

The Battle over the Osaka Rule

By Daniel Gandert*

1. Introduction

A world-class swimmer is advised by her coach to take a nutritional supplement. In order to ensure that the supplement does not contain any banned substances, the swimmer exercises the due diligence of contacting the manufacturer, the distributor, and the national governing body for her sport. The supplement becomes contaminated and the swimmer loses the opportunity to participate in the upcoming Olympic Games that will be held within the next couple of months. Nonetheless, the swimmer is also prohibited in participating in the following Olympic Games which will be held four years later. In another case, an elite track athlete purchases a product at a convenience store, which ends up containing a prohibited substance. The athlete cooperates in the hearing process regarding his doping offense, even making an embarrassing admission about the substance that he has taken. While this athlete's suspension is reduced from that of the standard two-year suspension and it is determined that he acted with *No Significant Fault or Negligence*, the athlete is still required to miss the next Olympic Games that will take place after he has completed his suspension. These are two examples of athletes whose inadvertent acts of doping would have caused them to miss out on their Olympic dreams had the IOC's Osaka Rule been applied to their situation. The Osaka Rule prohibited any athlete with a doping suspension of greater than six months from competing in the next Olympic Games, even for cases where the athlete's suspension has already been completed.¹ In October of 2011, the Court of Arbitration for Sport (CAS) invalidated the Osaka Rule which prevented athletes who committed a doping offence inadvertently from receiving disproportionately harsh consequences relative to their violation.

The first part of this article will describe the background relating to the Osaka Rule. The second part of the article will describe the system in place to prevent doping. The third part will discuss the principle of proportionality. First, the history of the principle in CAS jurisprudence will be discussed through a description of important cases. Second, the importance of proportionality will be explained. The fourth part will describe the three cases dealing with the Osaka rule as well as the impact of these cases on the Olympic World.

2. Background Relating to the Osaka Rule

Rule 45 of the Olympic Charter was approved as the Athlete's Code in 1988 to replace Rule 26, the previous rule that defined Olympic eligibility.² As late as 2003, it was known as the Eligibility Code and only required athletes to follow the rules of their International Federation and the Olympic Charter, to respect and follow all areas of the World Anti-Doping Code (WADC), and to respect the spirit of non-violence and fair play, including on the athletic field.³ At the time, it did not provide the IOC with any ability to limit an athlete's participation as long as the athlete met the requirements of his or her respective International Federation and was entered by his or her National Olympic Committee.⁴

In December 2001, the bobsleigh athlete Sandis Prusis tested positive for the prohibited substance nandrolone.⁵ Prusis believed that his contamination came from a food supplement that, according to the sell-

er, did not contain any banned substances.⁶ After having the supplement tested, it was confirmed that the substance contained nandrolone metabolites.⁷ Following this, the Fédération Internationale de Bobsleigh et de Tobogganing (FIBT) suspended Prusis for three months, retroactively starting the suspension on November 9, 2001. This allowed for the suspension to be finished before the start of the 2002 Winter Olympic Games.⁸ The FIBT stated that this sanction, as well as its early start date, was 'fair and just' in light of the Olympic Movement Anti-Doping Code and the case's exceptional circumstances.⁹ Upon inquiring with the Organizing Committee for the XIX Olympic Winter Games in Salt Lake City, the Latvian Olympic Committee confirmed that it was okay for Prusis to move into the Olympic Village prior to the end of his suspension.¹⁰

The IOC believed that the retroactive start of the suspension was "carved out" so that the suspension would be finished in time for Prusis to compete in the Olympics.¹¹ Consequently, the IOC decided not to accept Prusis as an athlete in the Olympics, to withdraw his Accreditation Card, and to ask him to leave the Olympic Village.¹² Prusis took his case to the CAS ad hoc Division.¹³

The CAS panel hearing the case described the importance of providing International Federations with autonomy.¹⁴ Because neither the Olympic Charter nor the FIBT mentioned anything giving the IOC the authority to become involved with the FIBT's disciplinary proceedings, athletes had an expectation to be able to participate following the end of their punishment.¹⁵ The panel went on to explain that the IOC could amend the Olympic Charter to allow it to intervene.¹⁶ Additionally, the panel recommended a set-up where either the IOC or World Anti-Doping Agency (WADA) could appeal an International Federation's doping decision to an independent body, and mentioned that it believed that this type of a system would not harm an International Federation's autonomy.¹⁷ This type of system seems to exist under the current anti-doping rules; WADA can appeal all doping cases to CAS for organizations which have adopted the WADC.¹⁸

The IOC claimed that it had the right to become involved with Prusis's case based upon Rule 49 of the Olympic Charter.¹⁹ This rule gave the IOC Executive Board the 'right of final acceptance of entries.'²⁰ The panel did not find this to be a sufficient basis for the IOC's action.²¹ While the IOC classified its action as 'purely administrative,' the panel determined that any decision impacting an athlete's expectation that he or she was allowed to enter the Olympics would risk constituting double jeopardy.

In 2004, Rule 45 of the Olympic Charter was revised to include the phrasing 'any entry is subject to acceptance by the IOC, which may at its discretion, at any time, refuse any entry, without indication or grounds. Nobody is entitled to any right of any kind to participate in the Olympic Games.'²² This Charter revision addressed the Prusis panel's concern and gave the IOC the ability to prevent athletes from participating in the Olympic Games. This phrase has remained a part of the Olympic Charter.

During the 2007 world athletics championships in Osaka, Jacques Rogge, the President of the IOC, proposed the Osaka Rule.²³ The IOC

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1 Stephen Wilson, *IOC Ratifies New Anti-Doping Rule*, USA TODAY (June 5, 2008, 1:46 PM), www.usatoday.com/sports/olympics/2008-06-05-2589742160_x.htm.

2 Allen Guttmann, *THE OLYMPICS: A HISTORY OF THE MODERN GAMES* (2002) 2nd ed. at 178.

3 See *2003 Olympic Charter*, at http://www.olympic.org/Documents/Olympic%20Charter/Olympic_Charter_

[through_time/2003-Olympic_Charter.pdf](http://www.olympic.org/Documents/Olympic_Charter.pdf).

