GOLD MEDALIST TO CHEATER?: IMPROVING THE WORLD’S FIGHT AGAINST DOPING IN THE WAKE OF FINA V. CIELO

INTRODUCTION

At the 2008 Olympic Games in Beijing, China, Brazilian swimmer César Cielo Filho (“Cielo”) lunged into the wall first in fifty-meter freestyle, finishing in 21.30 seconds, an Olympic-record time.1 In victory, Cielo thrust his fists into the air and repeatedly slammed them into the water, splashing with wild gesticulations.2 A half-minute later, he became more subdued and slid back into the water, hugging the lane line as tears welled in his eyes.3 After years of training and unwavering commitment to the sport of swimming, he had finally become the fastest swimmer in the world and an Olympic gold medalist.

Three years later, while competing in Brazil two months before the 2011 Fédération Internationale de Natation (“FINA”) World Championships, Cielo found both his reputation and swimming future in jeopardy. At a Brazilian national swimming competition, Cielo and three of his teammates tested positive for the banned substance furosemide,4 a diuretic that can mask the presence of performance-enhancing drugs in a biological system.5 Under the World Anti-Doping Code (“WADC”), to which all swimmers who compete at the international level must adhere,6 Cielo faced up to a two-year period of

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2 See id.
5 See Amy B Cadwallader et al., The Abuse of Diuretics as Performance-Enhancing Drugs and Masking Agents in Sport Doping: Pharmacology, Toxicology and Analysis, 161 BRIT. J. PHARMACOLOGY 1, 1, 7, 9 (2010).
ineligibility from the sport. Such a sanction would have prohibited him from competing in the 2012 Summer Olympic Games in London and potentially cost him millions of dollars in endorsement deals.

In response to his positive drug test, Cielo vehemently denied using any banned substances to improve his performance. On his website, he claimed innocence, stressing both that he ingested trace amounts of furosemide through a cross-contaminated supplement and that he took every precaution with drugs. Despite his claims, Cielo’s fate hung with the adjudicatory authorities that oversee the sanctioning of athletes who test positive for banned substances. In the past decade, these tribunals, particularly the Court of Arbitration for Sport (“CAS”), which hears many appeals on anti-doping issues each year, have heard many athletes argue that they failed a drug test because they ingested the banned substance via a contaminated dietary supplement. Although, in many of these cases, the athlete probably received little athletic benefit from the banned substance due to its small amount, the CAS had still imposed a significant sanction, such as a one- or two-year period of ineligibility from competition.

When the CAS reached its final decision regarding Cielo, which is discussed in Part III of this Comment, many swimmers at the World Championships expressed serious discontent with the decision. Australia’s Commonwealth Game champion Geoff Huegill tweeted incredulously,

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12 Hardy, CAS 2009/A/1870, para. 129; Vencill, CAS 2003/A/484, para. 63.
“WTF.” 13 Other athletes directed their frustration directly at the World Anti-Doping Agency (“WADA”) that administers the WADC. For example, Italy’s Filippo Magnini, a two-time world champion, commented, “I’m convinced [Cielo] is a champion, no matter what . . . it’s the system that doesn’t work.”14 Magnini’s statement is of particular interest to this Comment, as Cielo’s case illustrates the shortcomings of the anti-doping system.

Framed around Cielo’s case, this Comment advocates that the WADC must be redrafted to create a fairer and more understandable anti-doping system. This Comment contains four Parts. Part I provides background context regarding the international athletic community’s fight against performance-enhancing drugs. Tracing the history of anti-doping efforts, Part I describes the structure and function of the various non-governmental entities that oversee the regulation of athletes. Part II presents the 2003 WADC, the world’s first attempt to harmonize the doping laws and regulations for all athletes who compete at the international level. Part III explores how the 2003 WADC changed when it was amended in 2009 and analyzes how these changes affected the outcome of Cielo’s case. Finally, Part IV proposes several ways to improve the doping regulation system in light of Cielo. Part IV argues that the CAS reached a fair result in Cielo, yet its decision lacked reasoning that could have quelled public dissatisfaction over Cielo’s sanction. Additionally, Part IV recommends two ways that WADA can improve the WADC and one way that CAS panels can improve their reasoning in their opinions. Together, these steps would reshape the world’s fight against doping and create a system that is clearer, fairer, and more understandable to the public.

I. BACKGROUND ON THE FIGHT AGAINST DOPING

Sport is a global enterprise.15 The most apparent example of the globalized athletic endeavor is the Olympics, where thousands of athletes descend upon one city to compete for gold once every four years. But the Olympics are just

15 WALTER T. CHAMPION, JR., SPORTS LAW IN A NUTSHELL 248 (West Group 2d ed. 2000).
one of many international competitions; today, international competitions occur on a consistent basis for most sports.\footnote{16}

With the increase in international sporting events, unique challenges have arisen.\footnote{17} Chief among these challenges has been the regulation of drug usage and blood doping (collectively “doping”).\footnote{18} Indeed, in 2002, Jacques Rogge, President of the International Olympic Committee (“IOC”), stated that doping was the number one issue facing his organization.\footnote{19} To combat doping, the international community has developed an extensive hierarchy of governing and regulatory bodies to monitor athletes, promulgate regulatory codes, and adjudicate cases.

A. International Governing Bodies of Sport

A complex hierarchy of organizations oversees the international athletic community.\footnote{20} This Subpart provides an overview of this structure, describing the role of the IOC, National Olympic Committees (“NOCs”), International Federations (“IFs”), and National Governing Bodies (“NGBs”) in the fight against doping.

An analysis of the international governing bodies of sport begins with the IOC. Created in June 1894, the IOC is a non-governmental organization tasked with promoting sport as a vehicle for social responsibility and respect for fundamental ethical principles.\footnote{21} Although it lacks official government status, the IOC maintains a legal personality, such that “[s]tates acquiesce in its
decisions and conduct diplomacy with it.” Domestic courts, including the Supreme Court of the United States, have deferred to the IOC in international athletic issues. The IOC oversees the global agenda for anti-doping measures, but it relies on two kinds of organizations to promote them (and the principles of the Olympic Movement more generally): NOCs, which are country-specific, and IFs, which are sport-specific.

Considering these two bodies in turn, NOCs oversee and organize a country’s participation in the Olympic Games. All NOCs must conform to the rules set forth in the Olympic Charter, which is promulgated by the IOC. The Charter, in turn, mandates that all NOCs implement the WADC in order to be recognized by the IOC. Once the IOC has recognized an NOC, the NOC may have standing to appeal a case involving an athlete’s eligibility for participation in a competition.

The second type of organization that the IOC uses to promote its Charter is the IF. Every sport has its own IF which monitors the day-to-day administration of the various disciplines. IFs can regulate equipment standards, decide how many international competitions a sport can have each year, select judges and officials for competitions, and exercise limited appellate jurisdiction to review administrative decisions. With respect to doping, IFs test their athletes in and out of competitions and issue sanctions for


26 Olympic Charter, supra note 21, at r. 27.


29 Olympic Charter, supra note 21, r. 26.

30 Nafziger, supra note 22, at 21.
athletes who violate the WADC.\textsuperscript{31} Despite their autonomy over the administration of their sport, IFs must also conform to broader rules and principles within the Olympic Charter in order to receive IOC recognition.\textsuperscript{32}

IFs rely on NGBs to manage a sport on a national level.\textsuperscript{33} As part of their management, NGBs monitor the daily issues within a particular sport on the national playing field.\textsuperscript{34} With regard to doping, NGBs educate their athletes on the international rules against doping and further serve as liaisons to international organizations such as WADA, discussed in Part I.B.\textsuperscript{35} Still, despite having broad discretion to manage and monitor their athletes, NGBs must adhere to the rules of their respective IF.\textsuperscript{36}

B. Anti-Doping Regulatory Bodies

Comparable to the international governing bodies, the world’s anti-doping regulatory organizations—the WADA and National Anti-Doping Organizations (“NADOs”)—are also arranged hierarchically.\textsuperscript{37} Considering the regulatory bodies in turn, this Subpart describes the structure and goals of the WADA and the NADOs as well as how these organizations interact with the governing bodies described in Part I.A.

Created on November 10, 1999,\textsuperscript{38} WADA is an independent agency that oversees the global fight against doping in sport.\textsuperscript{39} WADA’s goals include


\textsuperscript{32} Olympic Charter, supra note 21, r. 25.


\textsuperscript{34} NAZIGER, supra note 22, at 38; Ryan Connolly, Note, Balancing the Justices in Anti-Doping Law: The Need To Ensure Fair Athletic Competition Through Effective Anti-Doping Program vs. the Protection of Rights of Accused Athletes, 5 VA. SPORTS & ENT. L.J. 161, 163 (2006).


\textsuperscript{36} NAZIGER, supra note 22, at 21.


\textsuperscript{38} History of Anti-Doping, supra note 18. The idea for WADA developed in 1998, following a high-profile Tour de France scandal, at the First World Conference on Doping Sport in Lausanne, Switzerland. At this conference, national governments, IFs, and NGBs pledged to fight the practice of doping by imposing two-year suspensions on athletes who tested positive for either in- and out-of-competition drug tests and by creating an international anti-doping agency. World Conference on Doping in Sport, Feb. 2–4, 1999, Lausanne Declaration, paras. 2–4 (Feb. 4, 1999), available at http://www.la84foundation.org/OlympicInformation
protecting the athlete’s right to participate in a drug-free sport and ensuring the harmonized, coordinated, and effective anti-doping measures with regard to detection, deterrence, and protection of doping. 40 To achieve its goals, WADA promulgated three sets of rules: International Standards,41 Model Rules, Guidelines, and Protocols;42 and the WADC.43 The International Standards are designed to harmonize the most technical aspects of doping, including not only what drugs constitute “prohibited” or “specified” substances44 but also the protection of privacy and personal information.45 Related to the International Standards, the Model Rules offer guidance for IFs, NOCs, and sporting event coordinators in implementing drug-testing procedures.46 The WADC, the core document of the WADA’s World Anti-Doping Program, harmonizes anti-doping rules, policies, and procedures of anti-doping organizations throughout the world.47 The WADC is the focus of Part II.

Center/OlympicReview/1999/OREXXVI25/OREXXVI25g.pdf. Under the Lausanne Declaration, WADA’s goals are to expand out-of-competition testing, coordinate research, promote preventive actions, and harmonize scientific and technical standards for drug-testing analyses and equipment. Id. paras. 1–4. The Olympic Movement committed twenty-five million U.S. dollars to WADA’s creation. Id. para. 4.

39 About WADA, supra note 37.

40 2009 WADC, supra note 7, at 11. Much of the original 2003 WADC stemmed from the 2000 Olympic Movement Anti-Doping Code, which was cobbled together from many IF rules, Court of Arbitration for Sport rulings, and judicial holdings. NAIZINGER, supra note 22, at 161–62.


43 See 2009 WADC, supra note 7.

44 For definitions of these terms, see infra Part II.D.

45 International Standards, supra note 41.

46 Model Rules, supra note 42; see, e.g., Model Rules for Major Events Organizations, WORLD ANTI-DOPING AGENCY, Sept. 2011, available at http://www.wada-ama.org/Documents/Resources/Model_Rules/WADA_Model_Rules_MEO_V2.0_EN.doc. The Model Rules, however, are merely instructive unlike the mandatory International Standards and the WADC. Id.

47 World Anti-Doping Program, WORLD ANTI-DOPING AGENCY, http://www.wada-ama.org/en/World-Anti-Doping-Program (last updated Oct. 2010). WADA has touted the success of the WADC, stressing that it is a “powerful and effective tool in the harmonization of anti-doping efforts worldwide.” World Anti-Doping Code, WORLD ANTI-DOPING AGENCY, http://www.wada-ama.org/en/world-anti-doping-program/sports-and-anti-doping-organizations/the-code (last updated May 2011). WADA claims both the growing number of signatories who have signed onto the WADC and the CAS’s consistent support of the WADC’s tenets are evidence of its efficacy. Id. With the growing acceptance of the WADC, one critic has questioned whether WADA has too much power, calling it “the ultimate authority on matters of drugs and sport—looming over [NOCs] and the national and international federations . . . and making it more difficult for those parochial interests to protect athletes caught doping.” Michael Sokolove, In Pursuit of Doped Excellence: The Lab Animal, N.Y. TIMES, Jan. 18, 2004, § 6 (Magazine) at 28.
On a national level, NADOs, such as the United States Anti-Doping Agency (“USADA”), assist WADA by coordinating doping control efforts within a specific country. Countries designate an NADO as the central authority to adopt and implement anti-doping rules, direct the collection of drug tests, manage test results, and conduct disciplinary hearings. To be compliant with the WADC, each NADO must agree to the tenets of the WADC, implement the WADC’s articles into its rules and policies, and enforce these rules and policies in accordance with the WADC.

