

# Streamlining Doping Disputes at the Olympics: World Sports Organizations, Positive Drug Tests, & Consistent Repercussions

ABBY CHIN\*

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*“You wave your finger No. 1, and you’ve been caught drug cheating? I’m not a fan.” – Lily King, USA, Olympic Gold Medalist<sup>1</sup>*

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\* Abby Chin is a 2018 graduate of the Ohio State University Moritz College of Law. At Moritz, she served as the Ohio State Journal on Dispute Resolution’s 2017-2018 Executive Editor and Chief Justice of the Moot Court Program. She received her Bachelor of Arts in Legal Writing and Economics for Pre-Law from the University of Louisville, where she was captain of the swim and dive team. Before and during her law school career, Ms. Chin competed at multiple, national-level swim competitions where drug tests, doping, and doping disputes were regularly present.

<sup>1</sup> Sean Gregory, *Team USA Is About to Be Kicked off Its Doping High Horse*, TIME (Aug. 13, 2016), <http://time.com/4446989/rio-2016-olympics-doping-efimova-gatlin-lilly-king-drug-cheat/>.

## I. INTRODUCTION

At the Olympic Games Rio de Janeiro 2016, world champion and Russian swimmer Yulia Efimova walked into the Olympics Aquatics Stadium not to cheers, but to the sound of boos.<sup>2</sup> The crowd, and many athletes, condemned Efimova as a drug-using outcast who should not be allowed to compete in the Games. At the Rio Olympic Games, Efimova was one of seven swimmers from the Russian Federation who were formerly banned from the competition due to previously failed drug tests and the “World Anti-Doping Agency’s investigation into state-sponsored doping.”<sup>3</sup> However, after an intense arbitration process, Efimova and her teammates were approved for competition.

Efimova’s doping dispute began in 2013 when she received her first positive drug test and served a sixteen-month suspension.<sup>4</sup> Next, in 2016, she tested positive for meldonium—the substance at issue for the alleged Russian state-sponsored doping.<sup>5</sup> However, because meldonium did not officially become a banned substance until January 2016, many athletes claimed that, although they were no longer actively taking it, they were still testing positive because traces of meldonium were left in their system.<sup>6</sup>

This left a question about who would decide an athlete’s future competition eligibility after a positive test. While many different agencies were involved, Efimova’s positive drug test came from the World Anti-Doping Agency (WADA). A positive test usually leads to a suspension, which

<sup>2</sup> Nathan Fenno, *Russia’s Yulia Efimova, Caught up in Doping Scandal, Booed in Olympics Debut*, L.A. TIMES (Aug. 27, 2016, 2:09 PM), <http://www.latimes.com/sports/la-sp-oly-rio-2016-russia-s-yulia-efimova-caught-up-in-1470603135-htmlstory.html>.

<sup>3</sup> *Id.*

<sup>4</sup> Braden Keith, *Yulia Efimova Suspended for 16 Months, Stripped of Medals and World Record*, SWIMSWAM (May 13, 2014), <https://swimswam.com/yulia-efimova-suspended-16-months-stripped-medals-world-record/>.

<sup>5</sup> Rachel Axon, *Yulia Efimova Is at the Games Because Those Are the Rules; Blame IOC*, USA TODAY (Aug. 10, 2016, 1:04 PM), <http://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/10/yulia-efimova-controversy-olympics-doping-ban/88518510/>.

<sup>6</sup> Fenno, *supra* note 2. See also World Anti-Doping Agency, *Prohibited List*, WORLD ANTI-DOPING CODE INT’L STANDARD (Jan. 2016), [https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Protecting-Clean-Athletes/Fight-against-doping/EN-WADA-Prohibited-List-2016.pdf#\\_ga=1.268477810.2063237670.1475847399](https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Protecting-Clean-Athletes/Fight-against-doping/EN-WADA-Prohibited-List-2016.pdf#_ga=1.268477810.2063237670.1475847399) (official publication of all prohibited substances as of January 2016).

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athletes can appeal through the Court of Arbitration for Sports (CAS). However, because the positive test results occurred in an Olympic year—and with the was scrutiny of the entire Russian Olympic Federation—the International Olympic Committee (IOC) would also influence the outcome of the doping investigation.<sup>7</sup>

In its press release, the IOC stated athletes who had served prior suspensions unrelated to meldonium would be banned.<sup>8</sup> If meldonium was the athlete's first offense, it was up to the individual federations governing each sport to decide the fate of each individual athlete.<sup>9</sup> However, the IOC decision conflicted with CAS precedent, which allowed athletes to return to competition with a clean slate after serving their entire suspension for a positive drug test.<sup>10</sup> As a result, there was confusion and uncertainty as to whether these Olympic athletes could compete.<sup>11</sup>

Efimova appealed to the CAS, requesting to be reinstated to compete as she had already served her suspension. The CAS, believing it was inappropriate to ban athletes like Efimova for having already served suspension, granted the appeal.<sup>12</sup> Efimova was able to compete in Rio despite the backlash of many other competitors and nations.<sup>13</sup> Whether Efimova

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<sup>7</sup> Axon, *supra* note 5. See also Press Release, International Olympic Committee, Decision of the IOC Executive Board Concerning the Participation of Russian Athletes in the Olympic Games Rio 2016 (July 24, 2016) (on file with author). Because the IOC was searching for a quick resolution due to the impending Olympic Games, an ultimate decision was required. This press release shows the conflict and confusion created when the IOC, WADA, the CAS, and a specific country's sports federation are all attempting to find a resolution through their own processes.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Fenmo, *supra* note 2.

<sup>12</sup> *Rio 2016 Olympics: Yulia Efimova Cleared to Compete After Appeal*, BBC NEWS (Aug. 6, 2016), <http://www.bbc.com/sport/olympics/36998249>.

<sup>13</sup> Fenmo, *supra* note 2. At the Olympic Games Rio de Janeiro 2016, many athletes, specifically those from the United States, were very outspoken against illegal drug use. See Jack de Menezes, *Rio 2016: Michael Phelps Says 'It Breaks My Heart' to See Drug Cheating in the Olympics*, INDEPENDENT (Aug. 9, 2016), <http://www.independent.co.uk/sport/olympics/rio-2016-michael-phelps-olympics-breaks-my-heart-drug-cheats-competing-a7180296.html>. However, because of past drug cheating by many United States' Olympic athletes, some athletes from other countries protested the United States' athletes' outspokenness, stating American athletes should not criticize those athletes approved to compete nor countries targeted for drug cheating like Russia. See Piers Morgan, *Put Down Your Sanctimonious, Hypocritical Wagging Finger, America – Your*

deserved the backlash, it became clear there was a significant problem with the uncertainty and lack of knowledge as to the appropriate process for punishing athletes who tested positive. Through the different rulings of the three major governing bodies involved, Efimova was placed under rigid scrutiny, in part because people did not understand the disciplinary process, her right to an appeal, and her right to receive relief from her sanction.

This Note will examine the effect of the governing bodies, specifically during an Olympic year, on athletes involved in doping disputes and suggest a more streamlined arbitration process for the governing bodies to use when determining the eligibility of athletes in doping disputes. Currently, the arbitration process lacks transparency and efficiency because of the arbitrator selection process, the costs associated with bringing a dispute in front of an appeals panel, and the mandatory nature of arbitration in international sports. Hence, to create more just dispute outcomes, the arbitration process should become more informal, and athletes should be given the option for a final appeal.