4 *Id.*

5 *Prusis & the Latvian Olympic Committee/International Olympic Committee* (CAS OG 2/001) at 573.

6 *Id.*

7 *Id.* at 574.

8 *Id.*

9 *Id.*

10 *Id.*

11 *IOC: Prusis' Suspension Had Been 'Carved Out'*, <http://sports.espn.go.com/oly/winter02/gen/news?id=1321384>, Feb. 2, 2002.

12 *Prusis* at 574.

13 *Id.*

14 *Id.* at 576.

15 *Id.* at 577.

16 *Id.*

17 *Id.*

18 *Court of Arbitration for Sport (CAS)*, World Anti-Doping Agency, at <http://www.wada-ama.org/en/Anti-Doping-Community/Court-of-Arbitration-for-Sport-CAS/>, October 2009. Since all members of the Olympic movement have adopted the WADC, this means that WADA can

appeal all cases of doping related to Olympic sports to CAS.

19 *Id.* at 574.

20 2001 Olympic Charter, at http://www.olympic.org/Documents/Olympic%20Charter/Olympic_Charter_through_time/2001-Olympic_Charter.pdf.

21 *Prusis* at 578.

22 Rule 45, 2001 Olympic Charter, at http://www.olympic.org/Documents/Olympic%20Charter/Olympic_Charter_through_time/2004-Olympic_Charter.pdf.

23 Stephen Wilson, *IOC Ratifies New Anti-Doping Rule*, USA Today,

executive board introduced this rule at its meeting in June 2008 and issued a letter describing the rule to the National Olympic Committees.²⁴ Under this rule, any athlete receiving a suspension related to doping that lasted longer than six months was prohibited from participating in the next Olympic Games.²⁵

Since the organization has no disciplinary authority over athletes who might compete in the Olympic Games in the future, the IOC has claimed that the rule is not a sanction, but an eligibility rule.²⁶ According to supporters of the IOC's argument, the purpose of the rule was to protect the reputation, image, and prestige of the Olympics, not to penalize.²⁷ Additionally, the rule was placed under the 'Participation in the Olympic Games' section of the Olympic Charter, instead of the 'Sanctions and Measures' section.²⁸

While CAS precedent is inconsistent regarding the disciplinary nature of the rule, most cases appear to support the rule falls on the disciplinary side. In the case *Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto Futebol SAD*, CAS determined that there was a disciplinary element in rules prohibiting clubs, who violated UEFA's values, from participating in the Champion's League.²⁹ Similarly, in the case *Advisory Opinion IAAF*, the European Athletics Association set up rules prohibiting athletes, who had received at least a two year suspension, from participating in the European Athletics Championships following the end of their suspension.³⁰ The International Association of Athletic Federations (IAAF) requested an advisory opinion and the CAS panel hearing the case determined that the rule was a penalty instead of an entry rule and that it violated the EAA's obligation to comply with the WADC.³¹ Additionally, in the case *RFEC & Alejandro Valverde v. UCI*, the panel mentioned that eligibility rules generally do not penalize athletes for their undesirable behavior.³² In contrast to the holdings of the other cases, CAS issued an advisory opinion, at the IOC's request, describing the Osaka Rule as an eligibility rule.³³

3. The Need for Strict, Uniform Anti-Doping Rules

Rule 45 was passed with the noble intention of strengthening the fight against doping. Strict, unilaterally implemented rules are necessary in the fight against doping, which will likely need to continue for as long as sport exists.³⁴ Without this type of anti-doping regime, Olympic sports could look like some American professional sports, where doping is common enough that the practice is almost expected by the public.³⁵ Historians believe that doping dates back to the ancient Olympic

Games in Greece where athletes would use ointments, teas, and anything else that might help their performance.³⁶ During the 1950s, doping became a major issue for the modern Olympic Games, which led to the establishment of the IOC Medical Commission.³⁷ Following this, a variety of organizations took on the role of regulating doping in international sport, with each organization having its own rules related to banned substances and penalties.³⁸ This brought about a period of chaos and confusion which illustrated the need to standardize the doping rules.³⁹ Widespread doping during the 1998 Tour de France further made the need for a new anti-doping regime clear.⁴⁰ In 1999, the IOC held the World Conference on Doping in Sport at which the need for an independent agency dealing with doping was identified.⁴¹ WADA was founded in November of 1999.⁴²

Upon its founding, one of WADA's main priorities was harmonizing the various anti-doping policies.⁴³ The organization held the World Conference on Doping in Sport in March of 2003 and the WADC went into effect in January 2004.⁴⁴ The WADC is important because it binds all signatories to the same penalties for doping, procedures, and prohibited substance lists. The IOC amended the Olympic Charter in 2003 to make a sport's continued participation in the Olympic Games contingent upon an international federation's ratification of the WADC.⁴⁵ Additionally, the Olympic Charter requires National Olympic Committees to abide by the WADC, makes compliance with the WADC a condition for the IOC's recognition of an International Federation, and states that 'The World Anti-Doping Code is mandatory for the whole Olympic Movement.'⁴⁶ The WADC was revised in 2009. However, it continues to act as a uniform set of rules for the entire Olympic movement.

4. The Prescribed Penalties for Doping Under the World Anti-Doping Code

The standard penalty for a first doping offence under the WADC is a two year suspension, while a lifetime ban serves as the standard penalty for an athlete's second offence.⁴⁷ An athlete engaged in inadvertent doping, can have his or her sentence reduced in some cases. Article 10.5.1 of the WADC describes the category of *No Fault or Negligence*.⁴⁸ An athlete whose case falls into this category does not receive a suspension and does not have the case count as a first offence if the athlete commits a future doping offence.⁴⁹ An athlete whose case falls into this category is considered completely free from blame.⁵⁰ Cases fall into this

http://www.usatoday.com/sports/olympics/2008-06-05-2589742160_x.htm, June 5, 2008. The terms "Rule 45," the "Osaka Rule," and "the Unpublished Memorandum" are used interchangeably in the cases and articles addressing the rule. In order to prevent confusion from taking place, the rule will be referred to as the "Osaka Rule" in this article.