Lest it seem that all the organizations described in Subparts I.A and I.B are separate, the WADC stresses that the IOC, WADA, NOCs, IFs, NGBs, and NADOs all participate in some aspect of the doping control process. Cielo’s case, for example, illustrates the interplay of the various organizations. The Confederação Brasileira de Desportos Aquáticos (“CBDA”), the Brazilian NGB for aquatic sports, presided over his case initially, but because it was dissatisfied with the NGB’s decision, FINA, the IF for swimming, appealed to the CAS.

C. The Adjudication of Doping Violations

As discussed in the previous Subpart, a two-tiered adjudicatory system exists for doping disputes. Typically, these tiers include a hearing by a local tribunal, which can be a federation or a sports-related body, and an appeal before the CAS—an independent, centralized, and specialized adjudicatory authority located in Lausanne, Switzerland. This Comment discusses the

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48 NAFTZGER, supra note 22, at 161–62. Regional Anti-Doping Organizations (“RADOs”) perform similar functions as NADOs. RADOs unite countries and stakeholders in a specific geographical area in order to pool resources for anti-doping efforts. Currently, WADA has established fifteen RADOs, which serve 121 countries. Regional Anti-Doping Organizations, WORLD ANTI-DOPING AGENCY, http://www.wada-ama.org/en/Anti-Doping-Community/RADOs (last updated Oct. 2012).

49 2009 WADC, supra note 7, app. 1, at 131. If a country has not designated a NADO, the NOC shall be the country’s NADO. Id.


51 2009 WADC, supra note 7, app. § 1, at 126.


54 NAFTZGER, supra note 22, at 40. The CAS also resolves cases through mediation. What is the Function of the CAS?, Ct. Arb. Sport, http://www.tas-cas.org/20question (last visited Feb. 9, 2012). The CAS has two
findings of several local tribunals, but it concentrates on appellate hearings before the CAS.

Although nominally a “court,” the CAS is an arbitral tribunal that, pursuant to the Olympic Charter, has broad jurisdiction over all activities pertaining to sport, including appellate jurisdiction over doping-related disputes. In doping cases, WADA, IFs, NOCs, and athletes may all seek appeal from the CAS. When a doping dispute is submitted to the CAS, it goes before an arbitration panel comprised of three arbitrators, one of whom is designated the President. These arbitrators have full power to review the facts and law of the case—the equivalent of the de novo standard of review in U.S. law.

Generally, the sequence of events in the CAS includes the petitioner filing an appeal, the respondent submitting a reply, and then both parties presenting evidence, witnesses, and oral arguments at a hearing before the panel. Once the parties have introduced all their evidence, the arbitration panel will deliberate and issue a written decision, which will be publicly disseminated unless the parties agree otherwise. When issuing its decision, the panel renders its award by a majority opinion; when the arbitrators do not reach a majority, the panel’s President issues the award alone.

55 NAZIGER, supra note 22, at 41–43. The Olympic Charter provides, “[a]ny dispute arising on the occasion of, or in connection with, the Olympic Games” must be submitted exclusively to the CAS. Olympic Charter, supra note 21, at r. 74. The Appeals Arbitration Division resolves disputes over the finding of a federation, associations, or other sports-related body. Id. The CAS was created by the IOC in 1983. COURT OF ARBITRATION FOR SPORT, DIGEST OF CAS AWARDS II 1998–2000, at xxiv (Matthieu Reeb ed., 2002) [hereinafter DIGEST II]. For a discussion of the IOC statutes that led to the CAS’s creation, see id.

56 CAS CODE, supra note 53, r. R57. Under the 2009 WADC, all IFs must use the CAS as the sole mechanism for resolving doping-related disputes. See 2009 WADC, supra note 7, DC13.5, at 83.

57 The CAS maintains a list of at least 150 arbitrators from thirty-seven countries, who specialize in sports-related disputes. CAS CODE, supra note 53, statutes S12, S13. Arbitrators are appointed for four-year terms that may be renewed. Id. statute S13. Upon becoming a CAS arbitrator, one must sign a declaration of independence as a legal statement of his or her impartiality. Id. statute S18. For more information on the CAS’s impartiality as a whole, see History of the CAS: The 1994 Reform, CT. ARB. SPORT, http://www.tas-cas.org/en/infogenerales.asp/4-3-236-1011-4-1-1-5-0-1011-3-0-0 (last visited Feb. 8, 2012).

58 CAS CODE, supra note 53, r. R57; see BLACK’S LAW DICTIONARY 1645 (9th ed. 2009).

59 See generally id. vs. R51, R55.

60 Parties choose the applicable law. Id. r. R58. However, a CAS panel, with proper justification, may use general rules of law as necessary and appropriate. Id.

61 Id. r. R59.

62 Id.
Like many international courts of arbitration, CAS panels are not bound by the common law principle of stare decisis. Still, precedent often affects a panel’s final decision in one of two ways. First, scholars have noted that panels often follow precedent “in the interests of comity and legal certainty.” For instance, in the 1990s, CAS panels consistently applied strict liability to all anti-doping cases in order to build a body of anti-doping jurisprudence that was then codified in the 2003 WADC. Second, before a decision is final, the panel must present its award to the CAS Secretary General, who reviews the decision and can raise “fundamental issues of principle.” According to a former Secretary General, this review is designed to point out discrepancies between the current award and existing CAS precedent. Despite this power of review, the CAS Procedural Rules do not grant the Secretary General the authority to change the award to comport with precedent. Therefore, the panel retains the ultimate decision-making authority in the matter and can depart from precedent.

In summary, although it is independent from the IOC and WADA, the CAS plays an integral role in the fight against doping in sport. Its panels not only interpret the WADC and sanction athletes, but in the past, its jurisprudence has also inspired many provisions of the WADC itself.

II. THE 2003 WORLD ANTI-DOPING CODE

As described in Part I, the world has developed a complex system of administrative, regulatory, and judicial bodies to combat doping in sport. At the center of all of these authorities is the WADC. Adopted at the Second World Conference on Doping in Sport on March 3, 2003, the WADC unified many disjointed and uncoordinated anti-doping efforts by standardizing...
international regulation of doping in sport. Indeed, the WADC established the framework for harmonized anti-doping policies, rules, and regulations within the various athletic organizations that oversee international competition. Drafted as a “living document” and most recently amended in 2009, the WADC’s adoption was a watershed moment in the coordinated international effort to eradicate doping from sport.

When it came into force on January 4, 2004, the WADC occupied a unique place in the law. Instead of merely replacing an anti-doping organization’s policies against doping, the WADC established both guiding principles and mandatory anti-doping rules. Generally, the guiding principles are non-binding procedural guidelines for implementing doping control processes within a country. In contrast, the mandatory rules of the WADC include many of the WADC’s substantive provisions: “Article 1 (Definition of Doping), Article 2 (Anti-Doping Rule Violations), Article 3 (Proof of Doping), Article 9 (Automatic Disqualification of Individual Results), and Article 10 (Sanctions).” Together, these articles harmonize the management of doping throughout the world. That is, the articles set forth uniform standards to quell confusion over questions such as what offenses constitute doping.


71 NAFZIGER, supra note 22, at 162; World Anti-Doping Code, supra note 47.

72 “Living document” means that the WADC would undergo periodic revisions. Indeed, Article 23.6 of the 2003 WADC stipulated that WADA would oversee the evolution and improvement of the WADC by proposing amendments to the WADC as necessary. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE art. 23.6, at 66–67 (2003), [hereinafter 2003 WADC], available at www.wada-ama.org/rtecontent/document/code_v3.pdf.

73 For a description of the 2009 WADC, see infra Part III.

74 World Anti-Doping Code, supra note 47.

75 2003 WADC, supra note 72, intro, at 6–7.

76 See id.

77 Id.; see supra Part I.

78 2003 WADC, supra note 72, intro, at 6 (“It is critical . . . that all Signatories base their decisions on the same list of anti-doping rule violations, the same burdens of proof and impose the same Consequences for the same anti-doping rule violations.”).
liability, and (D) sanctions. Subpart E explores these concepts within the context of two anti-doping cases involving Canadian skeleton racer Serge Despres and world record-holding American swimmer Jessica Hardy.

A. Due Process

Doping jurisprudence is grounded in contract law. When an athlete participates in an athletic competition as a representative of an NGB or NOC, she places herself in a de facto legal situation. She agrees, implicitly or otherwise, to abide by the WADC’s standards. Accordingly, if an athlete has committed a doping violation, she has consented to incur all sanctions issued against her by the governing body of her sport. The private contractual nature of the distribution of rights under the WADC can have serious consequences. For instance, American athletes who have suffered sanctions under the WADC have no legal right to seek redress in the domestic court system because the Fourteenth Amendment’s Due Process Clause does not extend to private contracts.

Although American athletes may not seek redress in domestic courts, the WADC still provides for an athlete’s due process rights in a way that is consistent with the Constitution. Article 8 guarantees an accused athlete the right to a timely, fair hearing before an impartial adjudicatory body. Further, Article 8 expressly allows an accused athlete the right to respond and present evidence to challenge her alleged doping violation. After this hearing and upon issuance of that body’s decision, an athlete who competes at the

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80 See CLAUDE ROUILLER, AVIS DE DROIT [Legal Opinion] 20 (2005), translation available at www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-Legal_Library/Advisory_and_Legal_Opinions/Article_10_2_WADC_Swiss_Law.pdf; see also Connolly, supra note 34, at 174 (“Athletes . . . must almost always sign a document which states that the athlete agrees to be bound by the rules of the sporting body.”).

81 ROUILLER, supra note 80, at 20.

82 Id.

83 Lambert, supra note 70, at 419.


86 2003 WADC, supra note 72, art. 8, at 24. Notably, Article 8 is only a “guideline principle,” not a mandatory rule under the Code. Id.

87 Id.
international level may appeal the decision to the CAS under Article 13.\(^{88}\) Taking Articles 8 and 13 together, an accused athlete has the right to challenge findings of doping violations in a manner that is consistent with due process principles of the U.S. Constitution.\(^{89}\)

B. The Burden and Standard of Proof

Article 3 places the burden of proof on the anti-doping organization that is prosecuting an athlete for a doping offense.\(^{90}\) In the past, prosecuting bodies have satisfied the burden of proof by using both direct and circumstantial evidence, but in most cases, they satisfy their burden through direct evidence.\(^{91}\) In doping disputes, direct evidence is a positive drug test where an accredited testing agency has determined the presence of a banned substance within an athlete’s biological sample.\(^{92}\) More controversially, the CAS has upheld on appeal that a prosecuting body may meet its burden of proof through circumstantial evidence, such as testimony from testing agents of odors of alcohol in a urine test or skewed results from doping labs that suggested tampering with a urine sample.\(^{93}\) Notably, USADA used circumstantial evidence to convict American cyclist Lance Armstrong of doping offenses in summer 2012.\(^{94}\) When using either direct or circumstantial evidence to

\(^{88}\) \textit{Id.} art. 13.2.1, at 38. National-level athletes may appeal to an independent and impartial body as provided by the national anti-doping organization. \textit{Id.} art. 13.2.2, at 38.

\(^{89}\) Critics have argued that the 2003 WADC did not adequately protect athletes’ due process rights. \textit{See}, \textit{e.g.}, Goldstone, \textit{supra} note 85, at 370; Lambert, \textit{supra} note 70, at 419. Lambert notes that Article 14.2 allows an anti-doping organization to disclose publicly any positive test results after administrative review and before a fair hearing. \textit{Lambert, supra} note 70, at 419. Accordingly, athletes, prior to a fair hearing, can suffer tremendous damage to their reputation without having an opportunity to offer evidence of no fault. \textit{Id.}

\(^{90}\) 2003 WADC, \textit{supra} note 72, art. 3, at 12–13.