Section II of this Note discusses the different governing bodies and their processes for dealing with doping disputes. Section III demonstrates how the different governing bodies work around each other when handling disputes. This section also analyzes the positive and negative impacts of the way in which governing bodies work together. Section IV explores Efimova's doping dispute in depth to provide an example of the arbitration process. Section V specifically describes the current concerns with the CAS arbitration process and ultimately offers a possible solution for a better-streamlined dispute process, such as modifying the current arbitration and arbitrator selection proceedings or allowing for an appeal from a CAS arbitrator decision.

## II. BACKGROUND ON ANTI-DOPING AND OLYMPIC GOVERNING BODIES

Every four years, the Olympic Games brings together athletes and fans from all walks of life. It is an opportunity for countries to present to the world the abilities of their athletes and promote connectivity between countries. However, when presenting athletes on such a highly competitive scale,

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*Own Olympic Team's Full of Drug Cheats Just like Russia's*, DAILYMAIL.COM (Aug. 8, 2016), <http://www.dailymail.co.uk/news/article-3729983/PIERS-MORGAN-sanctimonious-hypocritical-wagging-finger-America-Olympic-team-s-drug-cheats-just-like-Russia-s.html>.

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challenges arise. Illegal doping and regulating illegal doping has proven to be one of the most difficult challenges.

To fight illegal doping, various agencies and governing bodies have established numerous regulatory rules. Yet, with the wide array of governing bodies, each regulation and, ultimately, the procedure to handle doping disputes, has become complex and difficult to follow. This section explores the various governing bodies and their history in anti-doping.

### A. *World Anti-Doping Agency*

The World Anti-Doping Agency (WADA) was established pursuant to the Lausanne Declaration on November 10, 1999 after the cycling drug scandal in the summer of 1998.<sup>14</sup> The Lausanne Declaration, written at the First World Conference on Doping in Sport of 1999, “provided for the creation of an independent international anti-doping agency to be operational for the Games of the XXVII Olympiad in Sydney 2000.”<sup>15</sup> WADA was thus “set up as a foundation under the initiative of the IOC with the support and participation of intergovernmental organizations, governments, public authorities, and other public and private bodies fighting doping in sport.”<sup>16</sup>

WADA consists of various committees, including the Executive Committee, Athlete Committee, and Education Committee.<sup>17</sup> Each committee helps WADA function by providing insight on athlete challenges, creating educational programs for athletes, and researching the different effects of legal and illegal substances.<sup>18</sup> However, the entirety of WADA and its governance

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<sup>14</sup> *Who We Are*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/who-we-are> (last visited Nov. 8, 2016).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Governance*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/governance> (last visited Jan. 24, 2017).

<sup>18</sup> *Id.*

over sports is harmonized through the rules, policies, and regulations of the World Anti-Doping Code (WADA Code).<sup>19</sup>

The WADA Code implements strict liability standards for doping violations.<sup>20</sup> The main principal for this rule is to “establish fairness for the other athletes in the competition.”<sup>21</sup> The strict liability standard allows for sanctions to be placed immediately on athletes who test positive. However, there is flexibility in the standard. WADA states: “The rule is the starting point so that, while an anti-doping rule violation occurs regardless of the athlete’s intention, there is flexibility in the sanctioning process to consider the circumstances.”<sup>22</sup> This consideration of the circumstances refers to an athlete’s ability to appeal to the Court of Arbitration for Sport, which will be examined following the discussion of the International Olympic Committee.

### B. *International Olympic Committee*

The International Olympic Committee (IOC) “is the supreme authority of the Olympic movement” with a mission to “lead the fight against doping in sport.”<sup>23</sup> In 1894, the IOC was founded with a commitment to “supporting and promoting participation in sport throughout the World.”<sup>24</sup> The IOC chooses the location of the Olympic Games, “acts as a catalyst for collaboration between all parties of the Olympic family . . . and strongly encourages, by appropriate means, the promotion of the Olympic values.”<sup>25</sup>

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<sup>19</sup> *What We Do: The Code*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/what-we-do/the-code> (last visited Nov. 10, 2017). The WADA Code also provides a guide for countries to maintain anti-doping compliance. However, not all countries or organizations can, or do, legally enact the WADA Code. The countries that do implement WADA and the WADA Code are granted parallelism with other countries on sanctions, suspensions, and the possibility of appealing to the CAS. *See Code Compliance*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/what-we-do/the-code/code-compliance> (last visited Jan. 24, 2017).

<sup>20</sup> *Strict Liability in Anti-Doping*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/questions-answers/strict-liability-in-anti-doping> (last visited Feb. 24, 2017).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *What We Do*, INTERNATIONAL OLYMPIC COMMITTEE, <https://www.olympic.org/the-ioc/what-we-do> (last visited Jan. 24, 2017).

<sup>24</sup> *Id.* *See also The Olympics—International Olympic Committee*, HISTORY ON THE NET, [http://www.historyonthenet.com/olympics/international\\_olympic\\_committee.htm](http://www.historyonthenet.com/olympics/international_olympic_committee.htm) (last visited Jan. 25, 2017).

<sup>25</sup> *The Olympics—International Olympic Committee*, *supra* note 24.

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Protecting clean athletes is one of the most prominent Olympic values the IOC promotes through its anti-doping policies.<sup>26</sup> The IOC chooses to promote clean athletes because these athletes “are the role models who inspire millions of children around the world to participate in sport and [the athletes] reflect the Olympic ideals,” so by promoting clean athletes, the IOC is encouraging honesty and safe sport throughout the world.<sup>27</sup>

To promote clean athletes, the IOC has strict, anti-doping policies. The IOC’s anti-doping mission states: “[p]rotecting clean athletes by fighting against doping is a top priority for the IOC, which has established a zero-tolerance policy to combat cheating and to hold anyone responsible for using or providing doping products accountable.”<sup>28</sup> The IOC generally follows WADA’s publications of restricted drugs and policies for submitting sanctions.<sup>29</sup> Any sanctions placed on athletes from WADA, the IOC, a country’s individual doping regulatory agency, or a sport’s regulatory agency are ultimately appealable to the Court of Arbitration for Sport.<sup>30</sup>

### C. *Court of Arbitration for Sport*

The Court of Arbitration for Sport (CAS) was created in 1982 by the IOC upon need of a swifter arbitration process.<sup>31</sup> It “was created to bring order to the chaos and inconsistent world of international sports adjudications.”<sup>32</sup> By pursuing many of the goals of arbitration, the IOC sought a tribunal that had

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<sup>26</sup> *Support and Protect Clean Athletes*, INTERNATIONAL OLYMPIC COMMITTEE, <https://www.olympic.org/the-ioc/support-and-protect-clean-athletes> (last visited Jan. 25, 2017).

<sup>27</sup> *Id.*

<sup>28</sup> *Fight Against Doping*, INTERNATIONAL OLYMPIC COMMITTEE, <https://www.olympic.org/fight-against-doping> (last visited Jan. 24, 2017).

<sup>29</sup> *Id.*

<sup>30</sup> *Court of Arbitration for Sport*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/court-of-arbitration-for-sport> (last visited Feb. 21, 2017) (“WADA has a right of appeal to CAS for doping cases under the jurisdiction of organizations that have implemented the Code.”). See also *Code Signatories*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/code-signatories> (last visited Feb. 21, 2017) (a list of sport organizations and government-funded organizations that have implemented the WADA Code and ultimately have the right to appeal in front of the CAS).

<sup>31</sup> Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 LOY. U. CHI. L. J. 1203, 1208 (2005).