²⁴ Matt Lane, "Rule 45": Is LaShawn Merritt Banned from the London 2012 Olympics?, at <http://www.letsrun.com/2010/merritt-1021.php>, Oct. 10, 2010.

²⁵ *Id.* citing the IOC's letter describing the rule. An athlete whose suspension triggered this rule was prohibited from participating in the next Olympic Games that included the athlete's respective sport. For Winter Olympic sports, the athletes were prohibited from participating in the next Winter Olympic Games, while for Summer Olympic Sports, the athletes were prohibited from participating in the next Summer Olympic Games.

²⁶ *USOC v. IOC* (CAS 2011/O/24422) at 7-7.

²⁷ *IOC 'Osaka Rule': Prohibition of Dopers from the Olympics*, WORLD SPORTS LAW REPORT, May 2011 at 1-2.

²⁸ *Id.*

²⁹ *IOC citing Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto Futebol SAD*

(CAS 2008/A/1583 and CAS 2008/A/1584).

³⁰ *USADA v. LaShawn Merritt* at (AAA No. 77190 00293 10) at 42 citing *Advisory Opinion IAAF* (CAS 2008/C/1619).

³¹ *Merritt* at 42.

³² *RFEC & Alejandro Valverde v. UCI* (TAS 2007/O/1381).

³³ *USOC v. IOC* (CAS 2011/O/2422) at 15.

³⁴ See Daniel Gandert and Fabian Ronisky, *American Sports is a Doper's Paradise: It's Time that We Make a Change*, Daniel Gandert & Fabian Ronisky, *American Professional Sports is a Doper's Paradise: It's Time We Make a Change*, 86 N.D. L. REV. 813 (2010) and Rogge: *Doping is Eternal*, at www.skysport.co.nz/article/olympics/headlines/rogge-doping-is-eternal-51884/, for IOC President Jacques Rogge's statement that because cheating is a part of human nature meaning that doping will always remain an issue.

³⁵ *Gandert and Ronisky, supra note 32.*

³⁶ See Sarah R. Heisler, *Steroid Regulation in Professional Sports: Sarbanes Oxley as a Guide*, 27 CARDOZO ARTS & ENT. L.J. 199, 205 (2009); Paul A. Fortenberry & Brian E. Hoffman, *Illegal Muscle: A Comparative Analysis of Proposed Steroid Legislation and the Policies in Professional Sports' CBAs that Led to the Steroid*

Controversy, 5 VA. SPORTS & ENT. L.J. 121, 136 (2006); Kristin Jo Custer, *From Mice to Men: Genetic Doping in International Sports*, 30 HASTINGS INT'L & COMP. L. REV. 181, 182 (2007).

³⁶ Gandert and Ronisky, *supra note 32.*

³⁷ Kathryn E. Henne, THE ORIGINS OF THE INTERNATIONAL OLYMPIC COMMITTEE MEDICAL COMMISSION AND ITS TECHNOCRATIC REGIME: AN HISTORIOGRAPHIC INVESTIGATION OF ANTI-DOPING REGULATION AND ENFORCEMENT IN INTERNATIONAL SPORT 2009), http://doc.ero.ch/lm.php?url=1000,44,38,20100301152359-AF/2009_-_The_Origins_of_the_International_Olympic_Committee_Medical_Commission_-_HENNE_K.pdf.

³⁸ Jessica K. Foschi, *A Constant Battle: The Evolving Challenges in the International Fight Against Doping in Sport*, 16 DUKE L.J. 457.

³⁹ See Daniel Gandert, *Gasquet and the Career-Killing Kiss: A Precedent for No Fault or Negligence*, in 2010 International Association of Sports Law World Congress of Sports Law proceedings.

⁴⁰ Jin-Kyung Park, *Governing Doped Bodies: The World Anti-Doping Agency and the Global Culture of Surveillance, Cultural*

Studies Critical Methodologies, 5, no. 2: 177 (2005).

⁴¹ Albert D. Fraser, *Doping Control from a Global and National Perspective*, THER DRUG MONIT, Volume 26, Number 2, April 2004: 172.

⁴² "WADA History," <http://wada-ama.org/en/About-WADA/History/WADA-History/>.

⁴³ John Mendoza, 2002. "The War on Drugs in Sport: A Perspective from the Front-Line." *Clinical Journal of Sports Medicine*, 12(4) (July): 254-58.

⁴⁴ *World Anti-Doping Agency: What is the Code*, at <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=267>.

⁴⁵ Ryan Connolly, *Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. the Protection of Rights of Accused Athletes*, 5 VA. SPORTS & ENT. L.J. 161.

⁴⁶ Olympic Charter, Articles 43, 25, and 27.

⁴⁷ 2009 World Anti-Doping Code, Articles 10.2 and 10.7.

⁴⁸ World Anti-Doping Code, Article 10.5.1.

⁴⁹ 2009 World Anti-Doping Code, Article 10.5.1.

⁵⁰ Gandert, *supra note 37.*

⁵¹ Connolly, *supra note 42.*

⁵² 2009 World Anti-Doping Code, rule 10.5.1

category when “the athlete could not, even with the exercise of the utmost caution, reasonably have suspected, that he had been administered a prohibited substance.”⁵¹ It is extremely difficult for athletes to demonstrate this. Athletes are required to establish how the prohibited substance entered their system in order for their case to fall into this category,⁵² e.g. as a result of sabotage by an opponent. However, sabotage by a member of the athlete’s inner circle is specifically excluded from this category.⁵³ Additionally, other common reasons for accidental doping, such as mislabeled or contaminated nutrition supplements, are also specifically listed as insufficient grounds for an athlete’s case to fall into this category.⁵⁴

From the start of the WADC until 2005, no athlete was successful in having his or her case established to fall into the *No Fault or Negligence* category.⁵⁵ The first case where an athlete received a reduced sentence under this category was the ATP Anti-Doping Tribunal case *Appeal of Todd Perry* in 2006.⁵⁶ In this case, a tournament doctor refilled the athlete’s inhaler without his knowledge.⁵⁷ Even though Perry was not found to be at fault, the panel hearing his case allowed a reprimand to remain in his record.⁵⁸ Other successful cases include *Pobyedonostev v./IIHF*, where an athlete who was unconscious in the hospital was given a prohibited substance, and *Adams v./ Canadian Centre for Ethics in Sport*, where an athlete was assaulted and forced to ingest a prohibited substance without providing his consent.⁵⁹ In *Adams*, the athlete used a catheter to urinate after he was forced to ingest the cocaine and used the same catheter to take a drug test, causing the athlete’s urine sample to include a prohibited substance.⁶⁰