\(^{92}\) 2003 WADC, \textit{supra} note 72, art. 3, 12–13. Under Article 3.2.1, WADA-accredited laboratories are presumed to have conducted all tests in accordance with WADA International Standards. \textit{Id.} art. 3.2, at 12–13. However, an athlete may offer evidence to rebut this presumption. \textit{Id.} In all the cases referenced in this Comment, the prosecuting body met its burden of proof by direct evidence.

\(^{93}\) McLaren, \textit{supra} note 91, at 10. \textit{See}, \textit{e.g.}, B. v. Fédération Internationale de Natation, CAS 98/211, Arbitral Award, para. 56 (Ct. Arb. Sport 1998), \textit{in DIGEST II, supra} note 54, at 234, 272 (upholding the suspension of gold medal-winning swimmer Michelle Smith De Bruin for tampering with her urine sample through circumstantial evidence).

implicate an athlete for a doping offense, a prosecuting body must prove the doping offense to the “comfortable satisfaction” of the hearing body.

C. Strict Liability

The WADC has adopted strict liability for all anti-doping infractions. Pursuant to this rule, if a testing agency determines that an athlete possessed a banned substance, then the athlete has violated the WADC. An athlete’s intent does not factor into the imposition of the infraction; therefore, a violation occurs regardless of whether the athlete possessed the substance intentionally, unintentionally, or negligently. In circumstances when an athlete tests positive for a banned substance during an in-competition drug test, the violation results in an automatic disqualification of individual results. Cielo suffered this consequence when he tested positive for furosemide while competing in May 2011.

WADA’s rationale behind the strict liability is simple: to preserve fair competition. By adopting a strict liability standard, the WADC codified years of the CAS’s anti-doping jurisprudence. In these cases, the CAS has offered three arguments to support strict liability. First, the CAS has argued, if strict liability did not exist, “the fight against doping would become practically impossible”, because every prosecutorial body would have to present evidence of an athlete’s desire to improve her performance. Collecting this evidence would not only be practically difficult, but it would also slow down

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95 2003 WADC, supra note 72, art. 3.1, at 12. “Comfortable satisfaction” is higher than civil law’s balance of probabilities yet lower than criminal law’s beyond a reasonable doubt. Id. Critics have argued that athletes should get procedural protections more akin to criminal law. To substantiate this argument, these critics have emphasized three ways in which anti-doping jurisprudence resembles criminal law more than contract law: (1) terminology—a convicted athlete is guilty, not a breaching party; (2) an athlete lacks bargaining power over her contract; and (3) an athlete suffers immediate stigmatization by competitors and sponsors upon conviction. See Lambert, supra note 70, at 422; see also Straubel, supra note 67, at 1272.

96 2003 WADC, supra note 72, art. 2.1.1 cmt., at h–9.

97 Id.

98 Id.

99 Id.


101 Connolly, supra note 34, at 182.


103 Id.
the adjudication process and raise the cost of litigation. 104 Second, the CAS has noted that life itself contains inherent unfairness. 105 For example, it is “unfair” for an athlete to get food poisoning before a competition, yet that athlete has no avenue for redress from this sickness. 106 Accordingly, although strict liability will result in an unfair result where the athlete has absorbed a banned substance accidentally, the rules of competition cannot be changed to undo every injustice that may arise during the course of competition. 107 Third, the CAS has stressed that remedying one athlete’s unfairness can result in the transfer of that unfairness onto her competitors. 108 By excusing one athlete’s violation, the CAS would impose unfairness upon her competitors, as they would have to compete against an athlete who has a physiological advantage. 109 From an empirical perspective, shifting the unfairness in this manner would actually work an injustice against more athletes.

As strict liability appears to be a necessity in the regulation of doping in sport, the WADC places the onus on the athlete to monitor what substances enter her body. 110 Under this rule, an athlete must act as the gatekeeper of her body. 111 Accordingly, in theory, all athletes who actively monitor what they ingest should avoid any sanction. As supplement use has skyrocketed over the past decade, however, several vigilant athletes have suffered significant sanctions for the presence of a banned substance that had contaminated an otherwise valid nutritional supplement under the WADC. 112

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105 See id. para. 14, at 193 (“The vicissitudes of competition, like those of life generally, may create many types of unfairness whether by accident or the negligence of unaccountable persons, which the law cannot repair.”).

106 Id.

107 Id.

108 Id. para. 15, at 193.

109 Id.

110 See 2003 WADC, supra note 72, art. 2.1.1 cmt., at 8–9.

111 See id.

D. Sanctions

An athlete faced two forms of sanction under the 2003 WADC. First, if an athlete tested positive while competing at an athletic event, she had to forfeit all medals, points, and prizes.113 Second, and more importantly, she faced either a warning or a period of ineligibility from competition.114 This second kind of sanction depended on a variety of circumstances, including how many previous violations an athlete had and what type of substance the athlete possessed.115 Under Article 10.3, the sanction for possession of a “specified substance,” which is “particularly susceptible” to unintentional use because of its prevalence in over-the-counter drugs, ranged from a warning to one year of ineligibility for a first offense.116 Conversely, under Article 10.2 the sanction for possession of a “prohibited substance,” such as human growth hormone, was two years of ineligibility for a first offense.117

Under the 2003 WADC, before an adjudicatory body issued its sanction, an athlete had the opportunity to reduce her sentence based on “exceptional circumstances.”118 Article 10.5 ameliorated the harsh effect of the strict liability principle, offering an athlete a chance to mitigate a sanction based on how the “prohibited” or “specified substance” came into her possession.119 Using this WADC provision, an athlete had to argue either “No Fault or Negligence” or “No Significant Fault or Negligence.”120 On one hand, a successful argument of No Fault or Negligence eliminated a sanction completely.121 To meet this high standard, an athlete had to establish that she did not and could not have known or suspected that she had been administered a “prohibited substance.”122 On the other hand, a successful showing of No

113 2003 WADC, supra note 72, art. 10.1, at 26.
114 Id. art. 10.2, at 26–27.
115 This is a list of possible sanctions under Article 10 of the 2003 WADC: (1) for a first-time possession of a prohibited substance, a two-year period of ineligibility; (2) for a second-time possession of a prohibited substance, a lifetime ban from the sport; (3) for a first-time possession of a specified substance, up to a one-year period of ineligibility; (4) for a second-time possession of a specified substance, up to a two-year period of ineligibility; and (5) for a third-time possession of a specified substance, up to a lifetime ban. See id. art. 10, at 26–36.
116 Id. art. 10.3, at 27–28.
117 Id. art. 10.2, at 26–27.
118 Id. art. 10.5, at 29–32.
119 Id.
120 Id. arts. 10.5.1, 10.5.2, at 2931. Article 10.5.3 also allows for an athlete to reduce her sanction by providing assistance to the anti-doping organization regarding others who may be guilty of a doping scheme. Id. art. 10.5.3, at 32.
121 Id. art.10.5.1, at 2930.
122 Id. app. 1, at 76.
Significant Fault or Negligence reduced a sanction by a maximum of one-half of the period of ineligibility that would otherwise exist. To meet this standard, an athlete had to prove her negligence was not significant in relation to the violation under the totality of circumstances.

Although Article 10 provided athletes with two chances to mitigate their punishment, comment to Article 10.5.2 expressly limited the article’s scope, noting that a sanction should only be mitigated when the circumstances of the case are “truly exceptional.” In this respect, comment to Article 10.5.2 listed sabotage by a competitor as the only way to eliminate a sanction using No Fault or Negligence. Additionally, it provided that an anti-doping organization should not eliminate a sanction where a violation occurs as a result of: (1) a mislabeled or contaminated vitamin or nutritional supplement; (2) taking a banned substance prescribed by the athlete’s personal physician or trainer; or (3) sabotage from within an athlete’s circle of associates including a spouse or coach. Although an athlete could not eliminate her punishment in these instances, she could have nevertheless presented unique facts of her case in order to prove No Significant Fault or Negligence and have her sanction reduced by half. In practice, reducing a sanction was difficult, but, from 2003 to 2009, when the amended WADC came into effect, a few athletes managed to reduce their sanctions under Article 10.5.2.

E. Despres & Hardy: Jurisprudence Under the 2003 WADC

The cases of Serge Despres and Jessica Hardy illustrate the principles of due process, burden and standard of proof, strict liability, and sanction mitigation under the 2003 WADC. Both cases emphasize the CAS’s strict interpretation of the WADC and how difficult it is to reduce one’s sanction.

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123 Id. art. 10.5.2, at 3031.
124 Id. app. 1, at 76.
125 Id. art. 10.5.2 cmt., at 3031.
126 Id.
127 Id.
128 Id.
In 2007, Serge Despres tested positive for nandrolone, an anabolic steroid that can increase muscle growth and red blood cell production.\(^{130}\) A Canadian skeleton racer, Despres had recently undergone hip surgery and, at the advice of a nutritionist for the national organization for bobsledding in Canada, was taking a nutritional supplement to facilitate his recovery.\(^{131}\) Before ingesting this supplement, he had researched its contents and determined that it contained no ingredients that WADA prohibited.\(^{132}\) Despite his efforts, however, nandrolone appeared in this supplement by an alleged contamination during the manufacturing process.\(^{133}\)

Upon hearing his case, a local tribunal\(^{134}\) determined that Despres had violated the WADC, but the circumstances of his positive test qualified him for twenty months of ineligibility rather than two years of ineligibility.\(^{135}\) Upon this ruling, WADA appealed to the CAS, arguing that Despres was not entitled to a reduced sanction because his case was not “truly exceptional.”\(^{136}\) Agreeing with WADA, the CAS panel issued Despres the standard two-year suspension.\(^{137}\) According to the panel, to qualify for a reduction of the punishment, Despres needed to have taken additional steps to ensure what he was ingesting was not a “prohibited substance.”\(^{138}\) These steps included contacting the manufacturer, conducting more research into the contents of the supplement, or following up with the nutritionist.\(^{139}\) Because he did not take these precautions, Despres suffered the full punishment. In response to the sanction, he lamented, “I was scared and felt like my whole world was crashing down on me. None of it made sense to me.”\(^{140}\)

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\(^{131}\) Id. para. 5.12a.

\(^{132}\) Id. para. 5.12e.

\(^{133}\) Id. para. 5.15. According to the Canadian Centre for Ethics in Sport, independent laboratory tests conducted on the supplement confirmed that it had been laced with steroids. *Contaminated Supplement Likely Cause of Failed Drug Test*, CANADIAN CTR. ETHICS SPORT (Feb. 19, 2008), http://www.cces.ca/en/news-35-contaminated-supplement-likely-cause-of-failed.

\(^{134}\) In this case, the local tribunal was the Sport Dispute Resolution Centre of Canada. Despres, CAS 2008/A/1489, para. 3.1.

\(^{135}\) Id.

\(^{136}\) Id. para. 5.2 (internal quotation marks omitted).

\(^{137}\) Id. para. 7.1.

\(^{138}\) Id. para. 7.9.

\(^{139}\) Id.