<sup>32</sup> *Id.* at 1207.

the power to settle international sporting disputes quickly and inexpensively.<sup>33</sup> At its earliest stages, the CAS did not settle many disputes; however, by the early 2000s, it turned into the main governing body of all international sporting disputes.<sup>34</sup>

The CAS is governed by the Code of Sports-related Arbitration (the “Code”).<sup>35</sup> The Code is updated and maintained by the CAS and twenty high-level jurist members.<sup>36</sup> It allows for two different arbitration proceedings: “written proceedings, with an exchange of statements of case, and oral proceedings, where the parties are heard by the arbitrators.”<sup>37</sup> The CAS and the Code are recognized by the IOC, numerous national Olympic committees, WADA, and others as the main source for solving international sporting disputes. Specifically, “the CAS is the appeals body for *all* international doping-related disputes.”<sup>38</sup>

Hence, the CAS “is often referred to as ‘sport’s supreme court.’”<sup>39</sup> The “CAS is an institution independent of any sports organization which provides for services to facilitate the settlement of sport-related disputes, through arbitration or mediation, by means of procedural rules adapted to the specific needs of the sport world.”<sup>40</sup> Its independence allows the CAS to make swift and final decisions. This can be a benefit for athletes seeking a quick return to competition, such as Efimova before the Rio Olympic Games. However, the independence of the CAS and its sole rule over sports proceedings can inhibit athletes because there are simply no other options to appeal decisions or find alternative solutions.

One criticism of the CAS is the arbitrator selection process. In an appeal, the arbitration is generally submitted to three arbitrators.<sup>41</sup> To select the arbitrators, “each party chooses one arbitrator from the CAS list, then the two designated arbitrators agree on who will be the president of the panel.”<sup>42</sup>

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<sup>33</sup> *Id.* at 1208.

<sup>34</sup> *Id.* at 1208 n.32.

<sup>35</sup> *History of the CAS*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/en/general-information/history-of-the-cas.html#c74>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (emphasis added).

<sup>39</sup> *Court of Arbitration for Sport*, *supra* note 30.

<sup>40</sup> *Id.*

<sup>41</sup> *Frequently Asked Questions*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/en/general-information/frequently-asked-questions.html> (last visited Jan. 27, 2017).

<sup>42</sup> *Id.*



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The eligible list of arbitrators changes every four years, with hundreds of potential candidates from many different countries.<sup>43</sup>

In establishing the list of CAS arbitrators, the [organization] must, in principle, respect the following distribution of candidates:

- 1/5 of the arbitrators selected from among the persons proposed by the IOC, chosen from within its membership or outside;
- 1/5 of the arbitrators selected from among the persons proposed by the IFs, chosen from within their membership or outside;
- 1/5 of the arbitrators selected from among the persons proposed by the NOCs, chosen from within their membership or outside;
- 1/5 of the arbitrators chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes;
- 1/5 of the arbitrators chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article.<sup>44</sup>

However, outside this organization of possible arbitrators, there is seemingly a lack of transparency in the remainder of the process.<sup>45</sup>

Another criticism of the CAS is the lack of a final judicial review for athletes. While athletes can appeal a WADA decision to the CAS, once their appeal is heard in front of the panel of arbitrators, there is rarely any other appeal option. The CAS rules specifically state “the award . . . shall be final

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<sup>43</sup> Ian Blackshaw, *ADR and Sport: Settling Disputes Through the Court of Arbitration for Sport, the FIFA Dispute Resolution Chamber, and the WIPO Arbitration & Mediation Center*, 24 MARQ. SPORTS L. REV. 1, 7 (2013).

<sup>44</sup> *Id.* at 8 (citing Ian Blackshaw, *Fair Play on and off the Field of Play: Settling Sports Disputes Through the Court of Arbitration for Sport*, 3–4 INT’L SPORTS L.J. 107, 109 (2006)).

<sup>45</sup> Straubel, *supra* note 31. The current list of arbitrators is not publicly available nor is the selection process. Straubel suggests changes in the arbitrator process “to improve transparency and independence.” *Id.* at 1232 n.207.

and binding.”<sup>46</sup> Yet, the CAS also acknowledges that an athlete can seek a judicial review of a CAS decision on “extremely limited number of grounds.”<sup>47</sup> The ability to appeal a CAS decision should be much more readily available to all athletes to support a fair judicial review process. However, as of now, any CAS decision will likely remain final.

### III. HOW GOVERNING BODIES WORK TOGETHER

While the different anti-doping and governing bodies all promote clean sport, the process of being charged, penalized, and appealing any rulings often occurs sporadically through multiple different bodies. The previous section has alluded to how the different governing bodies work together. This section specifically explores how the different anti-doping and governing

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<sup>46</sup> COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION, Rule 59 (2017), available at [http://www.tas-cas.org/fileadmin/user\\_upload/Code\\_2017\\_FINAL\\_\\_en\\_.pdf](http://www.tas-cas.org/fileadmin/user_upload/Code_2017_FINAL__en_.pdf). Rule 59, in relevant part, states:

The award, notified by the CAS Court Office, shall be final and binding upon the parties subject to recourse available in certain circumstances pursuant to Swiss Law within 30 days from the notification of the original award. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration.

<sup>47</sup> Maureen A. Weston, *Doping Control, Mandatory Arbitration, and Process Dangers for Accused Athletes in International Sports*, 10 PEPP. DISP. RESOL. L.J. 5, 22 (2009) (citing COURT OF ARBITRATION FOR SPORT, GUIDE TO ARBITRATION, Rule 46, 59, available at <http://sportrecht.org/cms/upload/10verband/CASguideArbitration.pdf>) (describing the very limited grounds on how an athlete can appeal a CAS decision under Swiss arbitration law and the New York Convention). See also *Frequently Asked Questions*, *supra* note 41 (“Judicial recourse to the Swiss Federal Tribunal is allowed on a very limited number of grounds, such as lack of jurisdiction, violation of elementary procedural rules (e.g. violation of the right to a fair hearing) or incompatibility with public policy.”).

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bodies work together, how the process continues to support anti-doping policies, and the negative impacts of the current process.

The doping process begins with athlete drug testing.<sup>48</sup> College and professional athletes are regularly tested, with more successful athletes being tested most often.<sup>49</sup> Drug tests can be administered by a sport's specific governing body for an individual country, a sport's international governing body, the athlete's home country, or WADA. Once an athlete tests positive, the group administering the test may impose a sanction.<sup>50</sup> However, a sport's governing body or the country will often adhere to WADA statements or other WADA information to determine the proper sanction. Hence, at this stage, there are two outcomes for the athlete with a positive test: 1) receive a sanction, or 2) despite the positive test, receive no sanction based on WADA's suggestion after evaluating the case's unique circumstances.

Generally, WADA prescribes sanctions for athletes with positive tests. These sanctions may come directly from WADA, an individual country's drug regulatory agency, or the regulatory agency of the sport to which the athlete belongs. The athlete has the option to appeal to the CAS. However, every two years around the summer and winter Olympics, the IOC

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<sup>48</sup> *What Is Doping in Sport?*, BBC (Aug. 10, 2015, 3:31 PM), <http://www.bbc.co.uk/newsround/33759073>. See also Jill Pilgrim & Kim Betz, *A Journey Through Olympic Drug Testing Rules: A Practitioner's Guide to Understanding Drug Testing Within the Olympic Movement*, THE SPORTS JOURNAL (Feb. 13, 2008), <http://thesportjournal.org/article/a-journey-through-olympic-drug-testing-rules-a-practitioners-guide-to-understanding-drug-testing-within-the-olympic-movement/>.