It is likely a bit easier for an athlete’s case to fall into the *No Fault or Negligence* category following the case *ITF v./ Gasquet*.⁶¹ The professional tennis player Richard Gasquet went to Miami to play in the Sony Ericsson ATP tournament.⁶² After having an MRI scan of his injured shoulders and learning from his doctor about significant inflammation, Gasquet decided to withdraw from the tournament.⁶³ Because he was not scheduled to play right away, Gasquet decided to wait until the next day to formally withdraw from the tournament, which would include submitting to doping control.⁶⁴ That night, Gasquet met a woman at a restaurant.⁶⁵ The couple, along with others in their party, went to the night club “Set” later in the night, where the DJ invited them to his table and Gasquet drank apple juice that came from an open topped jug.⁶⁶ The couple kissed each other later that night and Gasquet formally withdrew from the tournament the next day.⁶⁷ Gasquet’s urine sample was found to contain benzoylcegonine, a metabolite of cocaine, which resulted in his being charged with a doping offence.⁶⁸

It was determined that kissing the woman was the most likely cause of Gasquet’s contamination. Because Gasquet’s test showed that he was only contaminated with a miniscule amount of cocaine, recreational use was determined to be unlikely.⁶⁹ This also ruled out the likelihood of his drink being deliberately spiked.⁷⁰ Additionally, the woman was a regular cocaine user in the past and it was noted that she had spent a lot of time that night in the restroom.⁷¹ Given these facts, the panel determined Gasquet was likely contaminated from kissing the woman. Because rule 3.1 of the WADC describes that “the standard of proof shall be by a balance of probability,”⁷² the panel was correct in assuming that this was Gasquet’s source of contamination.

Accordingly, the panel found that Gasquet’s case fell into the category

of *No Fault or Negligence*. The panel decided not to take account of the lack of caution that Gasquet exercised earlier during the evening, such as drinking apple juice from an open container, and determined that only the facts directly related to the kissing was relevant.⁷³ Had the panel looked at the entire situation when deciding whether Gasquet exercised the required amount of caution, it would have likely found that Gasquet did not act with *No Fault or Negligence*.⁷⁴ By narrowing the circumstances, however, the panel was able to find that Gasquet did not act with fault. This sets precedent for CAS to only consider the facts that directly relate to the cause of an athlete’s contamination when determining whether a case falls into the *No Fault or Negligence* category.⁷⁵

In determining whether Gasquet acted with the utmost caution, the panel cited the case *FIFA & WADA*. In this CAS advisory opinion, the tribunal stated that ‘the endeavours to defeat doping should not lead to unrealistic and impractical expectations the athletes have to come up with.’⁷⁶ The CAS panel hearing Gasquet’s case determined that he did not have any constructive knowledge that kissing the woman would contaminate him. The couple first met at a restaurant: he did not have any information about the woman’s history with the substance and did not see anyone using the substance during the night of his contamination.⁷⁷ As the panel needed to have experts conduct research to determine whether one could become contaminated of cocaine through kissing someone, it did not believe that Gasquet should have been aware of this possibility.⁷⁸ The panel determined that imposing ‘an obligation on an athlete not to go out to a restaurant where he might meet an attractive stranger whom he might later be tempted to kiss’ would be imposing the type of ‘unrealistic and impractical expectations’ that the panel in *FIFA & WADA* stated should not be placed on athletes.⁷⁹ This set forth the precedent of not allowing ‘unrealistic and impractical expectations’ to be placed on an athlete when determining whether he or she has acted with *No Fault or Negligence*.

An athlete whose case does not fall into the *No Fault or Negligence* category may argue that it falls into the *No Significant Fault or Negligence* category of the WADC. If applicable, the athlete can have his or her suspension reduced to up to half of the normal suspension period.⁸⁰ Athletes who would normally receive a lifetime ban for their offence can have their suspension reduced to no fewer than eight years under this category.⁸¹ As with cases of *No Fault or Negligence*, athletes are required to establish how the prohibited substance entered their body.⁸² An example of a case that was classified to fall into the *No Significant Fault or Negligence* category is *Squizzato v./FINA*, where the athlete received a cream to fight a skin infection that contained a prohibited substance.⁸³ While the panel hearing the case did not find that the athlete executed complete diligence, it was determined that she acted without significant fault.⁸⁴

Most cases do not fall into either the *No Fault or Negligence* or the *No Significant Fault or Negligence* category and result in the athlete receiving the regular suspension prescribed by the WADC.⁸⁵ Even in cases where the arbitrators acknowledged that the standard penalty is harsh for the athlete’s situation of accidental doping, it was nonetheless decided to apply the standard penalty.⁸⁶

53 2009 World Anti-Doping Code, Comment to 10.5.1 and 10.5.2.

54 *Id.*

55 Connolly, *supra* note 42.

56 Michael Hiltzik, *Presumed Guilty: Athletes See Doping Case Appeals as Futile Exercise*, L.A. TIMES, DEC. 11, 2006 AT A1 and *Appeal of Todd Perry*, ATP Tour Anti-Doping Tribunal, 2005.

57 *Id.*

58 *Id.*

59 Paul White, *Malicious Drugging and the Contaminated Catheter: Adams v Canadian Centre for Ethics in Sport*, BOND UNIVERSITY SPORTS LAW JOURNAL (2008), at

<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1007&context=slej> and *Pobyedonostev v./ IIHF* (CAS 2005/A/990) and *Adams v./ CCES* (CAS 2007/A/1312).

60 *Adams v./ CCES* (CAS 2007/A/1312).

61 *ITF v./ Gasquet*, (CAS 2009/A/1926)

62 *Id.* at ¶ 2.4.

63 *Id.* at ¶ 2.6.

64 *Id.* ¶ At 2.7.