One year after Despres’s failed drug test, American swimmer Jessica Hardy tested positive for the “prohibited substance” clenbuterol, which can increase aerobic capacity, just days after qualifying for the Beijing Olympics.[141] Similar to Despres, Hardy traced her ingestion of the “prohibited substance” to a supplement that she had been taking prior to competition—AdvoCare Arginine Extreme.[142] Unlike Despres, however, Hardy had taken no less than eight affirmative steps to ensure that the supplement was safe for consumption.[143] These steps included researching the supplement; having personal conversations with AdvoCare agents; receiving assurance that AdvoCare had an independent company test its products for purity; only obtaining the supplement directly through AdvoCare; and consulting with various swimming personnel, including the national team nutritionist, about AdvoCare’s contents.144 Despite her due diligence and the fact that she had been taking the product for eight months without a failed drug test, Hardy found herself in the United States facing two years of ineligibility instead of competing for a gold medal in Beijing.[145]

Pursuant to the USADA’s Protocol for Olympic Movement Testing, Hardy had her case appointed to a panel of arbitrators from the North American Office of the CAS, operating as the American Arbitration Association (“AAA–CAS”).146 Although the panel found that Hardy had violated the 2003 WADC, it determined that Hardy’s negligence did not rise to the level of being significant, and therefore, her period of ineligibility could be reduced to one year, the maximum reduction possible under the 2003 WADC.147

WADA appealed the AAA–CAS’s ruling to the CAS, arguing that Hardy’s sanction should not have been reduced because the exigencies of her case were

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142 Id. para. 12.
143 Id. para. 13.
144 Id.
145 Id.
146 Id. paras. 8–9. The AAA-CAS is an offspring of the CAS that was created in 1996 to resolve the inconsistent adjudication of North American NGBs. Athletes whose cases are heard before the AAACAS still have the right to appeal to the CAS. For a detailed description of the AAACAS’s history, procedures, administration, see Straubel, supra note 67, at 1219–25.
147 Hardy, CAS 2009/A/1870, para. 14.
not “truly exceptional.” Rejecting this argument, the CAS panel held that the circumstances of Hardy’s positive test met the “truly exceptional” standard. In the panel’s opinion, Hardy had researched and investigated AdvoCare’s products in a manner reasonably expected from an informed athlete wishing to avoid risks connected with supplements. Indeed, citing Despres, the panel ruled that Hardy made a good faith effort “to leave no reasonable stone unturned.” Although the panel avoided a direct comparison of Despres’ and Hardy’s cases, the citation suggests that the panel thought Hardy’s due diligence warranted a lesser period of ineligibility than Despres received.

In a subsequent discussion of the appropriate length of Hardy’s suspension, the panel rendered two important thoughts in dicta. First, the panel noted that the “level of diligence due by an athlete” had risen over the years. The panel, however, offered no citation to substantiate this claim, merely stating that future panels must evaluate the relation of fault with the reduction of the sanction. Second, the panel proclaimed, “[I]t follows . . . that CAS precedents . . . have to be reviewed carefully to determine whether or not the standard of care established at that time is still valid today.” Despite this statement, the CAS did not discuss precedent when determining the length of Hardy’s sanction. Instead, the CAS merely denounced WADA’s appeal for two years of ineligibility as “too harsh” and without “sufficient basis in the rules.”

The panel’s endorsement of using precedent without engaging in a discussion of any precedent is frustrating. As a non-common law tribunal that is not bound by stare decisis, the panel did not have to evaluate precedent. Still, the panel invoked Despres, suggesting an implicit comparison of the facts

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148 Id. para. 64. “Truly exceptional” was defined as “when an athlete can show that the degree of fault or negligence in the totality of the circumstances was such that it was not significant in relation to the doping offence.” Id. (emphasis omitted).
149 Id. para. 120.
150 Id.
151 Id.
152 Id.
153 Id. para. 127.
154 Id.
155 Id.
156 Id.
157 See id. paras. 123–29. The cases the CAS cites offer support for a different proposition—that a review of a sanction is only permitted when grossly disproportionate to the offense. Id. para. 128.
158 Id.
159 See id. paras. 123–29.
between Despres and Hardy, but then it refused to compare the specific exigencies of Hardy’s case with Despres or any other cases to decide the appropriate length of her sanction. Without a measured discussion of why Hardy deserved a different period of ineligibility than another athlete, the opinion avoided a justification for its holding. Accordingly, the decision seems incomplete, as if the panel missed an opportunity to refine the contours of the law and elucidate how athletes could take necessary steps to ensure due diligence before ingesting supplements.

Perhaps one of the reasons why the panel did not elaborate on the appropriate length of Hardy’s sanction compared to other athletes was because the 2003 WADC was already obsolete. Indeed, by the time Hardy’s case was heard, delegates at the Third World Conference on Doping in Sport had already endorsed several amendments to the 2003 WADC. These amendments, which came into effect on January 1, 2009, and their subsequent effect on doping jurisprudence, are the subject of Part III.

III. JURISPRUDENCE UNDER THE 2009 WORLD ANTI-DOPING CODE

The WADC’s drafters never intended for the 2003 WADC to be a conclusive set of all anti-doping rules and principles. In 2006, WADA initiated a WADC revision process, calling for input from “anyone.” After nearly two years of discussion and seventy presentations to stakeholder groups, WADA’s Executive Committee and Foundation Board unanimously approved a revised WADC (“2009 WADC”). Two general themes emerged from the revisions—firmness and fairness. Although these themes permeate the entire 2009 WADC, this Part focuses on these themes within the provisions on sanctions, Article (“DC”) 10.

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160 Id.
163 Q&A: 2009 Code, supra note 162.
164 Id.
165 Id.
166 When this Comment references articles in the 2009 WADC, “DC” precedes the article number. In contrast, when this Comment reference articles in the 2003 WADC, “Article” precedes the article number. For a textual comparison of the 2003 WADC and 2009 WADC, see infra Appendix, Figure 1.
A.  **DC10: Firmness and Fairness in the 2009 WADC**

DC10 resembles Article 10 in structure and content. However, DC10 changes the definition of two key terms, revises the provision concerning “specified substances,” and includes a new provision regarding multiple offenses. Together, these changes not only grant adjudicatory bodies greater discretion to fashion sanctions for first time offenders but also create stricter guidelines for administering sanctions in aggravated circumstances.

Comparable to the 2003 WADC, the 2009 WADC instructs an adjudicatory authority to sanction an athlete based on the type of substance the athlete possessed, the circumstances around the positive drug test, and the number of times an athlete has violated the WADC.\(^{167}\) For a first time offense, an athlete likely still faces two years of ineligibility for a prohibited substance and either a reprimand or a period of ineligibility for a specified substance.\(^{168}\)

The most notable similarity between DC10 and Article 10 is that DC10.5.1 and DC10.5.2 contain nearly identical language to Article 10.5.1 and 10.5.2.\(^{169}\) Therefore, under the 2009 WADC, athletes can use DC10.5.1 and DC10.5.2 to argue that the exceptional circumstances of their case allow them to escape or mitigate a sanction because they had no fault, or no significant fault.\(^{170}\) Like the 2003 WADC, however, athletes who test positive for a banned substance that they ingested via a supplement cannot argue *No Fault or Negligence* under DC10.5.1 to escape sanction entirely.\(^{171}\)

Despite some similar structure and language, the 2009 WADC departs from the 2003 WADC in three noteworthy ways. First, the 2009 revisions redefine “prohibited” and “specified” substances, vastly expanding the latter category. Under the 2003 WADC, WADA identified “specified substances” as a finite subset of its Prohibited List, and, notably, the list of “specified substances” contained many fewer substances than the list of “prohibited substances.”\(^{172}\)

\(^{167}\) 2009 WADC, *supra* note 7, DC10.1, at 51.

\(^{168}\) 2009 WADC, *supra* arts. 10.4, 10.5, at 54–62.

\(^{169}\) 2009 WADC, *supra* arts. 10.5.1, 10.5.2, at 56–57; 2003 WADC, *supra* note 72, arts. 10.5.1, 10.5.2, at 20–31.

\(^{170}\) 2009 WADC, DC10.5, at 5662.

\(^{171}\) Id. DC10.5.1 cmt., at 56.

contrast, the 2009 WADC stipulates that all “prohibited substances,” except anabolic agents and peptide hormones on the Prohibited List, are “specified substances” for the purpose of sanctions.\footnote{2009 WADC, \textit{supra} note 7, DC4.2.2, at 31.} The 2009 WADC’s semantic change greatly expands the list of “specified substances.” In turn, a larger list of “specified substances” increases the likelihood that an athlete will be able to reduce her sanction because an athlete may use DC10.4 to mitigate her sanction.\footnote{See \textit{id.}, DC10.4, at 54–55.}

The revised DC10.4 is the second important change in the 2009 WADC. DC10.4 (“Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances”) replaces the 2003 WADC’s Article 10.3 (“Specified Substances”).\footnote{\textit{Id.}; 2003 WADC, \textit{supra} note 72, art. 10.3, at 27–28.} Under DC10.4, a first-time offender faces at a minimum a warning and at a maximum two years of ineligibility for a positive drug test.\footnote{2009 WADC, \textit{supra} note 7, DC10.4, at 54–55.} Although DC10.4 increases the maximum sanction for a first-time offender (formerly one year under Article 10.3), it includes new language that explains how an athlete can mitigate her sanction. This new text provides that, if an athlete can establish how the substance entered her body and produce corroborating evidence that it was not intended to improve performance or mask the use of performance enhancing drugs, then the athlete’s “degree of fault” is “the criterion” for determining the sanction’s appropriate length.\footnote{\textit{Id.}}

The addition of DC10.4 reflected a concern for athletes who had tested positive for a banned substance without intent to gain an unfair competitive advantage.\footnote{Ensuring a Level Playing Field, \textit{supra} note 161, at 4–6.} By adding the language in DC10.4 and changing the definition of “specified substances” to include all banned substances aside from those on the Prohibited List, WADA granted adjudicatory bodies greater discretion in reducing sanctions based on extenuating circumstances of a positive drug test. Providing adjudicating authorities with this discretion, however, has not solved all of the shortcomings of the WADC because there is still an inherent flaw in the dichotomy between DC10.4 and DC10.5, which is discussed in Part IV.\footnote{See infra Part IV.C.}
violations. Under DC10.7, which has no counterpart in the 2003 WADC, if an athlete violates the WADC more than one time, she faces a period of ineligibility set forth in a table in DC10.7 (one year to a lifetime ban depending on the number and type of violations). Accordingly, when DC10.7 controls, an athlete receives a more severe sanction, and the court has less discretion over which sanction to apply based on the athlete’s degree of fault. Although the addition of DC10.7 provides clearer instructions for adjudicatory bodies issuing a sanction for an athlete’s second offense, it can lead to disparate sanctions under certain circumstances, such as in Cielo.

In total, the 2009 WADC revisions regarding sanctions promoted WADA’s two broad goals: firmness and fairness. The severe sanctions under DC10.7 increased the penalties for repeat offenders. In contrast, the new definition of “specified substances” and the new language in DC10.4 not only increased the likelihood that an athlete who mistakenly ingested a banned substance could mitigate her sanction, but also granted more discretion to adjudicatory bodies to consider the circumstances of a positive test before issuing a sanction for a first-time offender.

B. Melnychenko & Cielo: CAS Interpretation of DC10

The cases of Ukrainian gymnast Anastasia Melnychenko and Brazilian swimmer César Cielo illustrate how the CAS determines a sanction under the 2009 WADC. Both Melnychenko and Cielo tested positive for the substance furosemide, but despite possessing the same substance, the athletes received different sanctions—a four-month ban for Melnychenko and a warning for Cielo. This Subpart will analyze the athletes’ sanctions, inspecting each case’s attendant circumstances to explain why the CAS panels reached such divergent results.

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180 Ensuring a Level Playing Field, supra note 161, at 5. Other examples of aggravating circumstances include being part of a large doping scheme, or engaging in deceptive or obstructive conduct to avoid detection of a banned substance. 2009 WADC, supra note 7, DC10.6 cmt., at 65.

181 2009 WADC, supra note 7, art. 10.7.