<sup>49</sup> In 2015, WADA analyzed over 300,000 different samples for drug testing, including both Olympic and non-Olympic sports. This figure 7% greater than the number of samples tested in 2014. See *2015 Anti-Doping Testing Figures*, WORLD ANTI-DOPING AGENCY, at 4 (Nov. 23, 2016), [https://www.wada-ama.org/sites/default/files/resources/files/2015\\_wada\\_anti-doping\\_testing\\_figures\\_report\\_0.pdf](https://www.wada-ama.org/sites/default/files/resources/files/2015_wada_anti-doping_testing_figures_report_0.pdf).

<sup>50</sup> ROBERT C.R. SIEKMANN ET AL., *DOPING RULES OF INTERNATIONAL SPORTS ORGANISATIONS* (T.M.C. Asser Press, 1999) (a collection of the doping rules of different sports' international federations). While many international federations have similar doping rules, different sports are stricter on substances prohibited and the publicity of drug testing, whether the results are positive or negative. See Rex Hoggard, *Olympic Hopefuls Begin More Stringent Drug Testing*, NBC GOLF (May 6, 2016, 7:52 AM), <http://www.golfchannel.com/news/golf-central-blog/olympic-hopefuls-begin-more-stringent-drug-testing/>; *PGA Tour's Drug Testing Comes Under Scrutiny as 2016 Rio Olympics Approach*, FOX SPORTS (April 3, 2015, 4:28 PM), <http://www.foxsports.com/golf/story/pga-tour-2016-rio-olympics-drug-testing-scrutiny-040315>.

also steps in to the doping dispute resolution process. The IOC states: “As the ruling body for the Olympic Games, the IOC delegates the responsibility for implementing doping controls to the Organizing Committee for the Olympic Games and the World Anti-Doping Agency (WADA), who act under the IOC’s authority.”<sup>51</sup> Thus, although the IOC acknowledges WADA is the governing body of doping, the IOC releases statements on doping sanctions. For example, before the Rio Olympic Games, the IOC released arbitration rules<sup>52</sup> and anti-doping rules<sup>53</sup> specifically applicable to the Rio Olympic Games. With this, the IOC has created confusion as to whether it or WADA is the ultimate rulemaker on doping for the Olympic Games.

Anytime a sanction is imposed, an athlete can appeal to the CAS.<sup>54</sup> This can include a sanction from a sport’s specific international federation, WADA, or the IOC. The ability to appeal to the CAS helps promote flexibility and fairness in WADA’s strict liability standard in positive drug tests.<sup>55</sup>

During a doping appeal, the party seeking relief from sanctions submits a brief that includes “a statement of the facts, legal arguments, all

<sup>51</sup> *Fight Against Doping*, *supra* note 28. The Olympic Charter provides, “Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration.” Olympic Charter Art. 61.2 (2015).

<sup>52</sup> *Arbitration Rules Applicable to the CAS Anti-Doping Division*, INTERNATIONAL OLYMPIC COMMITTEE (2016), [https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Protecting-Clean-Athletes/Fight-against-doping/Arbitration-Rules-applicable-to-the-CAS-Anti-doping-Division-Rio-2016.pdf#\\_ga=1.101286402.2063237670.1475847399](https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Protecting-Clean-Athletes/Fight-against-doping/Arbitration-Rules-applicable-to-the-CAS-Anti-doping-Division-Rio-2016.pdf#_ga=1.101286402.2063237670.1475847399).

<sup>53</sup> International Olympic Committee, *THE INTERNATIONAL OLYMPIC COMMITTEE ANTI-DOPING RULES APPLICABLE TO THE OLYMPIC GAMES RIO 2016* (2016), [https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Protecting-Clean-Athletes/Fight-against-doping/EN-Anti-Doping-Rules-Rio-2016.pdf#\\_ga=1.89745944.2063237670.1475847399](https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Protecting-Clean-Athletes/Fight-against-doping/EN-Anti-Doping-Rules-Rio-2016.pdf#_ga=1.89745944.2063237670.1475847399).

<sup>54</sup> *Id.* See also *Code Signatories*, *supra* note 30 (“WADA has a right of appeal to CAS for doping cases under the jurisdiction of organizations that have implemented the Code.”).

<sup>55</sup> *Strict Liability in Anti-Doping*, WORLD ANTI-DOPING AGENCY, <https://www.wadama.org/en/questions-answers/strict-liability-in-anti-doping> (last visited Feb. 24, 2017). The interplay between governing bodies is positively demonstrated by WADA and the CAS agreeing on a strict liability standard. WADA has published:

As consistently confirmed by CAS, the strict liability rule for the finding of a prohibited substance in an athlete’s specimen, with a possibility that sanctions may be modified based on specified criteria, provides a reasonable balance between effective anti-doping

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exhibits and evidence, a list of all witnesses and experts that the applicant intends to call at the hearing, any witness statements, and any request for other evidential measures.”<sup>56</sup> The respondent submits an answer, and the Appeals Division then hears the case de novo.<sup>57</sup> Although the substantive law used in the hearing is chosen by the parties, the rules of the sports body usually apply.<sup>58</sup> The panel of arbitrators then hears the case, a majority vote decides the outcome, and an opinion is written and made public.<sup>59</sup> This opinion is the final verdict of a doping dispute and there is no higher authority for an athlete to seek another appeal.

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enforcement for the benefit of all clean athletes and fairness in the exceptional circumstance where a prohibited substance entered an athlete’s system through no fault or negligence on the athlete’s part.

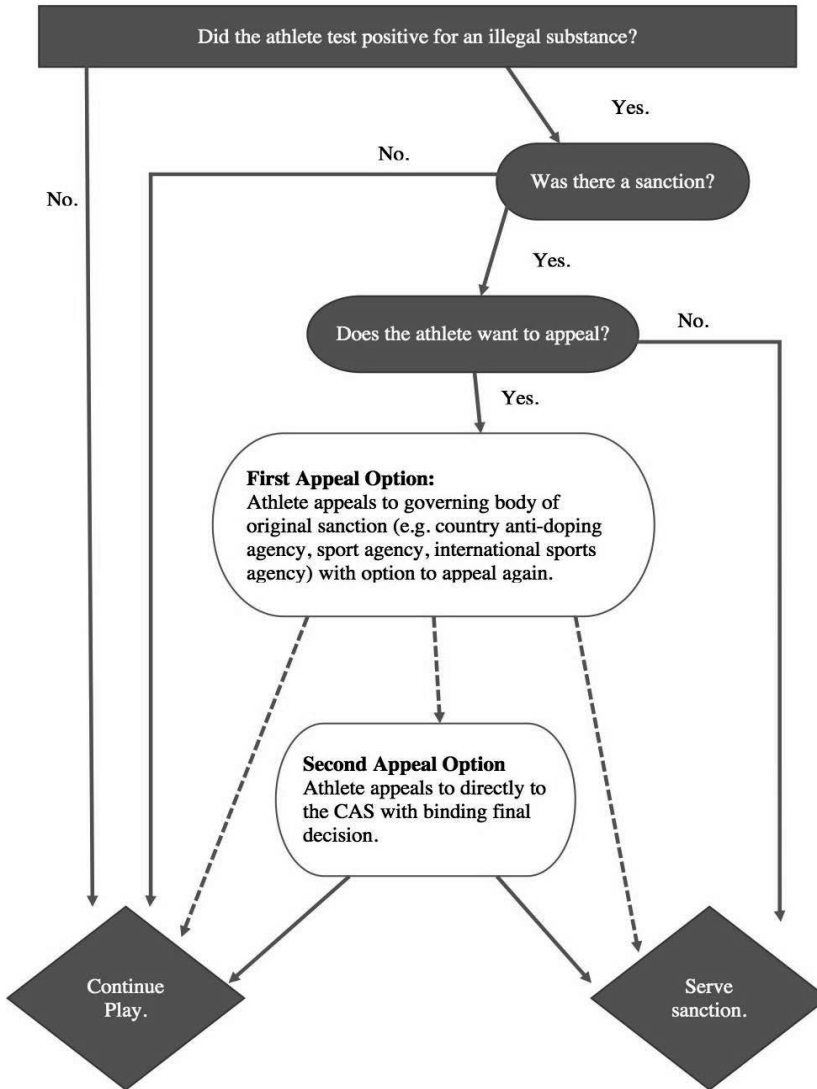
*Id.*

<sup>56</sup> Straubel, *supra* note 31, at 1216-17.