65 *Id.* ¶ At 2.9

66 M. Richard Gasquet, International Tennis Federation Independent Anti-Doping Tribunal (July 15, 2009) (Kerr, Arb.) (hereinafter “ITF”).¶93.

67 *Id.* At ¶ 2.12-2.14.

68 *Id.* At ¶ 2.17-2.18.

69 *Id.* At ¶ 5.13.

70 *Id.* At ¶ 5.15.

71 *Id.* At ¶ 5.23

72 2009 World Anti-Doping Code, Article 3.1.

73 Gandert, *supra* note 70.

74 *Id.*

75 *Id.*

76 *FIFA & WADA* (CAS 2005/C/1976&986) (available at http://www.rdes.it/RDES_2_06_fifa&wada.pdf), p. 220.

77 *ITF v./ Gasquet*, *supra* note 58 at ¶ 5.31.

78 *Id.*

79 *Id.* At ¶ 5.32.

80 2009 World Anti-Doping Code, article 10.5.2.

81 *Id.*

82 *Id.*

83 *Squizzato v./ FINA*, (CAS 2005/A/830).

84 *Id.*

85 Gandert, *supra* note 37 at 390.

86 See *USADA v./ Torri Edwards*, North American Court of Arbitration for Sport panel (2005) and *USADA v./ Torri Edwards* (CAS OG 04/300) and *WADA and USBSF v./ Zachery Lund* (CAS OG 06/001) for examples of cases where the standard penalty was given to athletes for cases of accidental doping.

5. CAS and the Principle of Proportionality

5.1 The History of Proportionality

CAS has a long history of using proportionality as one of the main principles for resolving disputes. The first case in which CAS applied this principle is *NWBA v./IPC*.⁸⁷ In this case, a wheelchair basketball athlete suffered an injury that aggravated his nerve pain and caused him difficulty in sleeping.⁸⁸ The athlete was given a drug that was not on the banned substance list, but did contain a banned component. It caused the athlete to test positive.⁸⁹ The CAS panel acknowledged that the proportionality principle should be considered. However, it found that the penalty for this case, the athlete's loss of a gold medal, was proportionate, thus not establishing a firm precedent.⁹⁰

In the case *C. v./FINA*, CAS established precedent for using the principle of proportionality to adjust a penalty from what was prescribed by the rules. In this case, a swimmer's coach admitted that he had mistakenly given her a capsule containing a banned substance.⁹¹ Under the FINA medical rules, which were the doping rules that applied at the time, a mandatory two-year suspension was required.⁹² The CAS panel deciding the case determined that although the athlete was at-fault, the two-year suspension did not fall in-line with the principle of proportionality.⁹³

The start of the new anti-doping regime under the WADC raised questions about how CAS would apply the principle of proportionality. Professor Richard McLaren wrote 'that the introduction of the WADA Code will eliminate the application of the doctrine of proportionality in future cases, except as provided for in the WADA Code itself.'⁹⁴ Similarly, in the case *IAAF v./ÖLV & Elmar Lichtenegger*, the panel hearing the case claimed that 'the doctrine of proportionality was incorporated into the WADA Code.'⁹⁵ This can be perceived as true in some instances as it is possible that under the WADC, the athlete in *C. v./FINA* might have had her case fall under the *No Significant Fault or Negligence* category. Nonetheless, there situations have come about for which the sanctions under the WADC have not been proportionate as applied to an athlete's case. One example is the case *Puerta v./ITF*, in which the panel set a precedent that the principles of proportionality can allow for a penalty outside of the WADC.

In *Puerta v./ITF*, the tennis player Mariano Puerta drank from a water cup that looked similar to his wife's water cup shortly before a match.⁹⁶ After Puerta left the cafeteria to get prepared to play, his wife moved to the place where Puerta had been sitting and put drops of Effortil, a medicine for menstrual issues that she was taking, into her glass and left to use the restroom.⁹⁷ Puerta returned after learning that his match's start was going to be delayed and accidentally drank water from his wife's cup.⁹⁸ After testing positive for a miniscule amount of efetine, he was able to establish that most likely, his wife's water cup was the source of his contamination.⁹⁹

Puerta's case was first heard by the ITF Anti-Doping Tribunal. Puerta tried to have his case fall into the *No Fault or Negligence* category, but the panel determined that he could have exercised more caution, especially since he was aware that his wife was using efetine.¹⁰⁰ The panel found that Puerta did meet the criteria for his case to fall into the *No Significant Fault or Negligence* category.¹⁰¹

In 2003, Puerta was suspended for nine months after using the prohibited substance clenbuterol for an asthma attack even though he had not received a therapeutic use exemption allowing him to use the sub-

stance.¹⁰² Because his doping was unintentional, Puerta's suspension was reduced from two years to nine months.¹⁰³ Because Puerta's 2005 case fell into the *No Significant Fault or Negligence* category, the ITF Tribunal hearing the case reduced his suspension from a lifetime ban to an eight year suspension.¹⁰⁴ Following this, Puerta appealed the case to CAS, which upheld the decision that his case fell into the *No Significant Fault or Negligence* category.¹⁰⁵ The panel took into account the fact that Puerta became contaminated through ingesting water instead of a nutritional supplement, the fact that he was unaware that his wife had taken efetine during the period that he was away, the fact that the amount of efetine that he ingested was small enough that it could not have provided him with any advantage, and the fact that in most instances, it would be reasonable for Puerta to believe that his glass was the one at the place where he had been sitting a few minutes earlier.¹⁰⁶ The CAS panel also agreed with the ITF Tribunal that violations that occurred prior to the introduction of the WADC were to count as violations, thus meaning that this offence counted as Gasquet's second doping violation.¹⁰⁷

Nevertheless, the panel stressed that because of Puerta's age, an eight-year suspension would effectively serve as a lifetime ban.¹⁰⁸ The panel found that at the age of 26, Puerta would likely be too old to play professional tennis at the end of his eight year suspension.¹⁰⁹ The panel determined that this punishment was inconsistent with the principle of proportionality and that it was not 'necessary for there to be undeserving victims in the war against doping.'¹¹⁰ The panel believed that there was a lacuna between the *No Fault or Negligence* and the *No Significant Fault or Negligence* categories which was to be filled by 'applying the overarching principle of justice and proportionality on which all systems of law, and the WADC itself, is based.'¹¹¹ Consequently, the panel reduced Puerta's suspension to two years following the date of his failed drug test.¹¹²