182 See supra Introduction.

183 Ensuring a Level Playing Field, supra note 161, at 3.


185 Melnychenko, CAS 2011/A/2403, para. 7.9; Cielo, CAS 2011/A/2495, para. 8.32.
1. **WADA v. Melnychenko**

At the European Team Championships for Gymnastics in October 2010, Ukraine’s Anastasia Melnychenko tested positive for furosemide.\(^{186}\) Just fifteen years old at the time of the test, Melnychenko had her father prepare a memorandum and commission a medical report from her physician to explain how the “specified substance” entered her body.\(^{187}\) According to these documents, Melnychenko took the medication “Lasix” for one and a half days to relieve pain and a high temperature caused by a boil on her nose.\(^{188}\) Taking the circumstances of her use into account under DC10.4, the International Federation of Gymnastics (“FIG”) suspended Melnychenko for two months—substantially less than the two years Melnychenko could have received.\(^{189}\)

Dissatisfied with the ruling, WADA appealed to the CAS in hopes of imposing two years of ineligibility.\(^{190}\) Respondents argued that FIG’s ruling should be upheld.\(^{191}\) Financially unable to hire an attorney or travel to the CAS to represent her interests, Melnychenko’s father sent a letter to the CAS on behalf of his daughter.\(^{192}\) His letter had two objectives. First, he reiterated his daughter’s innocence by stating he made the decision to give her Lasix when she was in a semi-unconscious state because her health was more important than “imaginary values” created by the WADC.\(^{193}\) Second, he attacked WADA for its failure to take into account individual characteristics of an investigated person, such as his daughter’s age, health, and relative inexperience.\(^{194}\)

Reviewing the case, the CAS panel balanced the need to sanction a doping offense against the exceptional circumstances of Melnychenko’s case.\(^{195}\) The panel found factors in favor of both sides. In favor of increasing the sanction, the panel emphasized the WADC’s foundation in strict liability and that it is the athlete’s burden to remain vigilant regarding everything that enters her body.\(^{196}\) In favor of a reduced sanction, however, the panel noted three

\(^{186}\) *Melnychenko*, CAS 2011/A/2403, para. 2.3.

\(^{187}\) *Id.*

\(^{188}\) *Id.* para. 2.5.

\(^{189}\) *Id.* para. 2.6.; see 2009 WADC, supra note 7, DC10.4–.5, at 54–62.

\(^{190}\) *Melnychenko*, CAS 2011/A/2403, paras. 3.1–.2.

\(^{191}\) *Id.* para. 3.5.

\(^{192}\) *Id.* para. 3.4.

\(^{193}\) *Id.*

\(^{194}\) *Id.*

\(^{195}\) *Id.* paras. 3.4, 7.5, 7.8.

\(^{196}\) *See* *Id.* para. 7.6.
circumstances: (1) Melnychenko’s age; (2) the fact that a medical decision had
to be made quickly by her father; and (3) the fact that Melnychenko had asked
her doctor whether Lasix contained any “prohibited substances” before taking
it.\(^\text{197}\) Weighing the parties’ interests against each other, the panel increased
Melnychenko’s two-month suspension to four months.\(^\text{198}\)

Although Melnychenko’s case revealed which factors a CAS panel
considers for determining an appropriate sanction, the panel only offered a
cursory overview of how to balance these factors against each other.\(^\text{199}\) Indeed,
the opinion avoided an extensive analysis of how a particular factor translates
into a finite number of months of ineligibility.\(^\text{200}\) The panel cited two cases
(\textit{Squizzato}, CAS 2005/A/830 and \textit{Foschi}, CAS 1996/A/156) in which athletes
received reduced sanctions on account of their age and inexperience,
suggesting that Melnychenko’s youth played a big factor in its decision to
reduce her sanction by sixteen months.\(^\text{201}\) Instead of discussing this factor in
relation to the other factors, however, the panel simply concluded that “a
suspension of four months . . . would better reflect the seriousness of the
offense, the fundamental responsibility of the athlete and her young age and
lack of experience.”\(^\text{202}\) On its face, the suspension comports with the text of
WADC and seems reasonable under the circumstances. But by refusing to
elaborate on its rationale for the sanction, the panel’s decision of four months
seems arbitrary—a haphazard number of months that is more than two and less
than twenty-four. The CAS panel should have entered into a more substantial
comparative analysis to rationalize its decision.

\(^\text{197}\) Id. para. 7.5.
\(^\text{198}\) Id. para. 7.9.
\(^\text{199}\) See id. paras. 7.5–7.9.
\(^\text{200}\) See id.
\(^\text{201}\) Id. para. 7.8 (citing S v. FINA, CAS 2005/A/830, Arbitral Award (Ct. Arb. Sport 2005); Foschi v.
Fédération Internationale de Natation Amateure, CAS 1996/A/156, Arbitral Award (Ct. Arb. Sport 1996)).
Perhaps not coincidentally, Foschi (of the case \textit{Foschi}, CAS 1996/A/156) went on to attend Duke University
School of Law and write a Note about the doping system. See Jessica K. Foschi, Note, \textit{A Constant Battle: The
Evolving Challenges in the International Fight Against Doping in Sport}, 16 DUKE J. COMP. & INT’L L. 457
\(^\text{202}\) Melnychenko, CAS 2011/A/2403, para. 7.9.
2. **FINA v. Cielo**

   a. Background and Procedural Posture

   César Cielo and three of his teammates (Nicholas Dias dos Santos, Henrique Barbosa, and Vinicius Waked) tested positive for furosemide at the *Maria Lenk* swimming competition in May 2011. On July 1, 2011, the athletes attended a sanction hearing before the CBDA. At the hearing, each athlete argued that a contaminated caffeine tablet had caused their anti-doping violation, and therefore, they should receive a reduced sanction under DC10. After consideration, the CBDA determined that all the athletes, save Waked, should have their results at *Maria Lenk* disqualified and, pursuant to DC10.4, be issued a warning because there was *No Fault or Negligence* on their part. Because Waked had already committed a doping violation in 2010, he was subject to a sanction under DC10.7, but, like the others, he suffered no period of ineligibility because the CBDA found *No Fault or Negligence* on his part. In reaching these holdings, the CBDA merged discrete provisions of the 2009 WADC, incorporating the no significant fault language of DC10.5 into its holding under DC10.4. Accordingly, FINA sought immediate appeal.

   FINA challenged the CBDA’s ruling on three fronts. First, although FINA acknowledged that the athletes had proven both how furosemide entered their bodies and that it was not intended to improve performance, FINA argued that the case did not qualify as one of *No Fault or Negligence*. Second, because the athletes did not have *No Fault or Negligence*, FINA claimed that DC10.4 applied and, accordingly, Cielo, dos Santos, and Barbosa should be suspended for three months based on their “degree of fault.” Third, FINA

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204 Id. para. 2.3.
205 Id. para. 3.4(y).
206 Id. para. 2.6.
207 Id. paras. 2.7–2.8.
208 See id. paras. 2.6, 2.8. The CBDA’s interpretation in Cielo’s case is an example of an improper interpretation of the WADC. In that case, the CBDA decided that, in accordance with DC10.4, the appropriate sanction for the athletes was a warning because there was *No Fault or Negligence*. Id. para. 2.6. As the CAS Panel pointed out, however, the ruling was “inconsistent and in error.” Id. para. 2.9. DC10.4 does not permit a finding of *No Fault or Negligence*; only DC10.5.1 permits that finding. See id.
209 Id. para. 7.6.
210 Id.
211 Id.
argued Waked should be ineligible for one year due to his previous anti-doping rule violation.212

In rebuttal, the athletes offered three arguments. First, they contended that caffeine was a “medication,” not a “supplement,” and therefore, their case should be adjudicated under DC10.5.1.213 Second, in the alternative that the panel found caffeine to be a supplement, the athletes, save Waked, argued that their sanction under DC10.4 should be a warning due to the circumstances of their positive drug test.214 Third, the athletes argued that, if caffeine was found to be a supplement, Waked should receive a sanction of three to four months under DC10.7.215

b. CAS Decision

What sanction the athletes deserved hinged on two issues: (1) whether caffeine was a “supplement” or “medication;” and (2) the athletes’ “degree of fault.”

First, to solve the preliminary question of what subsection of DC10 applied, the panel had to classify the caffeine pill as a “medication” or “supplement.”216 Once that was determined, the panel could decide the appropriate sanctions for the athletes.217 On one hand, if the panel ruled caffeine was a “medication,” DC10.5.1 could apply.218 Under DC10.5.1, if an athlete could both prove that she bore No Fault or Negligence and establish how the “prohibited substance” entered her system, then the anti-doping rule violation would not be considered a violation for the purpose of determining the period of ineligibility.219 As a result, the panel could impose “no sanction, not even a warning.”220 On the other hand, if the panel found that caffeine was a supplement, DC10.5.1 could not apply because the comment to DC10.5.1 expressly prohibits a sanction’s elimination where an athlete tests positive from a “contaminated vitamin or nutritional supplement.”221 Thus, if caffeine

212 Id.
213 Id. para. 7.8.
214 Id.
215 Id.
216 See id.
217 See id.
218 Id.
219 2009 WADC, supra note 7, DC10.5.1.
220 Cielo, CAS 2011/A/2495, para. 2.9(a).
221 2009 WADC, supra note 7, DC10.5.1–2 cmt., at 56–57.
was a supplement, the athletes could not eliminate their sanction. Instead, the athletes would be subject to DC10.4, where the panel would assess their “degree of fault” in determining what sanction should apply—at a minimum, a reprimand, and at a maximum, two years of ineligibility.

In answering this medication/supplement question, the panel made a three-part investigation, ultimately concluding caffeine was a supplement. First, the panel inspected the FINA Rules and WADC for a definition of “medication” or “supplement.” Both were silent on the issue, thus highlighting the need to define these terms in future versions of the WADC. Second, the panel considered evidence proffered by Cielo’s doctor, Dr. Magliocca, who claimed he had prescribed the caffeine in its pure form as a medication. The panel, however, rejected Dr. Magliocca’s view because it was neither supported by medical literature nor corroborated by an independent medical practitioner. Third, the panel performed its own inquiry. Considering real world uses of caffeine, the panel concluded caffeine was a supplement for five reasons: (1) it is readily available; (2) it is available without prescription; (3) it can be found in everyday products, such as coffee and energy drinks; (4) an ordinary person would not consider caffeine a “medication;” and (5) it is not curative or healing. In the face of the silent WADC, this five-factor test provided a thoughtful and measured analysis that should inform future panels.

Having concluded that caffeine was a “supplement,” the panel had thereby determined that the athletes were not entitled to an elimination of their sanction, and therefore, it would need to assess the athletes’ “degree of fault” under DC10.4. To make this determination, the panel reviewed the facts of the case and concluded the athletes’ fault was “at the very lowest end of the spectrum of fault.” Substantiating this holding, the panel cited the

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222 See id. DC10.5.1–2 cmt., at 56–57.
223 Id. DC10.4, at 55.
224 Cielo, CAS 2011/A/2495, para. 8.19.
225 Id. para. 8.13.
226 Id.; see infra Part IV.B.
228 Id. para. 8.14–15.
229 Id. para. 8.15.
230 Id. paras. 8.15–18. Although the athletes had a prescription for caffeine in its pure form, the panel refused to accept that a substance automatically qualifies as a “medication” if a prescription is necessary to obtain it. Id. para. 8.17.
231 See 2009 WADC, supra note 7, arts. 10.4–10.5, 54–62.
circumstances of the positive drug test, the evidence that the athletes had offered to prove their diligence in ensuring that the product they were ingesting was safe for consumption, and the sworn testimony from the pharmacy where the allegedly tainted caffeine originated.233

Considering the rationale for this holding in turn, the panel first noted that the circumstances of the positive drug test weighed in favor of the athletes.234 According to testimony, Cielo had been taking the caffeine tablets since January 2010 and had taken no fewer than five urine tests without testing positive for a “specified substance.”235 Additionally, the doping results showed that the urine concentrations of the failed drug test were within the normal range and not diluted.236 Accordingly, the furosemide in Cielo’s system could not have been used as an agent to mask the presence of a performance-enhancing drug.237

Second, the panel determined that the athletes’ fault was minimal because Cielo and his doctor took every reasonable precautionary measure possible before the athletes ingested the caffeine. These precautions included these facts: (1) Cielo, on behalf of his teammates, had consulted his father, a Health Secretary in Brazil, to determine which pharmacy complied best with health regulations;238 (2) Cielo’s father ensured Cielo that Anna Terra Pharmacy had the best reputation;239 (3) Cielo would have his prescription filled by Anna Terra and then, upon pick-up, deliver the pills to Dr. Magliocca;240 (4) Dr. Magliocca would only administer the pills when requested and when he thought appropriate;241 (5) Dr. Magliocca personally ensured each athlete that the prescription was safe every time he administered it;242 and, (6) on more than one occasion, Dr. Magliocca had visited Anna Terra and reviewed an electronic certificate of the new shipment’s purity.243 Taking these facts in the aggregate, the panel concluded that Cielo and Dr. Magliocca took every practical precaution to avoid a positive drug test.244 Playing devil’s advocate,

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233 Id. para. 8.25 (referring to the factual findings set out in para. 3.4).
234 See id. para. 3.4.
235 Id. para. 3.4(i).
236 Id. para. 3.4(ii).
237 Id.
238 See id. para. 3.4(iii).
239 See id. para. 3.4(iv).
240 See id. para. 3.4(v).
241 See id.
242 See id. para. 3.4(vi).
243 See id. para. 3.4(vii).
244 Id. para. 8.25.
the panel opined that the athletes could have tested each pill individually or
refrained from using caffeine, but it rejected these possibilities because
testing each pill would have been “disproportionately expensive and time
consuming” and because caffeine was a legal substance under the WADC.