<sup>57</sup> *Id.* at 1217.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*



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### IV. EFIMOVA V. ROC, IOC & FINA

The case of Yulia Efimova was one of the most apparent anti-doping cases at the Rio Olympic Games because of its confusing process and publicity throughout the Games. To provide a realistic example of the arbitration process, this section follows her story from her first doping penalization to her ultimate ability to compete in Rio.

Efimova's doping scandal began in January 2014 when a drug test she took three months prior came back positive.<sup>60</sup> Because of the positive test, FINA, the swimming international federation, imposed a sixteen-month competition ban and a loss of all titles and world records she achieved since the positive test.<sup>61</sup> Efimova choose not to appeal the decision, stating, "It requires energy, time, and most importantly, money. Moreover, I know that I made a mistake."<sup>62</sup>

After Efimova's first ban, she returned to competition in February 2015. However, she was brought under scrutiny again when six more drug tests came back positive between February and March of 2016.<sup>63</sup> She tested positive for meldonium, a substance only put on the prohibited list in January 2016.<sup>64</sup> Originally, Efimova was provisionally suspended by FINA for her positive drug tests; however, since the substance's presence was so new to the prohibited list, WADA issued a notice and recommendation on how to deal with the result.<sup>65</sup> Due to WADA's recommendation notice, FINA chose to lift

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<sup>60</sup> *Yuliya [sic] Efimova Banned for 16 Months; Stripped of World Records*, SWIMMING WORLD MAGAZINE (May 13, 2014), <https://www.swimmingworldmagazine.com/news/yuliya-efimova-banned-for-16-months-stripped-of-world-records/>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Press Release, Federation Internationale de Natation, Statement on Yulia Efimova (RUS) (July 15, 2016) (available at <http://www.fina.org/news/statement-yulia-efimova-rus>).

<sup>64</sup> *Prohibited List*, *supra* note 6.

<sup>65</sup> Press Release, World Anti-Doping Agency, Notice – Meldonium (June 30, 2016) (available at [https://www.wada-ama.org/sites/default/files/resources/files/2016-06-30-meldonium\\_notice.pdf](https://www.wada-ama.org/sites/default/files/resources/files/2016-06-30-meldonium_notice.pdf)). This notice gives recommendations on how to find fault with different amounts of meldonium in an athlete's system. Since the substance's presence was new on the prohibited list, some athletes had taken meldonium prior to January 2016. WADA did not want to sanction athletes who had stopped taking the substance once on the prohibited list, leading to these recommendations were given.

the suspension and “not apply any anti-doping violation sanction” to Efimova.<sup>66</sup>

However, with the Rio Olympic Games, the IOC also became involved. Since the IOC sanctions the Olympic Games, and one of its missions is promoting clean sport, the IOC had a stake in whether Efimova could compete in the games. The IOC also had a stake in Efimova’s fate because of her country of origin, Russia.

At the time, Russia was being investigated for state-sponsored doping due to the large amount of positive drug tests by Russian athletes. The IOC, in promoting its clean sport values, issued a decision, stating: “The IOC will not accept any entry of any Russian athlete in the Rio Olympic Games unless such athlete can meet the conditions set out” by the IOC.<sup>67</sup> These conditions were laid out as follows:

2. Entry will be accepted by the IOC only if an athlete is able to provide evidence to the full satisfaction of his or her International Federation (IF) in relation to the following criteria:
  - The IFs[], when establishing their pool of eligible Russian athletes, to apply the World Anti-Doping Code and other principles agreed by the Olympic Summit (21 June 2016).
  - The absence of a positive national anti-doping test cannot be considered sufficient by the IFs.
  - The IFs should carry out an individual analysis of each athlete’s anti-doping record, considering only reliable adequate international tests, and the specificities of the athlete’s sport and its rules, in order to ensure a level playing field.
  - The IFs to examine the information contained in the IP Report, and for such purpose seek from WADA the names of athletes and National Federations (NFs) implicated. Nobody implicated, be it an athlete, an

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<sup>66</sup> Press Release, *supra* note 63. See also Braden Keith, *FINA Lifts Suspension on Yulia Efimova, Will Still Pursue to CAS*, SWIMSWAM (May 20, 2014), <https://swimswam.com/fina-lifts-temporary-suspension-yulia-efimova-will-still-pursue/> (explaining how Efimova’s second positive test could lead to a lifetime ban).

<sup>67</sup> *Id.*



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- official, or an NF, may be accepted for entry or accreditation for the Olympic Games.
- The IFs will also have to apply their respective rules in relation to the sanctioning of entire NFs.
3. The ROC is not allowed to enter any athlete for the Olympic Games Rio 2016 who has ever been sanctioned for doping, even if he or she has served the sanction.
  4. The IOC will accept an entry by the ROC only if the athlete's IF is satisfied that the evidence provided meets conditions 2 and 3 above and if it is upheld by an expert from the CAS list of arbitrators appointed by an ICAS Member, independent from any sports organization involved in the Olympic Games Rio 2016.<sup>68</sup>

Under these criteria, Efimova was sanctioned and banned from competition in Rio by FINA. Hence, she appealed to the CAS.<sup>69</sup>

In her appeal to the CAS, Efimova requested entrance into the Rio Games.<sup>70</sup> She argued that the IOC violated multiple rules of the Olympic Charter with its quick and rash “change of rules” and “newly-made criteria” which, she contended, “impermissibly constitute[d] a sanction, and, further, contravene[d] [her] ‘due-process fundamental rights.’”<sup>71</sup> She claimed that Point Three of the aforementioned IOC decision did not give “each affected athlete...the opportunity to rebut the applicability of collective responsibility

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<sup>68</sup> Press Release, International Olympic Committee, Decision of the IOC Executive Board Concerning the Participation of Russian Athletes in the Olympic Games Rio 2016 (July 24, 2016) (on file with author).

<sup>69</sup> Yulia Efimova v. ROC, IOC & FINA, CAS OG 16/04, Award, The ad hoc Division of the Court of Arbitration for Sport (Aug. 4, 2016), [http://www.tas-cas.org/fileadmin/user\\_upload/FINAL\\_AWARD\\_OG\\_16-04.pdf](http://www.tas-cas.org/fileadmin/user_upload/FINAL_AWARD_OG_16-04.pdf).

<sup>70</sup> *Id.* at para. 4.2. In Efimova's request for relief, the CAS refused to hear all of her requests. Instead, the CAS heard only her requests that FINA's ineligibility decision be set aside and that the IOC's decision on Russian athletes competing in Rio was invalid and unenforceable. *Id.* at para. 4.3. The Russian Olympic Committee did not submit any requests for relief, stating it would rely on the final decision of the CAS. *Id.* at para. 4.4. The IOC and FINA both requested the CAS dismiss and reject Efimova's claims. *Id.* at para. 4.5–4.6.

