importantly, athletes and sports organizations must be educated about not only the list of prohibitions itself, but also the risks and lack of effectiveness of many popular drugs and supplements. They must also be given notice prior to substances and methods being included on the prohibited list. If WADA wishes to be effective, it must spend funds on prevention, and not just on the punishment of athletes.

B. The Strict Liability Standard

Sanctions under the WADA Code for using a prohibited substance or method are separated into two categories. The first category is disqualification: if an athlete violates the Code, the results of the event for that athlete are disqualified.65

63 Melethil, supra n 50 at 87-88.
64 Id. at 89.
65 WADA Code, art. 10.1.1.
This is mandatory, and the Court of Arbitration for Sport (CAS) considers neither the special circumstances of the case nor any issue of proportionality. However, a disqualification is allowed only if the test is carried out during the course of competition. The other category is to impose ineligibility. Penalties can range from two years to a lifetime. However, in exceptional circumstances, the measure of ineligibility may be waived when the athlete bears no significant fault or negligence for the violation, or reduced when the athlete did not intend to enhance sport performance by using the specified substance.

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67 Id. at 258 (citing B. v. FIJ, CAS 99/A/230, Award of 20 December 1999, CAS – Digest II, pp. 361, 366.).
68 WADA Code, art. 10.1.2.
69 WADA Code, art. 10.5.1. (“If the athlete establishes in an individual case involving an anti-doping rule violation under Art. 2.1… that he or she bears No Fault or Negligence for the violation…. [t]he otherwise applicable period of ineligibility shall be eliminated.”)
70 WADA Code, art. 10.3.
“The Prohibited List may identify specified substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents. Where an athlete can establish that the Use of such a specified substance was not intended to enhance sport performance. The period of ineligibility found in Art. 10.2 shall be replaced with the following:
First violation: at a minimum of warning and reprimand and no period of ineligibility from future events, and at a maximum one (1) year’s ineligibility.
Second violation: Two (2) years’ ineligibility.
Third violation: Lifetime Ineligibility.”
Prior to the mid-1980s, to satisfy elements of punishment in doping, the athlete’s act needed to fall within the definition of doping offence and to be illegal and culpable. Alan C. Michaels claims that “culpability refers to a morally blameworthy state of mind or vicious will or evil-meaning mind.” Since the mid-1980s, “the concept of ’strict liability’ as it has been used in doping cases does not imply an intentional element.... There is no tie between sanction and intent.” Under strict liability, the presentation of any prohibited substance or its metabolites or markers in an athlete’s body is automatically considered a punishable violation of doping rules, regardless of a doped athlete’s intent, fault, negligence, or knowledge of its use.

Only a limited number of national federations and central doping committees—such as the Sport Conference of Denmark, a large number of British federations, and the Netherlands Basketball Bond—had previously included strict liability in their doping regulations. However, WADA and the

71 Soek et al, supra n. 22 at 131.
73 Soek et al, supra n. 22 at 134.
74 WADA Code, art. 2.1.1.
75 Soek et al, supra n. 22 at 45.
76 Id. at 45-46 (UK Athletics definition of doping: “The offence of doping takes place when a prohibited substance is found to be present within an athlete’s body tissue or fluids[...]”.
77 Id. at 47.
CAS determinedly adopted strict liability, as has the Olympic Movement Anti-Doping Code and the vast majority of existing anti-doping rules.\textsuperscript{78} If positive results are found in any doping test, the athlete’s competition results are disqualified and no necessary fault must be found.\textsuperscript{79} The anti-doping organization bears the burden of proof that a doping violation has occurred under WADA Code Art. 3.1. The standard of proof required is less than the criminal standard, which is beyond all reasonable doubt, but greater than the ordinary civil standard, which is a balance of the probabilities.\textsuperscript{80} This standard has been broadly applied to doping cases involving professional athletes’ misconduct in most countries.\textsuperscript{81}