The final contributing factor to the panel’s conclusion of minimal fault was
evidence provided by the Anna Terra Pharmacy. In a declaration, pharmacy
representative Ana Tereza Cósimo de Souza stated that, on the day that one
bottle of caffeine tablets was being prepared, the pharmacy was also filling
several prescriptions that included furosemide. Notably, de Souza did not
definitively state that the pills had been contaminated at the pharmacy.
Although the evidence was not unequivocal, the panel accepted the possibility
that the furosemide “inadvertently contaminated” the caffeine. As a result,
the panel accepted this third party human error as the source of the
contamination.

As previously stated, the panel took all of these factors under consideration
and ultimately determined that the athletes’ fault was at the “very lowest end of
the spectrum.” Accordingly, as its next step, the panel had to convert this
degree of fault into a sanction under DC10.4. The panel lamented its position
as “somewhat of a dilemma” because “looking at the matters objectively and
with common sense, it [could not] find anything but the slightest fault on the
part of the Athletes.” Therefore, it determined the “only appropriate
sanction” for the athletes, save Waked, was a warning. Here, the panel’s
admission that these facts put it in a “dilemma” is particularly telling. By
admitting its quandary, the panel seemed to acknowledge the novelty of its
decision—never before had an athlete escaped a period of ineligibility after
possession of a banned substance. Still, as discussed in Part IV.A, the 2009
WADC’s text and the respondents’ evidence warranted such a holding.

245 Id. para. 8.26, 8.29.
246 Id. para. 8.26.
247 See id. para. 8.24.
248 Id. para. 3.4(y).
249 Id.
250 Id.
251 Id.
252 Id. para. 8.24.
253 Id. para. 8.31.
254 Id.
255 Id. para. 8.32.
Turning to Waked, the panel had to evaluate his positive drug test under DC10.7 because he had already committed a doping violation in 2010. Although the panel found his fault to be just as negligible as the others, it had to apply a period of ineligibility in accordance with a table in DC10.7. This table mandated that the period of ineligibility range from one to four years; accordingly, the panel elected the smallest sanction, sentencing Waked to one year of ineligibility. Again, under the 2009 WADC, the panel issued a fair sanction against Waked because repeat offenders unquestionably faced sanction under DC10.7.

IV. CRACKS IN THE CODE: IMPROVING THE WADC AFTER CIELO

Because of its timing and the athletes involved, the panel’s decision in Cielo made international headlines. Many derided the panel for a poor ruling—letting Cielo off with a mere warning or for setting a “dangerous precedent.” Part IV, however, argues that the panel made a valid ruling under the 2009 WADC. This Part also analyzes Cielo to reveal possible shortcomings of the WADC and to offer suggestions for how WADA can improve the WADC and the public’s understanding of the WADC. In light of these goals, this Part is divided into four subsections: (A) an analysis of Cielo; (B) the need for the WADC to define the terms “medication” and “supplement;” (C) the problems with DC10.4 and DC10.5; and (D) why CAS panels should discuss precedent in every case.

A. Analyzing Cielo: A Fair Ruling on the Merits

Despite the criticism it received, the panel reached a fair holding in Cielo for two reasons. First, the respondents offered ample evidence to demonstrate their minimal degree of fault under DC10.4. Second, the panel’s decision comported with the letter of the WADC and was buttressed by the purpose of the 2009 revisions.

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256 Id. para. 8.34(s).
257 Id. paras. 8.43–.45.
258 Id. para. 8.46.
259 See, e.g., Dampf, supra note 14.
260 Id.
A review of the respondents’ evidence shows its breadth, scope, and detail. In the abstract, the evidence fell into three major groupings—evidence of the Cielo’s due diligence, evidence of Dr. Magliocca’s due diligence, and evidence of the pharmacy’s potential error. Taking these groupings in turn, Cielo, on behalf of all the respondents, consulted a reputable public official for advice on the best pharmacy in his hometown; upon obtaining a prescription, he transferred possession to Dr. Magliocca; and he sought reassurance time and again from Dr. Magliocca that the pills were safe. Likewise, Dr. Magliocca personally visited the pharmacy on numerous occasions; he met with pharmacy staff; he read medical literature on pure-form caffeine; and he personally viewed an electronic certificate confirming that the caffeine was “100% pure.” Last, the Anna Terra Pharmacy’s representative declared that it filled several prescriptions involving furosemide on the same day it filled Cielo’s prescription for caffeine. Based upon all of this evidence, the athletes’ actual “fault” was extremely minimal.

But the fact that the evidence established that the athletes had only the slightest fault is not the main reason why this decision was a fair one; instead, what makes this decision fair is how the panel interpreted its finding of minimal fault under the WADC. Indeed, the panel used both a textualist and purposivist approach—a textualist approach to determine what the sanctions for the athletes should be and a purposivist approach to affirm its holdings.

Using a textual approach, the panel rejected the CBDA’s No Fault or Negligence ruling because a strict reading of DC10.5 explicitly forbids the elimination of a sanction where a contaminated supplement caused a positive test. As a result, the panel could not “eliminate” the athletes’ sanctions; instead, it had to operate under DC10.4, which prescribes a reprimand at the

261 2009 WADC, supra note 7, DC10.4, at 54–55. The second element requires the standard of “comfortable satisfaction.” Id. Comfortable satisfaction means more than the mere balance of probabilities but less than beyond a reasonable doubt. Id. DC3.1, at 26.

262 See Cielo, CAS 2011/A/2495, para. 3.4.

263 Id. paras. 3.4(i), 3.4(r)–(s).

264 Id. paras. 3.4(k), 3.4(t)–(u).

265 Id. para. 3.4(y).

266 Id. paras. 8.21–24. See generally John F. Manning, What Divides Textualists From Purposivists?, 106 COLUM. L. REV. 70, 71, 84 (2006) (“[T]extualism . . . requires judges to treat the clear import of an enacted text as conclusive, even when the text fits poorly with its apparent background purposes [whereas] . . . purposivism is characterized by the conviction that judges should interpret a statute in a way that carries out its reasonably apparent purpose and fulfills its background justification . . . ”).

267 Cielo, CAS 2011/A/2495, para. 2.9.

268 Id. para. 8.31; see 2009 WADC, supra note 7, DC10.5.1 cmt., at 56–57.
minimum and two years of ineligibility at the maximum.269 Hence, although the panel found the “slightest fault” on the athletes’ part, it had to issue a warning to Cielo, dos Santos, and Barbosa under the letter of DC10.4.270

The panel’s alternative sanction for Waked evidences both the textualist approach and the purposivist justification. Due to Waked’s prior doping violation in 2010, his 2011 positive test was his second offense. Accordingly, although the panel found him to have the “slightest fault,” it had to evaluate his sanction pursuant to the table in DC10.7.271 Waked’s fault was nominal; therefore, the panel issued him the table’s minimal sanction—one year, thus comporting with the text of the WADC.272 But Waked’s sanction, when compared with his fellow respondents, was immense. Perhaps in response to this disparity, the panel justified its holding by reviewing the purpose behind the 2009 WADC revision:

[T]he clear intention of the 2009 WADC (and its analogues) was to provide for greater, or harsher, sanctions in what are viewed as aggravating circumstances (such as multiple offences) whilst providing for flexibility and the lessening of sanctions in circumstances where, under the 2003 WADC, an Athlete, who was not a multiple offender, may have received what was considered to be an unduly harsh sanction.273

Here, with one stroke, the panel simultaneously defended Waked’s sanction as consistent with the purpose of the revised WADC and reminded naysayers that, under the revised WADC, the panel possessed greater discretion when issuing sanctions for athletes who were not multiple offenders. This justification might have been a premeditated response to critics who may have questioned how, despite similar circumstances, Jessica Hardy could receive a one-year period of ineligibility, while Cielo and his two teammates could walk away with a mere warning.

In summary, the panel reached a fair holding in Cielo. Given the overwhelming amount of evidence Cielo offered to prove his (and Dr. Magliocca’s) due diligence, the panel imposed appropriate sanctions, all of which comported with the text and purpose of the 2009 WADC.

269 2009 WADC, supra note 7, DC10.4 cmt., at 54–55.
270 Cielo, CAS 2011/A/2495, para. 8.31.
271 See 2009 WADC, supra note 7, DC10.7, at 66–70.
272 Cielo, CAS 2011/A/2495, para. 8.46.
273 Id. para. 8.41.
B. Improving the WADC: Defining “Medication” and “Supplement”

Cielo’s importance is not limited to its holding; indeed, the decision demonstrates how crucial it is to define terms in a regulatory document. Before considering any sanctions, the panel had to decide the threshold issue of whether prescription caffeine was a “medication” or a “supplement.” Out of context, the distinction seems trivial, but here, that distinction bore greatly on the eventual sanctions the athletes faced. 274 If the panel had determined that the caffeine was a “medication,” then the panel could have evaluated the athletes under DC10.5.1,275 and their sanction could have been eliminated. Accordingly, all of the athletes, including Waked, would have escaped any punishment under the WADC. Clearly, the panel’s classification of caffeine as a supplement had a substantial impact on the outcome of the case.

Although the CAS hears cases concerning positive drug tests from allegedly contaminated supplements every year, 276 the WADC has never defined the terms “medication” or “supplement.”277 With vast differences in sanctions riding on the classification of a substance such as caffeine, WADA should define both “medication” and “supplement.” Taking a cue from domestic law, the United States Code defines “medication” as a substance used in the “diagnosis, cure, mitigation, treatment, or prevention of disease.”278 Comparatively, according to the statute, a supplement intends to “supplement the diet” and contains one or more of the following: a vitamin, mineral, herb or botanical, amino acid, a dietary substance, or a concentrate, metabolite, extract or combination of the aforementioned substances. 279 From these definitions, the determinative factor between “medications” and “supplements” seems to be that “medications” are intended to be curative and more targeted toward curing or preventing disease.

274 2009 WADC, supra note 7, DC10.5.1 cmt., at 5657.
275 Of course, the Panel did determine that the athletes had a modicum of fault in this case, but this determination only came after they had decided the medication/supplement issue. Cielo is only used to demonstrate how important this threshold decision can be.

277 See 2009 WADC, supra note 7, app. at 128–35 (listing all the defined terms in the WADC).
279 Id. § 321(ff)(1).
Although these definitions help draw a distinction between the two products, defining substances in such narrow, “curative” terms creates concerns. First, there are substances, such as pure caffeine, that do not fit squarely within either category; it is not a vitamin, mineral or amino acid, but at the same time, it is not a curative substance in a traditional sense. Second, both the pharmaceutical and dietary supplement industries champion innovation, continuously pushing the boundaries of science to create new products for consumers. As new products are created, fairly rigid definitions can become outdated quickly.

Based on these concerns, this Comment advocates that WADA should incorporate a factor-based definition of “medication” and “supplement,” codifying the criteria the panel used in Cielo. These factors included the substance’s availability, form, and curative effect, as well as its public perception and whether a prescription is necessary to obtain it. None of these factors should be dispositive; rather, a panel should consider each to determine whether a substance should classify as a medication or supplement. Although a factor-based test would not foster stability and predictability the way a bright-line test would, this test would remedy the problem of having static definitions in the face of new products and medicines that may blur the line between “medication” and “supplement.” Additionally, this test would provide anti-doping adjudicatory bodies with a starting point for their analysis, thus creating a consistent approach to the question that would, in turn, lead to consistent findings on the merits.