<sup>71</sup> *Id.* at para. 7.3–7.9. While Efimova challenged the IOC's quick decision, the IOC argued the “extraordinary circumstances” of “a State-organized scheme of doping” called for urgency. *Id.* at para. 7.11.

in his or her individual case.”<sup>72</sup> Rather than looking at each individual athlete’s case, the IOC’s blanket ban on Russian athletes disregarded natural and individual justice.<sup>73</sup> Hence, the CAS ultimately ruled in favor of Efimova and she competed in the Rio de Janeiro Olympic Games.<sup>74</sup>

Efimova’s case shows the chaos in the doping dispute resolution process. Throughout her athletic career, she has been subjected to drug testing, sanctions, and resolutions from a multitude of different organizations. As an internationally-ranked athlete, she is unwillingly subjected to the rulings of several different organizations. It is hard to imagine the chaos of not knowing which organization will give a sanction, when a sanction will be given, and how long an arbitration process could last. While the most hopeful scenario would be a completely clean sport, this is impractical with the prevalence of legal and illegal dietary supplements and performance enhancers. Hence, a streamlined solution is necessary.<sup>75</sup>

## V. ISSUES LEAD TO SOLUTIONS

The previous text explained the chaos of the doping dispute resolution process. Between the different governing bodies, there is a lack of information and knowledge about how the entire process works among athletes and their coaches. This section specifically describes the many problems with the current doping dispute process, including the following: (1) lack of

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<sup>72</sup> *Id.* at para. 7.23.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at para. 8. In its conclusion, the CAS held that Point 3 of the IOC’s decision regarding Russian athletes was unenforceable. Hence, if an athlete, including Efimova, could satisfy Point 2 of the decision, the athlete would be able to compete in the Rio Games.

<sup>75</sup> See, e.g., Bill Chappell, *Russia Is Banned from 2018 Olympics: Athletes Told to Compete Under Olympic Flag*, NPR (Dec. 5, 2017, 12:55 PM), <https://www.npr.org/sections/thetorch/2017/12/05/568585759/russia-is-banned-from-2018-olympics-athletes-told-to-compete-under-olympic-flag>. This note was written at the conclusion of the Olympic Games Rio de Janeiro 2016. Following the Games, similar issues and allegations of state-sponsored doping occurred with Russia. *Id.* This led to banning Russia—but not its clean athletes—from the Olympic Games PyeongChang 2018. *Id.* Certain athletes were able to compete under the Olympic Flag. Yet, similar issues with the dispute process persisted, as the IOC was still issuing decisions two weeks into the games. See e.g., Sacha Pisani, *Winter Olympics 2018: IOC Upholds Decision to Ban Russia from Closing Ceremony*, SPORTING NEWS (Feb. 24, 2018), <http://www.sportingnews.com/athletics/news/winter-olympics-2018-russia-doping-closing-ceremony-pyeongchang/123efdsnn7rnb114audes0yinr>.

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transparency, (2) current costs, and (3) lack of a just proceeding with a final appeal for athletes. After briefly describing the issues in detail, this section explores possible solutions to the current doping dispute resolution process.

### A. *Current Issues*

A large problem with the doping dispute process is the lack of transparency. While many world-ranked athletes are aware of illegal substances, the prevalence of powders, supplements, and other health additives leads to “accidental” positive drug tests.<sup>76</sup> Athletes may have had good intentions but unfortunately took the wrong substance. Hence, with positive drug tests, athletes face sanctions. Several are stripped of titles, others are suspended from competition for a certain amount of time, and some are even sentenced to lifetime bans from competition. Yet, these sanctions can come from a multitude of different governing bodies: WADA, the IOC, a specific sport’s federation, a specific country’s federation, or a specific country’s anti-doping agency.

Transparency can be achieved through education. Athletes must be informed on which substances are prohibited, the possible sanctions of a positive test, and the arbitration process. To promote the education process, an athlete’s coach can play a larger part. Coaches at all levels are required to meet certain registration requirements. Depending on the sport, these requirements can include training in CPR, athlete protection, coaches’ safety, and more.<sup>77</sup> It

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<sup>76</sup> See, e.g., Robert Gibbs, *Madisyn Cox’s Suspension Reduced to Six Months After Trimetazidine Detected in Multivitamin*, SWIMSWAM (Aug. 31, 2018), <https://swimswam.com/madisyn-coxs-suspension-reduced-to-six-months-after-trimetazidine-detected-in-multivitamin/>. US-National swimming Madison Cox was originally given a two-year suspension for a positive test for Trimetazidine. *Id.* The suspension was reduced to six-months by the CAS after Cox gave credible testimony she was unaware of the substance’s presence in a multi-vitamin. *Id.*

<sup>77</sup> For examples of requirements that allow coaches to be accredited in different sports, see *Become a Coach*, INTERNATIONAL COACH FEDERATION, <https://coachfederation.org/icf-credential> (discussing international coaching requirements); *Launch of the International Sports Coaching Framework*, INTERNATIONAL COUNCIL FOR COACHING EXCELLENCE, <http://www.icce.ws/news-and-newsletters/news/launch-of-the-international-sports-coaching-framework.html> (providing a publication of Olympic coaching standards); *USA Swimming Coach Membership Requirements*, USA SWIMMING, <https://www.usaswimming.org/docs/default-source/coaching-resourcesdocuments/coach-membership-requirements/coach-requirements.pdf> (listing swim coach requirements); *Steps to Become a USA Hockey*

would be easy to add another requirement to a coaches' registration for doping control. If coaches are better informed on the process, they are more likely to be able to guide their athletes towards clean sport and, if necessary, the arbitration process.

Another transparency issue arises in the organization and membership of the different governing bodies. Each governing body can offer more openness in how its members are appointed and the results of doping disputes. While the CAS publishes opinions on all its arbitration proceedings, there is no background offered on the arbitrators and how they were selected.<sup>78</sup> If the CAS offers more transparency and publicity in its processes, athletes and coaches can also be more informed about the success of arbitration in disputes, and, if a change is needed, be better informed to promote it.

The current costs associated with the arbitration process are high. While appearing in front of the CAS is free, there are considerable costs for athletes including the financial expenses of procuring representation, registering their case with the CAS, and traveling to appear in front of the CAS and the time expenses of registering an appeal and receiving a financial judgment.<sup>79</sup> Over time, these costs can add up to millions of dollars.<sup>80</sup> Lastly, along with procedural costs, athletes may also face monetary sanctions after a final ruling.<sup>81</sup> It is ultimately a huge burden for athletes to appeal to the CAS.

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*Coach*, USA HOCKEY, <http://www.usahockey.com/coachingcertification> (listing hockey coach requirements).

<sup>78</sup> Straubel, *supra* note 31, at 1245. The current list of arbitrators is not publicly available nor is the selection process. Straubel suggests changes in the arbitrator process "to improve transparency and independence." *Id.* at 1233 n. 207.

<sup>79</sup> *Arbitration Costs*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/en/arbitration/arbitration-costs.html> (last visited Feb. 21, 2017). ("Each party involved in a dispute submitted to CAS arbitration must pay the Court Office a minimum sum of thousand Swiss francs (\$1,000 USD) in order for his application for arbitration or appeal to be registered.")

<sup>80</sup> Weston, *supra* note 47, at 10 (citing Bonnie D. Ford, *Landis May Not Race Again, But He's Not Done Fighting*, ESPN (July 1, 2008), <http://sports.espn.go.com/oly/cycling/columns/story?id=3468423> ("Two years, close to \$4 million spent by both sides combined, and an unquantifiable amount of collateral damage later" were the ultimate costs of a single doping dispute involving cyclist Floyd Landis.)).