Strict liability, however, may result in unjust punishment of an individual who is not culpable, as the individual may have used all reasonable efforts to prevent or remain unaware of his or her punishable act.\textsuperscript{82} According to CAS case law, the presumption of guilt under strict liability can be rebutted where the athlete can show that “he was doped without being aware of it, that he was mistaken as to the

\begin{itemize}
\item \textsuperscript{78} Klaus Vieweg, The Definition of Doping and the Proof of a Doping Offense (An Anti-Doping Rule Violation) under Special Consideration of the German Legal Position, 15 Marq. Sports L. Rev. 37, 41-46 (2004).
\item \textsuperscript{79} WADA Code, art. 9, 10.1.9 Comment.
\item \textsuperscript{80} Blackshaw et al., supra n. 66 at 237.
\item \textsuperscript{81} WADA Code, art. 3.1. Comment.
\item \textsuperscript{82} Laurie L. Levenson, GOOD FAITH DEFENSES: RESHAPING STRICT LIABILITY CRIMES, 78 Cornell L. Rev. 401, 404-05 (1993).
\end{itemize}
content of a pill, or that he himself endogenously produces the banned substance.”

For this purpose, mere indications cannot be sufficient and stringent standards
must be applied to the assessment of this exculpatory proof.\textsuperscript{83} The CAS struck
down the decision to ban an athlete for unintentionally taking a banned substance,
stating that, “[t]he fight against doping is arduous, and it may require strict rules.
But the rule-makers and rule appliers must begin by being strict with themselves.”

Regulations, it agrees, must represent a “predictable mandate from duly
authorized bodies” and “be adopted in constitutionally proper ways,” and not be
“the product of an obscure process of accretion.”\textsuperscript{84}

It is the strict liability standard driving most challenges to the WADA Code’s
legitimacy from athletes and/or national governing bodies.\textsuperscript{85} In 1994, in USA
Shooting and Q. v. International Shooting Union (CAS 94/129), the CAS panel
decided that strict liability is not applicable “if the rules of the federation involved
required an ‘aim of attaining an increase of performance’ on the part the
athlete.”\textsuperscript{86} With respect to doping offences, the burden of proof shifts to the

\textsuperscript{83} CAS 98/214.
\textsuperscript{84} CAS 94/129.
\textsuperscript{85} Michael Straubel, DOPING DUE PROCESS: A CRITIQUE OF THE DOPING
CONTROL PROCESS IN INTERNATIONAL SPORTS, 106 Dick. L. Rev. 523
529-31 (2002).
\textsuperscript{86} Blackshaw et al., supra n. 66 at 236.
accused athlete to rebut the guilty verdict or imposed sanction. In Bouras, the CAS governed that the disqualification of the athlete who was under the influence of a prohibited substance is a necessary and inevitable consequence of the doping offence, even if there was no intent to violate the prohibitions or negligence associated with the offence.

If an athlete sanctioned under strict liability proves that he or she was not at fault or negligent for the violation, or not significantly at fault or negligent, the ineligibility period may be eliminated or reduced based on exceptional circumstances.87 Fixed penalties can be corrected by the CAS when considering flexibility and proportionality, which is applied where “the penalties imposed by an international federation can be deemed excessive or unfair.”88 Where considering the severity of a penalty, it must be in proportion with the seriousness of the infringement; according to the general principle of sports law, the athlete must be given the chance to rebut charges by providing exculpatory evidence.89

WADA Code Art. 10.5 also mitigates the penalties by reduction or elimination of the period of ineligibility under very exceptional circumstances.90 Both the CAS

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87 WADA Code, art. 10.5.1, 5.2.
88 CAS 99/A/246
89 CAS 99/A/246.
90 Id. at 22-23.
and the WADA Code, then, indicate that strict liability may not be fair to all
athletes in all cases.