This provided precedential value for CAS to continuing applying the principle of proportionality following the introduction of the WADC. It is likely that most athletes whose case falls into the *No Significant Fault or Negligence* category close to their retirement will be able to cite *Puerta* as precedent to have their suspension reduced.¹¹³

In their opinion, the arbitrators deciding *Puerta* wrote that they hoped that the lacuna in *Puerta* would 'be filled when the WADC is revised in the light of experience in 2007.'¹¹⁴ Many of the arbitrators' wishes were fulfilled when the 2009 WADC was released.¹¹⁵ Some of the changes to the code brought it more in line with the principle of proportionality. Article 10.7 of the 2009 WADC makes the penalty for second doping offences vary based upon an athlete's first offence, which is illustrated by a rubric.¹¹⁶ Most of the categories listed in the rubric provide a range for suspensions, which give the arbitrators more discretion for what penalty to give an athlete.¹¹⁷

Additionally, the 2009 WADC allows more athletes to have their suspensions reduced for accidentally taking a Specified Substance. Athletes whose accidental doping results from taking a specified substance can have their penalty reduced. These substances 'are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents.'¹¹⁸ The 2003 WADC put Specified Substances into a narrow category, which excluded most ordinary doping offences.¹¹⁹ Under the 2009 WADC, the Specified Substances category includes all substances 'excluding substances in the classes of ana-

87 McLaren, *CAS Doping Jurisprudence: What Can We Learn*, 2006 INT'L SPORTS L. REV. 4 (Feb. 2006).

88 National Wheelchair Basketball Association (WNBA) v./ International Paralympic Committee (IPC) (CAS 95/122).

89 *Id.*

90 *Id.*

91 *C. v./ Federation Internationale de Nation Amateur (FINA)* (CAS 95/141).

92 *Id.*

93 *Id.*

94 McLaren, *supra* note 53 at 17.

95 *Id.* describing *IAAF v./ ÖLV & Elmar Lichtenegger* (CAS 2004/A/624).

96 *Mariano Puerta v./ International Tennis Federation* (CAS 2006/A/1025).

97 *Id.* at 4.5.

98 *Id.* at 4.6.

99 *Id.* at 5.1

100 *Id.* at ¶5.5.

101 *Decision in the Case of Mariano Puerta (International Tennis Federation Tribunal)*, ¶5.13.

102 *Puerta*, *supra* note 93 at 3.

103 *Id.*

104 *Id.* at 37.

105 *Puerta*, *supra* note 93 at 28.

106 *Id.*

107 *Id.* at 28.

108 *Id.* at 36-37.

109 *Id.* at 37.

110 Gandert, *supra* note 37 citing *Puerta*, *supra* note 93 at ¶ 11.7.14.

111 *Id.* at 39.

112 *Id.* at 43 and 41.

113 Daniel Gandert, *Puerta: Applying the Principles of Proportionality to the World*

Anti-Doping Code, SPORTS LAW: 15TH IASL CONGRESS PROCEEDINGS (2010) at 50, edited by Jacek Foks, Warsaw, 2010.

114 *Puerta*, *supra* note 93 at 39.

115 Gandert, *supra* note 113 at 51.

116 *Id.*

117 *Id.*

118 2003 World Anti-Doping Code, Article 10.3.

119 Gandert, *supra* note 113 at 51. According to Article 10.3 of the 2003 World Anti-Doping Code, only substances specifical-

bolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the “Prohibited List.”¹²⁰ This change makes the Specified Substances category the new default category for most cases of inadvertent doping.¹²¹ The minimum offence for athletes who have their suspension reduced based upon taking a Specified Substance is only a reprimand. This gives arbitrators a lot more flexibility for determining an athlete’s suspension for inadvertent doping.¹²² As a result, most athletes who receive suspensions under the WADC for inadvertent doping are now more likely to receive penalties that fit with the principle of proportionality.

When applying the principle of proportionality in *Puerta*, one of the factors that the CAS panel applied was the amount of time left in Puerta’s career. When the WADC was revised following the case, the drafters included a comment stating that neither calendar timing nor the amount of time left in an athlete’s career should be considered when reducing an athlete’s suspension under either the *No Fault or Negligence* or *No Significant Fault or Negligence* category.¹²³ It appears that the arbitrators disregarded this rule in the International Tennis Federation (ITF) Anti-Doping Tribunal Case *In the Matter of Richard Gasquet*.¹²⁴

The ITF Tribunal hearing this case determined that Gasquet’s offense fell into the *No Significant Fault or Negligence* category.¹²⁵ According to the 2009 WADC, an athlete whose first offence falls into this category should have his or her suspension reduced from two years to one year.¹²⁶ Instead of following the prescribed penalty, the panel explained that there was a lacuna in the rules, as there was in *Puerta*, and that an athlete in these circumstances would not have been envisioned by the WADC drafters.¹²⁷ The panel accepted ‘the player’s submission that if we were to impose a one year period of ineligibility, applying the rules rigidly, we would be penalizing a person whom the rule was not intended to catch.’¹²⁸ It determined that based upon the way rankings work in tennis, Gasquet’s being suspended for an entire year would likely prevent him from being able to move back into the top rankings of the sport.¹²⁹ The panel’s penalty for Gasquet ended up being a suspension for the time that he had already sat out, which allowed him to start playing again immediately.¹³⁰ Additionally, it determined that the miniscule amount of cocaine that Gasquet had ingested could not have helped his performance in the tournaments that he played in Rome and Barcelona prior to his learning that he had tested positive. Because of this, the panel decided that he would neither lose the ranking points nor have to pay back the prize money for those tournaments.¹³¹

This decision significantly strengthened the precedent of *Puerta*. It strengthens the doctrine of deviating from the prescribed penalty for doping based upon the proportionality. It also continues the doctrine of showing ‘that there does not need to be innocent victims in the war on doping.’¹³² Unlike in *Puerta*, where shortening the athlete’s sentence was the only thing that was done for proportionality, in *Gasquet*, the panel also allowed the athlete to keep his ranking points and prize money from other tournaments after his initial positive drug test.¹³³ This provides precedential value for adjusting any part of an athlete’s sanction when it is believed to be either unjust or disproportionate. Additionally, this case illustrates that there is still room for arbitrators to apply the principle of proportionality outside of the WADC.¹³⁴