C. Redrafting DC10.4 and DC10.5

Cielo exposed two weaknesses in DC10, both of which are contained in DC10.4 and DC10.5. First, DC10.4 suffers from imprecise drafting. Second, the WADC’s drafters placed too much importance on what substance caused an athlete’s failed drug test. Considering these points independently, this Subpart argues that DC10.4 and DC10.5 need redrafting to remedy their inherent flaws.

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280 Cielo, CAS 2011/A/2495, para. 8.18 (stating that caffeine is not a “curative or healing substance”).
282 Cielo, CAS 2011/A/2495, paras. 8.15, 8.18.
283 See id. para. 2.9.
284 See 2009 WADC, supra note 7, DC10.4–5, at 54–62.
DC10.4’s imprecise language stems from its use of the word “elimination.” “Elimination” appears not only in DC10.4’s title\textsuperscript{285} but also in its body.\textsuperscript{286} Although its language suggests that an athlete’s sanction may be eliminated, DC10.4 expressly provides that an athlete may receive “[a]t a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.”\textsuperscript{287} Thus, under DC10.4, an athlete cannot escape all punishment. Instead, at a minimum, an adjudicatory body must issue a warning. Lessening a two-year period of ineligibility to a warning is a reduction; it is not an elimination. To eliminate is “to get rid of” or “remove,”\textsuperscript{288} and the text states that a sanction cannot be removed in DC10.4.

To a casual reader, the inclusion of “elimination” may seem inconsequential, but it confuses terminology that has substantial effects on athletes’ rights. If an athlete has her sanction eliminated, “the anti-doping rule violation shall not be considered a violation for . . . determining the period of Ineligibility for multiple violations under Article 10.7.”\textsuperscript{289} For instance, in Cielo’s case, if the panel had eliminated his sanction, his record today would be clean. Instead, because of his warning, his situation is comparable to Waked’s prior to the CAS hearing. If Cielo tests positive for any substance in the future, he faces sanction under DC10.7, and he will be unable to escape a period of ineligibility regardless of his fault. The consequences of having a sanction eliminated and reduced are vastly different; therefore, WADA must expunge “elimination” from DC10.4 to provide clearer instructions for adjudicatory bodies around the world.

In addition to its imprecise drafting, DC10 also places too much emphasis on what kind of banned substance an athlete possesses. As explained in Part III.A, when determining whether an athlete’s case warrants a reduced sanction, an adjudicatory body must apply DC10.4 or 10.5.\textsuperscript{290} If DC10.4 applies, a panel may reduce a sanction to a warning.\textsuperscript{291} However, if DC10.5 applies, a panel may only reduce the sanction by up to “one-half of the period of Ineligibility

\textsuperscript{285} Id. DC10.4, at 54 (“Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances.”) (emphasis omitted).
\textsuperscript{286} Id., at DC10.5, at 55 (“To justify any elimination or reduction . . . .”).
\textsuperscript{287} Id.
\textsuperscript{289} 2009 WADC, supra note 7, DC10.5.1, at 56.
\textsuperscript{290} See 2009 WADC, supra note 7, DC10.4–5 at 54–62. This statement only applies to athletes who are facing sanction under the WADC for the first time. Athletes who are facing sanction for the second or third times are subject to DC 10.7. See id. DC7.1–7.3, at 66–68.
\textsuperscript{291} Id. DC10.4, at 54–55.
otherwise applicable” unless the athlete can prove No Fault or Negligence, an extremely high standard. Under DC10.2 the period of ineligibility imposed for a first-time violation is two years; therefore, the likely best scenario for an athlete whom a panel evaluates under DC10.5 is a one-year period of ineligibility. Jessica Hardy suffered such a fate under the 2003 WADC.

Because of such a wide disparity between the sanctions under DC10.4 and 10.5, most athletes with No Significant Fault or Negligence would prefer that their case be subject to DC10.4 rather than 10.5. But in most cases where an athlete can prove how a substance entered her body and that it was not intended to improve her performance, she cannot control whether she possessed a “specified substance” or a substance on the Prohibited List. What kind of substance she possessed, however, determines whether her case is evaluated under DC10.4.

Limiting access to DC10.4 to only those athletes who possessed “specified substances” exposes a flaw in the WADC. Every year, athletes test positive for taking a contaminated supplement or from taking a drug from a physician who does not understand the WADC’s parameters. Do these athletes choose what

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292 Id. DC10.5.2, at 57.
293 Id. DC10.2, at 52.
294 See World Anti-Doping Agency v. Hardy, CAS 2009/A/1870, Arbitral Award, para. 124 (Ct. Arb. Sport 2010), available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-Legal_Library/Case_Law/WADP-Case-Law-2/CAS-2009-A-1870-Hardy.pdf. Notably, Hardy’s case was adjudicated under the 2003 WADC. The outcome of her case, however, is still relevant to this discussion because the texts of DC10.5.1 No Significant Fault or Negligence are the same in both the 2003 and 2009 WADC. Compare 2009 WADC, supra note 7, DC10.5, 56–62, with 2003 WADC, supra note 72, art. 10.5, 29–32.
295 This statement assumes that the athlete does not qualify for complete elimination of a sanction under DC10.5.1 No Fault or Negligence. Such an outcome would usually be a best-case scenario; however, few athletes meet the standard of DC10.5.1. The comment to DC10.5.1 explains just how difficult this standard is. The comment describes only one situation in which DC10.5.1 applies: where an athlete can prove that, despite all due care, she was sabotaged by a competitor. Further, the comment expressly prohibits application of DC10.5.1 in three common scenarios: (1) positive test resulting from a mislabeled or contaminated supplement; (2) administration of a “prohibited substance” by the athlete’s personal physician; and (3) sabotage by an athlete’s spouse or coach. The third scenario is particularly telling when juxtaposed with the comment’s earlier statement that DC10.5.1 would apply where an athlete could prove that, despite due care, she was sabotaged by a competitor. Drawing a distinction between different forms of sabotage highlights the narrow circumstances where DC10.5.1 might apply. It seems that the WADC’s architects want to create an expressio unius exception that only applies in the most unjust of circumstances. 2009 WADC, supra note 7, DC10.5.1 cmt., at 56–57.
296 Id. DC10.4. (“Where an Athlete or other Person can establish how a Specified Substance entered his or her body . . . .”) (emphasis omitted).
substance will cause them to test positive? In most cases, the answer is no. The WADC, however, boxes athletes into different categories based on one factor that is beyond their control. If the Anna Terra Pharmacy had been filling prescriptions containing an anabolic agent instead of furosemide, Cielo would have likely suffered a year of ineligibility, possibly banning him from the 2012 Olympic Games. Likewise, if Melnychenko’s doctor had prescribed a substance containing clenbuterol instead of furosemide, Melnychenko would have suffered at least a year of ineligibility. These hypothetical situations expose a fundamental inequity in the WADC—regardless of an athlete’s intent or due diligence, she may face a minimum sanction of a warning in some cases and a minimum sanction of one year of ineligibility in another—it all depends on one factor that is outside of her control.

In theory, distinguishing between “specified substances” and substances on the Prohibited List seems consistent with the revised WADC’s goals of flexibility and harsher, stricter sanctions. Not only, in WADA’s words, is there a greater likelihood that “specified substances” “could be susceptible to a credible, non-doping explanation,” but substances on the Prohibited List generally affect the body’s physiology to improve athlete performance. Accordingly, athletes who test positive for a substance on the Prohibited List probably gained a competitive advantage and likely do not have a credible explanation for use. Consider, however, the plethora of cases that the CAS has heard regarding contaminated supplements. Athletes in these cases may have gained an unfair athletic advantage over competitors, but that advantage could have been slight or nonexistent, as the substance could have appeared in extremely small amounts. Indeed, modern doping tests can detect even the slightest amounts of a banned substance in a biological system. Further, the athlete could have provided an explanation for her use by confirming through an accredited third party that her supplement was contaminated through no fault of her own.

Of course, the WADC notifies all athletes of its strict liability principle—that an athlete has a duty to ensure no banned substance enters her body. This
Comment does not wish to abandon strict liability; instead, it advocates redrafting DC10 in light of the modern-day reality that the vast majority of modern athletes ingest supplements despite WADA’s persistent warnings that up to twenty percent of supplements may contain substances that are not listed on the label.\textsuperscript{302} Statistics on supplement use are rare; however, the studies that have been performed confirm the rising prevalence of supplements among international athletes. For example, at the 1996 Atlanta Olympics, thirty-nine percent of Canadian athletes reported consuming nutritional supplements; four years later, at the Sydney Olympics, that number had climbed to forty-seven percent.\textsuperscript{303} Another study found, at the 2008 Beijing Olympics, the number of athletes using supplements had surged to ninety percent of all Olympic athletes.\textsuperscript{304} The psychological and economic reasons for such high use are outside the scope of this Comment;\textsuperscript{305} such high use, however, indicates that athletes are willing to risk using a potentially contaminated supplement to remain competitive in the sport.

Because of the prevalence of supplement use among modern athletes, the next version of the WADC should eliminate the schism between “specified substances” and “prohibited substances.” If an athlete tests positive for a substance found in a contaminated substance, she should not have to face a lengthier period of ineligibility solely based on the molecular composition of the contaminant. DC10.4’s text, save the “specified substances” aspect, should be incorporated into DC10.5.1 to give adjudicatory bodies the discretion to issue a sanction that spans anywhere from a reprimand to a two-year period of ineligibility for a first offense.\textsuperscript{306} Such a provision would still reflect the 2009 WADC’s goal of providing flexibility for reducing sanctions where they would otherwise be unduly harsh.

\textsuperscript{303} Shih-Han (Susan) Huang et al., The Use of Dietary Supplements and Medications by Canadian Athletes at the Atlanta and Sydney Olympic Games, 16 CLINICAL J. SPORT MED. 1, 29–30 (2006).
\textsuperscript{305} For discussion on the possible reasons why athletes consume supplements, see Huang et al., supra note 303, at 31.
\textsuperscript{306} Within this analysis, a panel should consider whether an athlete received a significant physiological advantage over her competitors due to consumption of the banned substance. Such a consideration should be based on the type of substance an athlete tested positive for and the concentration of that substance in the athlete’s body. Presumably, a higher concentration would lead to a more substantial advantage and thus warrant a stronger sanction in light of the unfairness that worked against her competitors.
Critics may argue that this clause would grant adjudicatory bodies too much discretion, possibly leading to inconsistent rulings throughout the world. This concern is credible, particularly given that local tribunals, which are not as impartial or familiar with the WADC as the CAS, usually administer a ruling in the first instance. WADA and IFs have the power to appeal a decision in the CAS. The CAS, however, is an independent body and reviews all cases de novo. With such authority to review all facts and law before it, the CAS will ensure that appropriate sanctions are administered under the WADC. Therefore, although the number of appeals to the CAS may increase if WADA redrafted DC10.4 and DC10.5.1 into one article, the problem of inconsistent judgments would likely not come to fruition.

D. CAS Should Discuss Precedent in Every Case.

When the panel issued its ruling in Cielo, discontent and confusion swept through the international swimming community. Some athletes decried Cielo for cheating; others criticized a broken anti-doping system. There are many factors that may have caused these reactions—personal vendettas against Cielo and previous bad experiences with doping authorities are just a few. This Subpart, however, assumes that most athletes were dissatisfied or confused because they did not understand the ruling in light of previous decisions. To improve public comprehension of the WADC, which even reputable authorities misinterpret, CAS panels should explain their reasoning more thoroughly by discussing precedent in every published decision. Not only will this elucidate the panel’s reasoning in a particular case, but it will also clarify standards under the WADC.