More importantly, the sanctions for doping violations are “true statutory
penalties” because they restrict the athletes’ fundamental rights.\(^9\)\(^1\) Where
fundamental rights are limited, it can be by only statutory methods and cannot
exceed the necessity of protection of the public interest or others’ fundamental
rights, under the proportionality principle.\(^9\)\(^2\) When an association imposes on its
members necessary standards of conduct, these rules are not subject to review by
a legal authority—like the “rules of the game.”\(^9\)\(^3\) However, if a sports association
restricts fundamental human rights by imposing harsh penalties, “such as
retroactive disqualification, invalidation of important results or suspension for a
relatively long period of time,” legal authority steps in because these have the
character of “rules of law.”\(^9\)\(^4\) For example, in one case, the CAS awarded the
challenge that a lengthy suspension was a violation of a swimmer’s personal

\(^9\) Id. at 29.
\(^9\)\(^1\) Claude Rouiller, LEGAL OPINION at 20 (Nov. 2005) available at
http://www.wada-ama.org/rtecontent/document/Article_10_2_WADC_Swiss_Law.pdf (last visited
March 10, 2008). Id. at 20.
\(^9\)\(^2\) Id. at 20-21.
liberty.\textsuperscript{95} Also, in \textit{Avel Xavier}, the court ruled that the athlete’s suspension interfered with the economic freedom to choose and exercise one’s profession.\textsuperscript{96}

The right to work was recognized as a fundamental right in Germany.\textsuperscript{97}

According to legal opinion, application of the general principles of criminal procedure would apply in doping matters.\textsuperscript{98} The opinion further stated that, under Article 10.6 of the 2007 Draft Code, when “aggravating circumstances” are at stake, there should be “no punishment without law.”\textsuperscript{99} In \textit{Meca-Medina}, the Court has recently held that sport in general and anti-doping regulations in particular were not immune from EC competition law.\textsuperscript{100} Because WADA is just at the beginning stage of its practice, many unexpected problems may occur and in light

\textsuperscript{96} \textit{Id.} (“Article 27 of the Swiss Constitution was invoked by the athlete in the \textit{Abel Xavier} case.”).
\textsuperscript{97} \textit{Id.} (“See Grischka PETRI, \textit{Die Sanktionsregeln des World Anti-Doping-Codes} 231, SpuRt 2003, p. 231 and the references.”).
\textsuperscript{98} \textit{Id.} at 17 (“WADA’s effort to ensure the compatibility of the new Code with fundamental rights and to devote special attention to the criminal law procedural guarantees embodied in Article 6[(2-3) and 7] EHRC is a welcome development in the sports arena.”).
\textsuperscript{99} \textit{Id.}
of the WADA Code’s strictness, it is crucial that athletes’ fundamental rights must be attached with clarity, predictability and individualization.\textsuperscript{101}

C. Case in Point: Kim Bum-Suk

Kim Bum-Suk, a high school student, earned three Korean speed skating records on February 3, 2006 in the 87th National Winter Athletic Short Track Competition. After the competition, a urine sample taken from him tested positive for Triamterene—a diuretic on WADA’s Prohibited Substance List. Kim had ingested the substance by taking two doses of his grandmother’s arthritis medication in hopes of reducing some knee pain. In two hearings, in March and May 2006, Kim received a “warning” from the Korea Skating Union (KSU).

Seven months later, however, the KSU—under pressure from the International Skating Union (ISU)—informed Kim that he was suspended for two (2) years, as prescribed by the WADA Code rules.\textsuperscript{102}