In *Puerta*, the CAS panel carefully stated that ‘the circumstances

in which a tribunal might find that a gap or lacuna exists in the WADC in relation to sanctions for a breach of its provisions will arise only very rarely.’¹³⁵ One could easily interpret this language as providing a high burden for attorneys planning to cite *Puerta* as precedent.¹³⁶ However, *Gasquet* illustrates that attorneys can now cite *Puerta* as precedent whenever the anti-doping rules would not provide for a proportionate outcome. Although the CAS panel reached a different outcome for Gasquet’s case, from what the ITF Tribunal panel had decided, it left the ITF Tribunal’s decision untouched.¹³⁷ This means that the decision and its reasoning remain valid precedent.

5.2 The Legal Requirement for Proportionality

One reason that the tribunals hearing sports cases are concerned about proportionality is because of Swiss law. CAS, the IOC, and WADA are all seated in Switzerland and the Code of Sports-related Arbitration makes the Swiss Federal Tribunal the only judicial body that can review its CAS awards.¹³⁸ The Federal Code on Private International Law for Switzerland makes the use of Swiss law the default and states that parties are to use Swiss law unless there is another law that is applicable to their contract.¹³⁹ Additionally, it allows arbitration awards to be attacked when they are determined to be incompatible with Swiss public policy.¹⁴⁰ Based upon Articles 5 and 36 of the Swiss Federal Constitution, proportionality is one of the main principles that governs Swiss administrative law.¹⁴¹ This means that CAS awards can be attacked if arbitrators view them to go against the principle of proportionality. However, it is rare for parties to succeed at challenging CAS awards to the Swiss Federal Tribunal.¹⁴² Even when parties succeed at their challenge, their awards are remanded back to CAS.¹⁴³

6. Cases under the Osaka Rule

6.1 Jessica Hardy’s Case

Had the case not been resolved in a manner outside of the sports arbitration system, the precedents of *Gasquet* would have likely helped the case of the world-class swimmer Jessica Hardy. Hardy was advised by her coach to take the AdvoCare nutritional supplement.¹⁴⁴ She believed that between eighty-five and ninety percent of elite swimmers were taking supplements.¹⁴⁵ In order to exercise due diligence, she and her agent contacted the supplement company, AdvoCare, and verified that the supplements were uncontaminated.¹⁴⁶ She also went to the company’s website to make sure that the company was reputable, contacted other elite athletes that were taking the substance, and contacted the supplement’s distributor to further verify the safety of the product.¹⁴⁷ Additionally, Hardy made inquiries with her governing body, USA Swimming, as well as the United States Olympic Committee (USOC) and received additional assurances about AdvoCare’s being a safe company.¹⁴⁸ Despite all of these measures, Hardy tested positive for the prohibited substance. The AdvoCare supplements were determined to be the most likely cause of Hardy’s contamination.¹⁴⁹

The North American CAS panel initially hearing Hardy’s case classified it into the *No Significant Fault or Negligence* category.¹⁵⁰ As the supplements were tested to contain clenbuterol, the panel determined that Hardy had met the requisite burden of proof.¹⁵¹ Although Hardy

ly listed on the *Prohibited List* as Specified Substances can allow an athlete’s case to fall into this category.
 120 2009 World Anti-Doping Code, Article 4.2.2.
 121 Gandert, *supra* note 113 at 51.
 122 *Id.*
 123 2009 World Anti-Doping Code, Comment to 10.5.1 and 10.5.2.
 124 See *ITF*, *supra* note 63.
 125 *Id.* at ¶ 98-99. A description of the facts relating to Gasquet’s case is provided earlier in the article. Gasquet’s case, which is described earlier in the article, was the International Tennis Federation and WADA’s appeal of this decision.
 126 See 2009 World Anti-Doping Code,

Article 10.5.2.
 127 *Id.* at ¶ 114-116.
 128 *Id.* at ¶ 116.
 129 *Id.* at ¶ 119.
 130 *Id.* at ¶ 120.
 131 *Id.*
 132 Gandert, *supra* note 37.
 133 *Id.*
 134 *Id.* at 405.
 135 *Puerta*, *supra* note 93 at ¶ 11.7.26.
 136 Gandert, *supra* note 37 at 404.
 137 CAS Gasquet 5.4-3.
 138 *Statutes of the Bodies Working for the Settlement of Sports-related Disputes*, at <http://www.tas-cas.org/d2wfiles/document/281/5048/0/3.19020CodeEngnov2004.pdf>, *About WADA*, [\[ama.org/en/About-WADA/\]\(http://www.wada.org/en/About-WADA/\), Olympic Charter, Article 15, and Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 PEPP. DISP. RESOL. L. J. 51 \(2009\).
 139 *Switzerland’s Federal Code on Private International Law*, <http://www.tas-cas.org/usefultexts> at 173.
 140 *Id.* at 190.
 141 Dessemontet and T. Ansay, *INRO-DUCTION TO SWISS LAW* \(2004\) at 3, citing Articles 5 and 36 of Federal Constitution of Switzerland.
 142 Maureen A. Weston, *Simply a Dress Rehearsal? U.S. Olympic Sports Arbitration and De Novo Review at the*](http://www.wada-</p>
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Court of Arbitration for Sport, 38 GA. J. INT’L & COMP. L. 99 at 124.
 143 *Id.*
 144 *USADA v. Jessica Hardy*, North American Court of Arbitration for Sport panel at 5.
 145 *Id.* at 6.
 146 *Id.* at 7.
 147 *Id.*
 148 *USADA v. Jessica Hardy* (CAS 2009/A/1870) at 17.
 149 *Id.* at 3.
 150 *Hardy*, *supra* note 146 at ¶ 7.25.
 151 *Id.* at 9.