<sup>81</sup> *Id.* On top of the millions of dollars spent during Floyd Landis' doping dispute, Landis was sanctioned \$100,000 by the CAS. However, monetary sanctions against athletes who test positive are rare; rather, such sanctions generally include bans from competition, suspensions from competition, and/or loss of competition results. *See* David Howman, *Sanctions Under the World Anti-Doping Code*, WORLD ANTI-DOPING AGENCY (Nov. 12, 2003), <https://www.wada->

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While many athletes still appeal so they can return to the sport, it is an unnecessary hardship that could be relieved through a more informal arbitration proceeding.<sup>82</sup>

The largest concern for an athlete involved in a doping dispute who appeals to the CAS is fairness. For athletes to compete in their respective sports, the athletes must be registered with different governing bodies. For example, an American swimmer must be registered with both USA Swimming and the United States Anti-Doping Agency (USADA) to compete for a spot on the Olympic team.<sup>83</sup> The USADA is a signatory of WADA and is thus fully compliant with the WADA Code and its mandatory arbitration clause. Hence, a swimmer must consent to mandatory arbitration to the CAS in order to compete at the national or international level. This mandatory arbitration clause to the CAS is inherently unfair because the athlete has no choice for how to remedy a dispute. Because the athlete must be registered with a governing body to compete, and because registration requires consent to mandatory arbitration, there is no voluntary nature to an appeal of a sanction to the CAS.<sup>84</sup>

Another fairness concern is the way in which arbitrators are chosen. As previously discussed, the selection of the arbitrator pool is an intense criticism of the CAS.<sup>85</sup> Since arbitrators are chosen by the different national and international governing bodies, there is little separation between the CAS and the sanctions prescribed by the governing bodies. Ultimately, a change in

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[ama.org/sites/default/files/resources/files/LEGAL\\_sanctions\\_howman.pdf](http://ama.org/sites/default/files/resources/files/LEGAL_sanctions_howman.pdf) (explaining the different ways sanctions are proscribed through an interpretation of the WADA Code and a sanctions flowchart).

<sup>82</sup> See generally COURT OF ARBITRATION FOR SPORT, *supra* note 46, at Rule 64 (describing the costs of the arbitration proceedings, including the costs for an appealing party to appear in front of a CAS arbitration panel).

<sup>83</sup> See USA Swimming, Inc., *Article 303: Eligibility*, 2017 USA SWIMMING: RULES AND REGS., at 95 (2017), <https://www.usaswimming.org/docs/default-source/rules-regulations/2017-rulebook.pdf> (providing the text of Procedural Rule 303.3, which states eligibility requirements).

<sup>84</sup> See Kevin Draper, *A Lawsuit Threatens the Future of the Court of Arbitration for Sport*, DEADSPIN (Feb. 18, 2015, 11:14 PM), <http://deadspin.com/a-lawsuit-threatens-the-future-of-the-court-of-arbitrat-1686685232> (criticizing the CAS and its selection of arbitrators. Draper specifically notes that the pool of arbitrators is nominated by the IOC and national sports governing bodies and that arbitrators chosen by these organizations choose the remainder of the arbitrators that will be included in the pool of arbitrators who may be chosen to hear disputes. Thus, while many argue the CAS is useful as an independent organization, Draper argues the CAS is not independent enough).

<sup>85</sup> *Id.*

the CAS proceedings must be made. This change could come from conducting a more informal arbitration process and, to alleviate some of the fairness concerns, providing a more readily available system of judicial review.

### B. *Streamlining Possible Solutions*

This section strives to streamline the entire doping dispute resolution process. The process can be improved in the following ways: (1) developing one doping standard from one governing body; (2) modifying the current arbitration process by changing the arbitrator selection process, and (3) allowing athletes a final appeal to a tribunal.

#### 1. *ONE DRUG-TESTING AGENCY*

Due to the multiple governing agencies that administer drug tests, it can be difficult for athletes to understand the policies and procedures for each agency. One solution to the problem could be the implementation of *one* drug-testing agency. After the Olympic Games Rio de Janeiro 2016, the IOC released a statement intending to strengthen WADA.<sup>86</sup> Along with strengthening WADA, the IOC is seeking to implement an Independent Testing Authority to ensure clean sport.<sup>87</sup> This was a large move for the IOC because—after years of doping and unclean sport—the Olympic Committee was finally searching for an answer. The IOC’s statement is as follows:

#### **STRENGTHENING WADA**

1. The World Anti-Doping Agency must be equally independent from both sports organisations and from national interests. This is necessary because even the perception of a conflict of interests can be considered damaging to the credibility of the anti-doping system. With regard to national interests, this is particularly important because of the recent challenges to the system from certain National Anti-Doping Organizations (NADOs), from disputes between different NADOs, and

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<sup>86</sup> Jared Anderson, *IOC to Create Independent Anti-Doping Testing Authority*, SWIMSWAM (Mar. 16, 2017), <https://swimswam.com/ioc-create-independent-anti-doping-testing-authority/>.

<sup>87</sup> *Declaration of the IOC Executive Board*, INTERNATIONAL OLYMPIC COMMITTEE (Mar. 16, 2017), <https://www.olympic.org/news/declaration-of-the-ioc-executive-board-1>.

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from appeals by International Federations (IF) against decisions of National Anti-Doping Institutions.

2. Since the sports organisations and the governments are both founding stakeholders on an equal basis, they must be represented equally on the WADA Foundation Board and Executive Committee. The role of athletes on the Foundation Board and Executive Committee must be strengthened. The representation of athletes must be by elected (not appointed as now) athlete representatives. The WADA boards should also include independent members.
3. WADA to have a neutral President and Vice-President who have no function in any government or governmental organisation or in any sports organisation. The candidates to be agreed upon by both founding stakeholders, i.e. the governments and the sports organisations, including the elected representatives of athletes. This was already proposed by the Olympic Movement in October 2016.
4. The role of WADA to be strengthened and clarified to be the sole international body responsible for:
  - a. Legislation with regard to the World Anti-Doping Code including the list of prohibited substances and standardisation of anti-doping procedures
  - b. Accreditation of anti-doping laboratories
  - c. Compliance monitoring including investigation of all code signatories
  - d. Anti-doping research
  - e. Prevention
5. The IOC supports WADA's intention to have a compliance policy which drives towards Code compliance of all signatories of the World Anti-Doping Code. This would ensure a level playing field for all the athletes of the world.

### **Creation of an Independent Testing Authority**

6. An Independent Testing Authority (ITA) to be created.
7. The ITA to develop with each respective International Federation an International Test Distribution Plan (ITDP) not only by sport but by discipline. This ITDP to contain a minimum number of tests for every athlete wanting to

participate in the World Championships or in the Olympic Games. This number to be transparent for each athlete in a discipline of a sport. Athletes not having the established minimum testing level not to be eligible for World Championships and Olympic Games.

8. The NADOs to execute these international tests on request by the ITA.
9. The NADOs to continue and, where appropriate, to strengthen all their other testing activities and WADA to ensure that NADOs' Test Distribution Plans are implemented independently from national interests.
10. The ITA board to be restricted to a supervisory role only. The ITA board to have no power to direct or instruct the management of the anti-doping programme.
11. The ITA board to include representatives from public authorities, the Olympic Movement and WADA as well as elected athlete representatives.