\textsuperscript{101} Rouiller, \textit{supra} n. 93 at 13.
\textsuperscript{102} CAS 2007/A/1259 \textit{Kim Bum-Suk v/ Korea Skating Union}. Kim had suffered from arthritis in both knees from May 22, 2000, to January 3, 2005, and then he experienced no pain for one year. When he re-started practice skating in order to participate in the National Winter Festival scheduled for February 2-4, 2006, at Sungnam Ice Link, in Sungnam City, GyengGi-do, South Korea, Kim’s knee pain returned. Upon seeing Kim in severe pain, his grandmother gave him some of her own prescription arthritis medication to relieve the pain. Kim took the medication twice, the night before the competition on February 2, 2006, and the morning of
This heavy sanction was unreasonably stark, considering the number of gray areas into which Kim’s case fell. Beyond the questions of intent and whether or not the substance was “performance-enhancing,” there was, at the time of the competition, no formal doping control system yet in place in Korea, and the KSU had never informed its athletes of WADA’s rules. Kim thus found himself caught the competition on February 3, 2006. The Korea Skating Union (KSU) has never provided a doctor during their events and still does not. On February 3, 2006, Kim was selected for a doping test because he marked a new competition record, and he tested positive for Triamterene. The decision of the Disciplinary Committee of the Korea Olympics Committee (KOC) on March 17, 2006 was to issue a “warning.” The decision of the Disciplinary Committee of the KSU on May 15, 2006 was also to issue a “warning.” According to the KSU’s regulations, this decision was final, since Kim did not request a review within 15 days of its receipt. However, about seven months later, on December 29, 2006, the KSU changed its decision and instead declared a “two-year ineligibility” following the direction of the ISU. On April 9, 2007, the KSU and Kim agreed to appeal to the CAS to resolve the dispute. On April 17, 2007, both parties chose a sole arbitrator, Mr. Loh Lin Kok, advocate and solicitor from Singapore. Later, the KSU raised a jurisdictional objection, alleging that there was a condition in the Agreement on Applying for Arbitration that an appeal must be filed to the Korea Sports Arbitration Committee (KSAC) first. However, there was no such condition. At that time, the KSU was working with the Korean government on a bid to host the 2014 Winter Olympics, which may have influenced its actions. At the time of Kim’s case, there was no national body in Korea to review doping decisions involving national-level athletes rendered by sports organizations in accordance with WADA Code Art. 13.2.2. The Korea Anti-Doping Agency (KADA) was established on June 22, 2007—long after Kim’s case—pursuant to section 35 of the National Sports Promotion Act. Before that, the Korea Players Village of the KOC handled doping control over amateur national players. Even the KSU and KOC, who acted to test doping, did not have doping rules. The CAS arbitrator decided that “Kim had a legal remedy in Korea to apply for arbitration to the KSAC, even though the legal remedy appeared not to be a mandatory one.” However, to reach this decision, the arbitrator ruled on matters erroneously, failed to rule on claims, and reached issues not submitted by the parties. Although Kim prepared to appeal to the Swiss Supreme Court based on all of the reasons of the article 192(2) of CPI, he ultimately had to give up his case because for lack of money to pursue it.
in a transitional moment without, however, any proper recourse to appeal. When Kim did appeal his suspension, he and the KSU agreed to proceed to arbitration with the Court of Arbitration for Sport (CAS) on April 9, 2007. Both parties then signed an agreement to elect a sole arbitrator who would treat the case as “urgent,” but the KSU raised a groundless jurisdictional objection to delay the CAS’s decision until after its bid in July to host the 2014 Winter Olympics. The decision finally rendered on August 14, 2007 ruled in error and bias that the jurisdictional objection was valid, and additionally failed to address any of Kim’s own claims. The impact on his career and life were disastrous.

Beyond the organizational confusion involved in the transition of the Korean sports organizations to the standards of the WADA Code, Kim’s case highlights the more permanently embedded problems posed by the opaqueness of WADA’s list of outright prohibited substances vs. “specified” ones, sanctions for which may be reduced in certain circumstances. By definition, the substances included in the WADA Code’s prohibited substances list meet at least two of its three criteria for prohibition: actual or potential enhancing of performance; actual or potential health risk to the athletes; or violation of the spirit of sport. Triamterene, the substance found in Kim’s urine, is not among the “specified substances” that
are considered negotiable based on their likelihood of being taken unintentionally or for reasons other than performance enhancement. In Kim’s case, however, it should be, and his situation highlights the very real dangers of the WADA Code’s imperfections.