Although it reached a fair decision in Cielo, the panel missed an opportunity to justify its holding by discussing precedent. In particular, the panel should have compared Hardy and Cielo. Although they were adjudicated

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307 See supra Part I.B–C.
309 See supra Introduction.
under different versions of the WADC, both cases featured similar fact patterns involving contaminated supplements and world record-holding swimmers. Instead of comparing the exigencies of the cases, however, the panel justified its holding in Cielo by referring to the factual findings set out in a separate section and concluding: “[T]he ‘fault’ of the Athletes is at the very lowest end of the spectrum . . . .” From a reader’s perspective, this statement was dissatisfactory for two reasons. First, the panel failed to reiterate any key facts of the case that would have validated the holding. Second, although the word “spectrum” implies a continuum on which there exist points of reference, the panel never referenced another case that may have served as a point of reference. Had the panel reiterated key facts in comparison to Hardy, its holding would have been more digestible to the general public, particularly members of the swimming community who were wondering how Cielo could receive only a warning when Hardy had suffered a year of ineligibility. If such a comparison had been made, the public would have better understood that the athletes were held to different legal standards and that Cielo had taken more precautionary measures than Hardy prior to ingesting the caffeine.

In addition to substantiating its decision, the comparison would have also clarified the WADC, particularly the phrase “degree of fault.” This phrase did not appear in the 2003 WADC; the drafters inserted it when they gave adjudicatory bodies greater discretion for sanctioning first-time offenders. In the 2009 WADC, however, the drafters offered no guidance for how to assess “degree of fault” besides the fact that the “circumstances considered must be specific and relevant to explain the Athlete’s . . . departure from the expected standard of behavior.” Because of these amorphous instructions, adjudicatory bodies could consider hundreds of factors to determine where on the spectrum of fault an athlete lies. If the panel had gone a step further and compared key facts in Cielo to key facts in another “degree of fault” case, the panel could have clarified the WADC by explaining what factors are most important in this assessment and what weight each factor has. In turn, this

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313 Compare 2003 WADC, supra note 72, at 10.3, at 27–28, with 2009 WADC, supra note 7, DC10.4, at 5455.
314 2009 WADC, supra note 7, DC10.4 cmt., at 54–55.
information would have created a more predictable legal system by advancing a coherent corpus of law.\(^{315}\)

In response to this argument, critics may point out that discussion of case law in the CAS is moot because the Court does not recognize the principle of stare decisis. Although the CAS has not adopted stare decisis, its panels nonetheless increasingly rely on previous decisions when crafting rulings. According to data compiled by Professor Gabrielle Kaufmann-Kohler, one in six CAS cases between 1986 and 2003 cited prior cases, but since 2003, “nearly every award contains one or more references to earlier CAS awards.”\(^{316}\) A CAS panel has even explicitly stated, “[I]t will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel.”\(^{317}\) Clearly, the statistics and anecdotal evidence indicates a shift toward embracing precedent. CAS panels should continue this practice such that every doping case features a comparison of facts to prior decisions.

The CAS’s discussion of previous cases is particularly significant due to interplay between WADA and the CAS. On one hand, WADA studies, considers, and integrates CAS jurisprudence into iterations of the WADC. On the other hand, the CAS shapes and refines the contours of the law through analysis of the issues before it. In light of this interplay, the CAS should discuss precedent in every case, especially high profile cases such as Cielo.\(^{318}\) Not only will it lead to a better ruling on the merits, but it will also help progress anti-doping jurisprudence, providing clarity and predictability to a specialized, burgeoning legal system.

CONCLUSION

This Comment ends where it began, with the story of César Cielo. Four days after the CAS panel reached its decision, Cielo returned to competition at

\(^{315}\) Some scholars refer to the CAS’s corpus of law as the *lex sportiva*. For a detailed discussion of the term and the potential problems with using it, see Kaufmann-Kohler, *supra* note 64, at 365.

\(^{316}\) *Id.*


the World Championships in Shanghai, China. In the face of intense scrutiny from the press and his competitors, Cielo captured gold in the fifty-meter butterfly.\footnote{Controversial Cesar Cielo Takes Gold in 50m Butterfly, NATIONAL (July 26, 2011), http://www.thenational.ae/sport/other-sport/controversial-cesar-cielo-takes-gold-in-50m-butterfly.} Defiant in victory, he jumped on the lane-line and flexed his biceps for the media, but, in stark contrast to his gold medal at the 2008 Olympics, he immediately became overwhelmed—his brow furrowed, his head lowered, and he sobbed uncontrollably into the water as his competitors cleared the pool.\footnote{Id. (describing photograph).} Shortly after the race, he waxed, “This gold medal has a different feel from the other ones. This one was the hardest of my life . . . . It was a tough time. Time to test not only my talent but how much I could take.”\footnote{Id.} Clearly, the doping ordeal had weighed heavily on his psyche.

If there is a silver lining to Cielo’s story, it is the fact that he was rightfully sanctioned with a warning under the WADC, and he was able to compete at the 2012 London Olympics where he won bronze in the fifty-meter freestyle.\footnote{Olympics Swimming: Florent Manaudou Wins Shock Gold, BBC SPORT (Aug. 3, 2012), http://www.bbc.co.uk/sport/0/olympics/18916967.} As the WADC is revised, hopefully more athletes with minimal fault will receive warnings rather than suffer a period of ineligibility. After all, one of WADA’s stated goals in its 2009 revision of the WADC was to balance effective anti-doping enforcement with fairness for athletes who may have ingested without intending to enhance performance.\footnote{Ensuring a Level Playing Field, supra note 161, at 5.}

From time to time, however, WADA has lost sight of this goal. On February 6, 2012, John Fahey, the president of WADA, made an unnecessarily extreme statement to the press. In response to a CAS panel sanctioning 2010 Tour de France winner Alberto Contador\footnote{For information on Contador’s case, see World Anti-Doping Agency v. Contador, CAS 2011/A/2386, Arbitral Award (Ct. Arb. Sport 2012), available at http://www.tas-cas.org/d2w/files/document/5648/5048/0/FINAL20AWARD202012.02.06.pdf.} to two years of ineligibility, Fahey said:

The simple fact is that anyone who has a prohibited substance in their [sic] system is a cheat. It is as simple as that. The only argument then comes as to what was the nature of how the prohibited substance got
into the athlete’s system. But you’re a cheat, effectively, the moment you’ve got that substance in there.325

Although the WADC’s strict liability principle implicates an athlete as guilty of an anti-doping violation when she tests positive for a banned substance, Fahey’s oversimplification of the adjudication process both misrepresents the tribunals’ actual inquiries and undermines WADA’s broader goals. Undoubtedly, WADA is committed to catching cheaters, but its broader goal, which is stated at the beginning of the 2009 WADC, is preserving the “spirit of the sport.”326 Preserving the “spirit of the sport” should include enforcing anti-doping sanctions against a WADC violator and offering a fair hearing for an athlete who may have ingested a banned substance through no fault of her own. One may question whether Lance Armstrong received a “fair hearing” in summer 2012 when USADA instituted a lifetime ban against Armstrong despite the fact that he never failed a drug test.327

Armstrong aside, in recent years, WADA has taken affirmative strides toward reaching this goal but still must improve in several ways. The 2009 revisions of the WADC took a step in the right direction by providing adjudicatory bodies with greater discretion to determine applicable sanctions for athletes who had violated the WADC. To help protect the “spirit of the sport” in the future, WADA should adopt the changes that this Comment advocates during its next process for amendment and review. These changes include defining the terms “medication” and “supplement,” eliminating the dichotomy between DC10.4 and 10.5, and encouraging the CAS to adopt a consistent practice of discussing precedent when drafting opinions. Together, these revisions would further WADA’s overarching goal and create a system

326 2009 WADC, supra note 7, at 14.
that is fairer, more predictable, and more understandable for the greater international athletic community.

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* J.D. Candidate, Emory University School of Law (2013); A.B., History and Literature, Harvard College (2008). The Author wants to thank his parents and siblings for their love and support and his faculty advisor, Aaron Kirk, for providing great feedback throughout the writing process.
## APPENDIX

**Figure 1:** Textual Comparison of Sanctions under the 2003 and 2009 WADC

<table>
<thead>
<tr>
<th>Distinction between Prohibited Substances and Specified Substances</th>
<th>2003 WADC</th>
<th>2009 WADC</th>
</tr>
</thead>
<tbody>
<tr>
<td>A Prohibited Substance is “[a]ny substance so described on the Prohibited List.” (Definitions section). “The Prohibited List may identify specified substances . . . which are less likely to be successfully abused as doping agents.” (Article 10.3).</td>
<td>“[A]ll Prohibited Substances shall be “Specified Substances” except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List.” (Article 4.2.2).</td>
<td></td>
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</table>

### Sanctions

<table>
<thead>
<tr>
<th>Article 10.2: Sanction for Possession of a Prohibited Substance</th>
<th>2003 WADC</th>
<th>2009 WADC</th>
</tr>
</thead>
<tbody>
<tr>
<td>“[T]he period of Ineligibility imposed for a violation of Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers) . . . shall be: First violation: Two (2) years’ Ineligibility. Second violation: Lifetime Ineligibility.”</td>
<td>“The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers) . . . shall be as follows . . .: First violation: Two (2) years Ineligibility.”</td>
<td></td>
</tr>
</tbody>
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<tr>
<td>“First violation: At a minimum, a 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.”</td>
<td>“First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.”</td>
<td></td>
</tr>
</tbody>
</table>
“However, the *Athlete* . . . shall have the opportunity . . . to establish the basis for eliminating or reducing (in the case of a second or third violation) this sanction as provided in Article 10.5.”

“To justify any elimination or reduction, the *Athlete* . . . must produce corroborating evidence . . . which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the *Use* of a performance-enhancing substance. The *Athlete’s* . . . degree of fault shall be the criterion considered in assessing any reduction of the period of *Ineligibility*.”

<table>
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<tr>
<th>Article 10.5.2: Mitigating a Sanction for <em>No Significant Fault or Negligence</em></th>
<th>“If an <em>Athlete</em> establishes in an individual case . . . that he or she bears <em>No Significant Fault or Negligence</em>, then the period of <em>Ineligibility</em> may be reduced, but the reduced period of <em>Ineligibility</em> may not be less than one-half of the minimum period of <em>Ineligibility</em> otherwise applicable.”</th>
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</table>

<table>
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<tr>
<th>Article 10.7 (2009): Aggravating Circumstances (Multiple Violations)</th>
<th>[None]</th>
</tr>
</thead>
</table>

| Article 10.5.2: Mitigating a Sanction for *No Significant Fault or Negligence* | “If an *Athlete* . . . establishes in an individual case that he or she bears *No Significant Fault or Negligence*, then the otherwise applicable period of *Ineligibility* may be reduced, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable.” |

| Article 10.7 (2009): Aggravating Circumstances (Multiple Violations) | “For a second anti-doping rule violation the period of *Ineligibility* shall be within the range set forth in the table [in Article 10.7, which ranges from one-year ineligibility to a lifetime ban].” |
## Glossary

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Designation</th>
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<tbody>
<tr>
<td>AAA</td>
<td>American Arbitration Association</td>
</tr>
<tr>
<td>CAS</td>
<td>Court of Arbitration for Sport</td>
</tr>
<tr>
<td>CBDA</td>
<td>Confederação Brasileria de Desportos Aquáticos</td>
</tr>
<tr>
<td>DC</td>
<td>Doping Code (used in conjunction with a specific article from the 2009 WADC)</td>
</tr>
<tr>
<td>FIG</td>
<td>Fédération Internationale de Gymnastique</td>
</tr>
<tr>
<td>FINA</td>
<td>Fédération Internationale de Natation</td>
</tr>
<tr>
<td>IF</td>
<td>International Federation</td>
</tr>
<tr>
<td>IOC</td>
<td>International Olympic Committee</td>
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<tr>
<td>NADO</td>
<td>National Anti-Doping Organization</td>
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<tr>
<td>NF</td>
<td>National Federation</td>
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<tr>
<td>NGB</td>
<td>National Governing Body</td>
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<tr>
<td>NOC</td>
<td>National Olympic Committee</td>
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<tr>
<td>WADA</td>
<td>World Anti-Doping Agency</td>
</tr>
<tr>
<td>WADC</td>
<td>World Anti-Doping Code</td>
</tr>
<tr>
<td>USADA</td>
<td>United States Anti-Doping Agency</td>
</tr>
<tr>
<td>USOC</td>
<td>United States Olympic Committee</td>
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