### **Sanctions**

12. Sanctioning with regard to individuals (athletes, officials, coaches, doctors, etc.) following a case established by the ITA, or sanctioning of a Code signatory (sports organisations, event organisers, NADOs and laboratories) following a declaration of non-compliance by WADA, both to be determined by the independent Court of Arbitration for Sport (CAS), following the democratic principle of the 'separation of powers'.<sup>88</sup>

In accordance with this statement, and immediately before the Olympic Games PyeongChang 2018, the Independent Testing Authority (ITA) board members were ratified.<sup>89</sup> Thus, at the time of this note, it is too soon to tell the effectiveness of the ITA in preventing doping and promoting clean sports. If the ITA manages to achieve its goals, it could streamline a large portion of the current doping process, as any positive tests would go immediately to the

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<sup>88</sup> *Id.*

<sup>89</sup> *Independent Testing Authority on Track*, INTERNATIONAL OLYMPIC COMMITTEE (Oct. 12, 2017), <https://www.olympic.org/news/independent-testing-authority-on-track>.



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CAS.<sup>90</sup> Yet, this would still require a more transparent and cost-effective system of appeals within the CAS.

### 2. *MODIFYING THE CURRENT ARBITRATION PROCESS*

As previously discussed, the CAS's current arbitration process requires appealing to a panel of arbitrators and appearing in front of that panel to argue the case. The panel of arbitrators is chosen from a set list created by the different governing bodies. Thus, there is little independence between the CAS and the governing bodies that make the decisions athletes are appealing. The athlete is able to choose one of the arbitrators on the panel<sup>91</sup> and can thus attempt to choose an arbitrator that understands their sport. However, because the list is pre-determined, the choice is not completely free.

One solution here is to allow athletes to choose any arbitrator, even one not on the list. This will not hurt the process because athletes only choose one of the three arbitrators on the panel.<sup>92</sup> Hence, even if the arbitrator favors the athlete, there is balance from the other arbitrators. This solution would give athletes more autonomy in their dispute proceedings. Another solution is to not have the panel of arbitrators chosen by the different governing bodies. While the CAS is specifically dealing in disputes relating to sports, arbitrators in general should be neutral, third-parties. There is not necessarily a need for the arbitrators to be sports law experts; rather, the need is to maintain the fairness of the process.

Consequently, the panel of arbitrators could be chosen using the International Centre for Dispute Resolution (ICDR) and its arbitrator selection services.<sup>93</sup> The ICDR's Arbitrator Appointment Services "provides users with a list of the most appropriate arbitrators for their dispute, according to the

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<sup>90</sup> *IOC to Create an Independent Testing Authority to Strengthen Anti-Doping*, WORLD SPORTS LAW REPORT (2017), [http://e-comlaw.com/world-sports-law-report/article\\_template.asp?ID=1967&Search=Yes&txtsearch=ard](http://e-comlaw.com/world-sports-law-report/article_template.asp?ID=1967&Search=Yes&txtsearch=ard).

<sup>91</sup> *Frequently Asked Questions*, *supra* note 41.

<sup>92</sup> See e.g., Julian Linden, *Olympics-Sports Court to Give Athletes More Say in Choosing Arbitrators*, REUTERS (Aug. 2, 2015, 10:06 AM), <https://www.reuters.com/article/olympics-doping-procedures/olympics-sports-court-to-give-athletes-more-say-in-choosing-arbitrators-idUSL1N10C09F20150802> (promoting more freedom to athletes when choosing arbitrators).

<sup>93</sup> *ICDR Arbitrator Appointment Services*, INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, [https://www.icdr.org/sites/default/files/document\\_repository/ICDR\\_Arbitrator\\_Selection\\_Services.pdf](https://www.icdr.org/sites/default/files/document_repository/ICDR_Arbitrator_Selection_Services.pdf) (last visited Mar. 17, 2017).

parties' criteria."<sup>94</sup> Hence, the ICDR can provide all parties with an appropriate list of arbitrators to choose from. Because this list is no longer affiliated with sports governing bodies, many fairness concerns about the arbitrators are relieved. This solution can also relieve fairness concerns about mandatory arbitration.<sup>95</sup> While mandatory arbitration is useful because it allows for swift and generally consistent relief, allowing athletes to choose from a neutral list of arbitrators brings more freedom and fairness into the arbitration process and thus relieves some of the tension of mandatory arbitrations.

### 3. GIVING ATHLETES A FINAL APPEAL OPTION

Fairness concerns can also be combatted by giving athletes a final appeal option. There is a lack of ability for an athlete to appeal a CAS decision, since almost all the CAS decisions are final and binding.<sup>96</sup> This could be solved by permitting an appeal to a judicial body outside of the CAS. By allowing a judicial review of the CAS decisions, athletes would be given more autonomy over the outcome of their disputes.

Current judicial review is limited to Swiss arbitration law or the New York Convention.<sup>97</sup> The standard to review under this is very high and rarely used.<sup>98</sup> One way to extend judicial review is lowering the standard. If more athletes could receive review under Swiss arbitration law or the New York convention, athletes would, at a bare minimum, be able to have one final review of their sanctions.<sup>99</sup>

Another way the CAS could implement more judicial review is to change their current arbitration process. Currently, the arbitration process allows athletes to hold a hearing in front of a panel of chosen arbitrators, and

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<sup>94</sup> *Id.* at 1.

<sup>95</sup> See Melissa R. Bitting, *Mandatory, Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for "Job Security"?*, 25 FLA. ST. U. L. REV. 655, 678 (2009) (arguing that while mandatory arbitration may not be "panacea for all concerns for Olympic athletes," the need for quickly settled disputes promotes mandatory arbitration).

<sup>96</sup> *Frequently Asked Questions*, *supra* note 41.

<sup>97</sup> *Limited Review of Awards—Independence of CAS Reaffirmed—Applicability of Art. 6 ECHR to Arbitration*, SWISS INTERNATIONAL ARBITRATION DECISIONS, <http://www.swissarbitrationdecisions.com/limited-judicial-review-of-awards-independence-of-cas-reaffirmed> (last visited Mar. 17, 2017).

<sup>98</sup> *Id.* See also Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 PEPP. DISP. RESOL. L.J. 51, 55–61 (2009).

<sup>99</sup> See generally, Weston, *supra* note 47, at 22–25.

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that decision in final and binding. The CAS could create another layer to their proceedings by allowing appointed judges to review the CAS arbitrator decisions. Appointed judges would decrease the concerns about the arbitrator selection process and the mandatory nature of arbitration.

Where these appointed judges come from is the next issue. One possibility is to have the Swiss government appoint judges, since the ultimate jurisdictional law of the CAS is Swiss law. However, the process for judge appointment, a judge's duties, and tenure should be a discussion between the CAS, the IOC, and the other various governing bodies.

There are some issues with creating another appeal procedure to the CAS. A new appeals procedure may counteract the original purpose of the CAS, which was "to bring order to the chaotic and inconsistent world of international sports adjudications."<sup>100</sup> The chaos and inconsistency that existed before implementation of the CAS would begin again. A new appeals procedure would relieve some of the fairness concerns of the current system, but these concerns would be replaced with new concerns of dispute costs and timeliness of getting a final judgement. Ultimately, a more transparent version of the current arbitration process would be the best solution to the current concerns of the CAS.

## VI. CONCLUSION

Efimova's story surrounding the Rio Olympic Games is a prime example of the chaos, confusion, and concerns surrounding the current doping dispute process. While the governing bodies all promote the same mission of drug-free, clean sports, the amount of governing bodies gives athletes unclear knowledge on sanctions and how to appeal sanctions. Hence, some solution is needed. One solution is to create another appeals process with appointed judges. However, appointed judges could bring a set of new issues. The ultimate solution should be a more transparent modification of the current arbitration proceedings under the CAS.

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<sup>100</sup> Straubel, *supra* note 31, at 1207.