Were it not for strict liability, Kim Bum-Suk’s case would have been an exemplary case for exemption or mitigation of punishment. In fact, Kim’s use of Triamterene fails all three prongs of WADA’s test. Triamterene is “a diuretic…that increases the amount of urine passed, which causes the body to lose water and salt.” Diuretics may be misused for reduction of weight to meet weight-class limits, such as boxing, judo, or weightlifting; for overcoming fluid retention induced by androgenic steroids; and for modifying the excretion rate of urine and altering urinary concentrations of prohibited drugs. None of these situations was applicable to Kim. With respect to the danger posed to the athlete’s health, taking Triamterene only twice posed Kim no unreasonable risk. Finally, if, according to WADA’s Fundamental Rationale for the World Anti-Doping Code, the “spirit of sport” is “the celebration of the human spirit, body and mind”

104 Mottram, supra note 21 at 46-47.
characterized by “values: ethics, fair play and honesty; health; excellence in
performance; character and education; fun and joy; teamwork; dedication and
commitment; respect for rules and laws; respect for self and other participants;
courage; community and solidarity,” then Kim’s behavior in taking the
Triamterene does not appear to be in violation. In initial reviews, the KSU even
confirmed this in a letter to the ISU stating that “Kim unintentionally took
medicine not to improve his ability but to treat his disease.”

The WADA Code’s insufficiency in terms of cultural sensitivity also shows
itself in Kim’s case. The rationale for the “specified substances” portion of
WADA’s list is to account for substances “which are particularly susceptible to
unintentional anti-doping rules violations because of their general availability in
medicinal products or which are less likely to be successfully abused as doping
agents.” Triamterene is in fact generally available in medicinal products under
Korean law. The Korean Pharmaceutical Affairs Act section 21 establishes

107 WADA Code, art. 10.3.
and 12/13/1997); President Decrees regulations of the Pharmaceutical Affairs
Act§57 13 (In the following geographical areas, the pharmacist may dispense
medicine without a physician or dentist’s prescription.
1. Areas in which there are no medical facilities or pharmacies.
2. Islands where there are no medical facilities or pharmacies.
that a pharmacist may dispense medicine without a physician or dentist’s prescription,\textsuperscript{109} and Kim’s grandmother purchased arthritis medication which included Triamterene from such a pharmacist. Triamterene is also “less likely to be successfully abused as a doping agent” because it can enhance performance only in a very limited sports field, such as boxing, where diuretics may be abused to control weight.

The KSU did not, of course, have appropriate rules to cope with situations specific to Korean pharmaceutical culture that would apply under WADA Code Art 23.2.\textsuperscript{110} Considering the fact that the WADA Code had only been in effect for two years when Kim’s case occurred, and is still being refined as particular situations arise, WADA needs more flexible responses to cope with unanticipated circumstances, such as the “general availability” of certain drugs in certain cultures.

\textsuperscript{109} Pharmaceutical Affairs Act art. 21 (4) (R.O.K); President Decrees regulations art. 57 \&. 13 (R.O.K).

\textsuperscript{110} WADA Code Introduction: Comment (“the Code does not require absolute uniformity in result management”); Code, art. 23.2 (“The Signatories shall implement applicable Code provisions through policies, statutes, rules or regulations according to their authority and within their relevant spheres of responsibility.”).
III. Evaluation of Responsibilities and Suggestions for Improvement

A. Balance Responsibilities: Cause Impact Analysis, Consequence Impact Analysis

WADA’s penalties for violation of doping rules is extremely harsh with respect to athletes’ basic rights. We can see evidence of this fact in Kim’s case: due to a lack of education on the rules of doping, the absence of doping rules in Korea, and the violation of due process, an innocent young member of the KSU has suffered seriously, both monetarily and emotionally, from an unpredictable and unjust suspension. In theory, the doping rule makers and enforcers must begin by being stricter with themselves; they should not be permitted to exercise vague discretion. Although WADA is not a law-enforcement agency, in reality it exerts force over almost every sport organization in the world. Therefore, WADA has an obligation to uphold and respect athletes’ basic human rights.

However, WADA has unbalanced regulations, as it regulates athletes’ penalties yet does not have any penalty provisions for itself or other anti-doping agencies. Under the WADA Code (“Roles and Responsibilities”), multiple parties
bear responsibility concerning the implementation and enforcement of anti-doping rules. From a responsibility standpoint, where a doping violation has occurred because of a breach of any party’s duties under the WADA Code, all parties involved should share the burden of penalty. If violations of WADA rules or duties by the WADA itself, other anti-doping agencies, or sports organizations cause injury to athletes, the athletes’ liability should be reduced or eliminated according to a Cause Impact Analysis.

A cause impact analysis identifies who and/or what factors cause an athlete to dope and how much such cause would impact the determination of responsibility for the violation. Under strict liability, athletes are responsible for a positive result in a doping test regardless of fault.\textsuperscript{111} With penalties ranging from a two-year to lifetime suspension, it is fair and reasonable to transfer or share the severity of the penalty with others who might be responsible for it.\textsuperscript{112} In what follows, I list other individuals and bodies who might share this responsibility.

National Anti-doping Organizations: WADA Code Art. 20.4.2 establishes that national anti-doping organizations are responsible for requiring as a condition of membership or recognition that sports federations’ anti-doping policies and rules

\textsuperscript{111} \textit{WADA Code, art. 2.1.}  
\textsuperscript{112} \textit{Id. art. 10.2.}
are in compliance with the applicable provisions of the Code.\textsuperscript{113} WADA Code Art. 20.4.6. also says that national anti-doping organizations have a responsibility to withhold some or all funding from any member that is not in compliance with the Code.\textsuperscript{114} Therefore if national committees breach their duties, these committees and agencies should share responsibility by reducing sanctions on the athletes.

**Government:** WADA Code Art. 22.1 provides insight on any government that monitors or undertakes “the availability of prohibited substances and prohibited methods; the problem of nutritional supplements which contain undisclosed prohibited substances; withholding some or all financial support from sport organizations and participants that are not in accordance with the Code or applicable anti-doping rules adopted pursuant to the Code.”\textsuperscript{115} In the case that a government has neglected the above responsibilities and may have helped cause the violation of doping rules by an athlete, the athlete’s sanction should be reduced.

**WADA:** According to WADA Code Art. 20.7, WADA is responsible for monitoring the processing of adverse analytical findings and approving international standards applicable to the implementation of the Code.

**Others:** Company personnel, doctors, pharmacists, trainers, coaches, knowing teammates, and others involved in the manufacture or distribution of prohibited substances or methods may legally share responsibility for the athlete’s doping penalty unless the substances and methods are prescribed for treatment purposes

\textsuperscript{113} Id. art. 20.4.2.
\textsuperscript{114} Id. art. 20.4.6.
\textsuperscript{115} Id. art. 22.1.
by a doctor. These professionals are most likely to cause a direct impact on the athlete who tests positive for the substances or methods. Therefore, they should bear responsibilities for the athlete’s doping infraction if there exists any causal relationship between them and the violation.

All of these parties have obligations under the WADA Code, but neither penalties for them nor compensation provisions for the injured athletes are currently regulated. Athletes are not the only group responsible for doping activity: it can be a social responsibility. If the real purpose of the WADA is to ‘fight against doping,’ and not to punish athletes exclusively, this cause impact analysis may work toward accomplishing that purpose. Under an additional consequence impact analysis, WADA should bear the burden of proving that a doping situation meets its own definitional standards of violation (two of the three categories of performance enhancement, risk to athlete, or violation of the spirit of sport). This is absolutely fair when a strict liability standard is in play.

In summary, in the determination of what fair range of penalties should be imposed on athletes who violate doping rules, cause impact analysis and consequence impact analysis should be used, and the involved parties (a–e above) must have their own responsibilities assigned by the insertion of appropriate provisions into the WADA Code.
B. Suggestions for Improving the WADA Code

There is no doubt that the WADA has been very successful in fighting doping and punishing athletes who break the rules. However, it has been far less successful in the pursuit of its other stated purpose—protection of the athletes’ rights. On that point, the legitimacy of the WADA Code is doubtful. The following sections analyze some of WADA’s problematic regulations and provide suggestions for greater success.

1. Definition of Scope

The definition of “athlete” is too broad and ambiguous—with no definition of the range of the athletes to whom the WADA Code applies, whether on international or national levels—leaving anti-doping agencies too much discretion to decide who is subject to application. Immediate application of the WADA Code should be limited to international sports events; for domestic events, it should be left to individual countries to choose whether adopt the WADA Code or enact their own national doping rules. To bolster this point, reference to standard

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116 WADA Code, Introduction.
117 WADA Code, Definition: “Athletes.”
arguments supporting the doctrine of federalism might be helpful, in that local
tentities know more about local needs and aspirations than distant bodies, local
athletes (and fans) are more likely to support enforcing decisions if those
decisions are locally made, and more generally, centralized authority tends to be
less sensitive to individual situations.118

2. Acceptance of the WADA Code

When adopting the WADA Code,119 a country or sports organization should
have a review and preparation period of at least one year before the enforcement
period should begin. This time should be used to educate and promote doping
rules among athletes, and to implement suitable doping rules under their national
laws where they may conflict with the Code. Furthermore, conditional adoption of

118 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Vikram David
PROCEDURE, Current through the 2008 Update (“the doctrine of ‘Our
Federalism’ is that a federal court, in the absence of unusual circumstances,
cannot interfere with a pending state criminal prosecution…. It also bars the
federal courts from intervening to suppress the use of evidence claimed to have
been unconstitutionally obtained. On similar reasoning the rule should apply
whenever the orderly course of state prosecutions would be seriously hindered by
piecemeal federal determination of issues that arise in the course of state
proceedings.); Beverley Baines, FEDERALISM AND PREGNANCY
BENEFITS: DIVIDING WOMEN, 32 Queen's L.J. 190 195 (2006) (the
“doctrine” is defined as “a concept-based, self-contained, court-created rule or set
of rules applicable to a discrete area of legal regulation”).
119 As governed by WADA Code, art. 23.1.1.
the WADA Code should be allowed based on the nation’s unique legal and other environments. However, no indirect or implied mandatory enforcement provision on any country should be permitted under international sports organizations’ rules unless the country directly signs to adopt those rules. For example, the ISU doping code should not be automatically applied to the KSU, which had no knowledge of it. As explained above, the doctrine of federalism can also be applied in this situation. The same adoption process I outlined for WADA above should apply to any international code. Outstanding written notice about doping rules and testing procedures that apply during any particular competition should be given—and consent secured —when athletes register for the competition.

3. Prohibited Lists and Specified Substances

To be included on the prohibited list, substances or methods must meet at least two of the following three criteria: they must (1) include actual or potential enhancing performance, (2) pose an actual or potential health risk to the athlete, and (3) violate the spirit of sport. However, application should be interpreted

\(^{120}\) WADA Code, art. 4.3; Rationale for the World Anti-Doping Code: “‘the Spirit of Sport’ is the celebration of the human spirit, body and mind, and is characterized by the following values: Ethics, Fair play and honesty, Health, Excellence in performance, Character and education, Fun and joy, Teamwork,
and applied on a case-by-case basis. Kim’s case, for example, involves Triamterene, which, as a diuretic, should only be banned in sports where fast weight loss is an issue. To punish an athlete in a non-related sport for testing positive for Triamterene, the drug must both pose a risk to the athlete’s health and be a violation of “the spirit of the sport.” Therefore, an athlete in a case such as Kim’s should not be suspended because Triamterene is on the prohibited list.

The “Specified Substances” sub-list used to reduce penalties in special cases suffers the same problems: although substances on this list may be recognized for general availability or less-likely abuse in the intent to enhance performance, the list should not be fixed and limited; rather, exceptional cases should be defined by individual circumstances. If the WADA Code is to apply to all countries, the WADA must either accommodate each country’s culture and laws or research all involved countries’ laws before creating the specified substances list. Alternatively, the WADA should allow countries to alter the WADA Code to be sensitive to their local customs as well as their local drug laws. Furthermore, the WADA needs to disclose reliable scientific evidence concerning the

Dedication and commitment, Respect for rules and laws, Respect for self and other participants, Courage, Community and solidarity.”

121 WADA Code, art. 10.3.
prohibited list, such as the effects and side effects for each item, so athletes can be educated about the risks associated with these drugs and the public can review the appropriateness of the prohibited list.

4. Protection of Due Process

Where an anti-doping agency has violated an athlete’s right to counsel and a fair hearing, the WADA Code should provide for a penalty for that agency, in order to deter future casual due process violations. As noted below, wider use of warnings rather than automatic suspensions should also be encouraged, in recognition of the reality that future due process violations may be inevitable no matter what precautions are taken, and that once an athlete has been wrongly suspended from competition, the damage to his or her athletic career may be irreparable, even if the suspension is belatedly lifted.

5. Sanctions Rendered on Individual Basis

The WADA Code basically provides two penalties for violation of its doping rules (two-year and lifetime ineligibility for the first and second offenses,

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122 WADA Code, art. 8.
respectively). This rule is at once too rigid and too harsh. It should be more
flexible to take account of extenuating circumstances. Above all, the possibility of
issuing warnings rather than automatic suspensions should be introduced.

6. Equal Appeal Rights to the CAS

Where a case involves national-level athletes, sports organizations
automatically have a right to appeal to the CAS in the event of disputes. The
athlete who is a direct party of the doping dispute, however, does not have appeal
rights unless their case is proven to be “international” in nature. This
constitutes unequal treatment, especially because “international nature” itself is
not defined, thus granting unlimited discretion to WADA and the CAS. Unless
WADA has different doping rules for national-level athletes, there is no reason to
distinguish between the appeal rights of athletes on different levels.

123 Id. art. 10.2.
124 Id. art. 13.2.2.

WADA imposes several responsibilities on anti-doping agencies, but there are no penalty provisions for non-compliance, as there are for athletes. There should be a balance between the harsh punishments imposed on athletes under the WADA Code and doping agencies’ duties and responsibilities to athletes guaranteed by the WADA Code. Additionally, WADA has to monitor and secure the agencies’ responsibilities. If a breach of duty exists, and has caused athletes to violate doping rules, the penalty on these athletes must be reduced or eliminated.

8. Domestic Court Arbitration Except During Events

A binding arbitration clause would be useful where the sports events in process require prompt decisions rather than lengthy trials. However, if an on-the-spot decision is not required, an athlete’s right of due process becomes more important. Therefore, even if arbitration is desirable, a domestic court arbitration panel would be much more appropriate, particularly when parties reside in the same nation, unless the parties can mutually consent to binding arbitration before the CAS. The applicable law would be domestic law designated by the parties, the

\[125\] Id. art. 18, 20.6.
panel would know these laws and culture better than CAS arbitrators. Moreover, considering the distance, expenses, and language barriers, and assuming the impartiality of the CAS arbitrators, there would be no reason to appeal solely to the CAS.

To avoid conflicts over an arbitrator’s qualifications and responsibility, mandatory binding arbitration in sports should provide qualified arbitrators, such as a court-designated neutral panel, similar to the United States District Court for the Southern District of New York Median Panel.

Lastly, the enforcement of the arbitrators’ decision against a sports organization should be effective immediately, without the sports organization’s discretion as to whether or not to accept the arbitration decision.

The sports world is keeping an eye out for doping, however, legitimate attention toward this issue has the danger of turning into a crusade. To avoid that potentiality, the penalty for doping must be balanced against penalties for other crimes of equivalent moral offense. Therefore, the other side of sports corruption—problems with sports organizations—must also not be ignored.
Between doping scandals among athletes and bribing scandals among sports organizations, there is much corruption for sports news to report on. However, doping seems to get more press and shocks and infuriates people more, perhaps because doping is an offense committed by an individual athlete, who is supposedly motivated and obligated to compete by honor. The circumstances behind a doping offense can be complex, but the penalties are currently oversimplified: disgrace and a loss of livelihood. To preserve the spirit of sport, to which governing organizations are ostensibly committed, WADA must amend its Code for fairness and equality, including sections about doping due process, mandatory binding arbitration, and a doping agency’s responsibilities.