was warned about taking nutritional supplements, the panel decided to look at the totality of the situation, including the effort that Hardy put into making sure that the product was safe.¹⁵² While the panel determined that Hardy could have taken even more steps to ensure that the AdvoCare supplements were safe, it decided to reduce her suspension to one year.¹⁵³ This was the maximum reduction possible under the *No Significant Fault or Negligence* category of the WADC at the time.¹⁵⁴

The panel then went on to consider the Osaka Rule and its impact on Hardy's eligibility.¹⁵⁵ Because the rule would have prohibited anyone with a suspension of over six months from competing in the next Olympics, Hardy would not be eligible to compete in the 2012 Olympic Games. Since Hardy had already sat out of the 2008 Olympic Games because of her offence, she argued that this was 'shockingly disproportionate to her degree of fault'. The penalty would be excessive, abusive, and contrary to Swiss law. She cited the case *FIFA & WADA* in explaining that panels cannot impose penalties that are considered excessive under Swiss law.¹⁵⁶ Hardy further pointed out that the rule would also prohibit her from competing to qualify for the Olympic Games. The USA Swimming Standard Waiver and Release form requires athletes to sign that they are 'eligible and in good standing with the regulations laid down by USA Swimming, the International Federation for Amateur Swimming (FINA), and the International Olympic Committee.'¹⁵⁷ Furthermore, USOC policies do not allow athletes who are ineligible for competing in the Olympics to compete in the Olympic trials.¹⁵⁸

The panel explained that the rule appeared to contradict Article 20.1 of the WADC, which describe the IOC's rules and responsibilities. While the IOC was not at the proceeding to argue its position, the organization is a WADC signatory.¹⁵⁹ Additionally, it described how article 23.2.2 of the 2009 WADC specifically stated that 'No additional provision may be added to a Signatory's [such as the IOC] rules which change the effect of the Articles enumerated in this article.'¹⁶⁰

While the panel viewed the penalty with the Osaka Rule factored in as disproportionate, it decided to keep Hardy's suspension at one year and stated that it was not applying any rules other than the FINA Doping Code (FINA DC).¹⁶¹ It further stated that reducing suspensions so that they allow athletes to compete in the Olympics could bring about the problems of causing all doping violations to be reduced to six months.¹⁶² However, the panel decided to allow Hardy to apply for a waiver to the IOC regarding the Osaka Rule, with the IOC having the ability to appeal the case to CAS.¹⁶³

Following this, Hardy requested a waiver from the IOC which was subsequently denied.¹⁶⁴ Additionally, WADA appealed the North American CAS decision to CAS.¹⁶⁵ The CAS panel also found the case to fit into the *No Significant Fault or Negligence* category and left Hardy's suspension at one year.¹⁶⁶ The panel also stated that it could not further reduce Hardy's suspension to allow her to be eligible to compete in the 2012 Olympic Games. In a manner similar to that of the North American CAS panel that had previously heard the case, it stated that

it was bound by the FINA DC.¹⁶⁷ The panel stressed that disregarding the FINA DC provisions would be like rewriting the rules, for which the panel has no authority.¹⁶⁸ Also, the panel made the argument that the Osaka Rule was only intended to affect elite athletes who have a chance of qualifying for the Olympics.¹⁶⁹ Because of this, it believed that reducing the suspensions of elite athletes under the WADC, because of how proportionality would work when the Osaka Rule is factored in, would mean that these athletes would have lower sanctions than lower level athletes (who are not likely to qualify for the Olympics). This would effectively be unfair.¹⁷⁰

Hardy also requested a declaratory judgment from the panel that would allow her to compete in the 2012 Olympic Games.¹⁷¹ However, the panel determined that Hardy did not have a legal interest, which is needed for declaratory relief to be granted.¹⁷² Additionally, it stated that it did not believe Hardy would be helped by a declaratory judgment since neither the USOC nor the IOC would be bound by it.¹⁷³ The panel went on to explain its position that the lawfulness of the Osaka rule is more of an abstract question than an actual dispute concerning the parties.¹⁷⁴

The panel's refusal to provide declaratory judgment prevented Hardy from having a forum to take her dispute. Hardy would have been without a legal interest regarding the outcome of the Osaka Rule part of her case until she had qualified for the Olympic Games. However, she was unable to qualify for the Olympic Games because the rule made her ineligible to participate in the Olympic trials. This resulted in Hardy being caught in a "Catch 22" type situation for which there was no way for her to get relief. It is likely that many other athletes would have been caught in similar "Catch 22" situations had the Osaka Rule been allowed to stay in force.

If Hardy had asked for the panel to allow her to continue to participate in USA Swimming events, it would have given her the needed eligibility to qualify for the Olympics. Once Hardy was qualified for the Olympics, she would then have standing to request relief from the IOC regarding the Osaka Rule.¹⁷⁵ While this solution would have perhaps helped Hardy's case before CAS, it would have likely made things difficult for USA Swimming and the USOC. It would be problematic for these organizations to have an athlete qualify for the Olympics who might later be found ineligible to participate. Had Hardy qualified for the Olympics but been denied entry because of an Osaka Rule decision at the last minute, it would be too late for US Swimming to find a replacement to fill Hardy's spot.

In its explanation for why it did not allow proportionality to affect the length of Hardy's suspension, the panel cited *Puerta*. While the WADC has some flexibility to satisfy the proportionality principle, the flexibility is limited to avoid situations that are at odds with the purpose of applying a consistent anti-doping framework.¹⁷⁶ However, Hardy's situation was unique enough that providing a different suspension from what was prescribed by the WADC, in order to achieve proportionality, would not undermine the anti-doping framework more than the adjustments made in *Puerta* and *Gasquet*. Despite Hardy's diligence in trying to make sure that her supplement was not contaminated, the rule would have required her to miss both the 2008 and the 2012 Olympic Games. A decision could be tailored specifically to cases holding this level of disproportionality, which would prevent the decision from going against the anti-doping framework. Requiring Hardy to receive the *No Fault or Negligence* penalty prescribed by the WADC would have been as disproportionate as the suspensions that arbitrators found to be problematic in *Gasquet* and *Puerta*.¹⁷⁷

One may also be able to apply *Gasquet* and factor in whether Hardy was the type of athlete who the drafters of the Osaka Rule were intending to catch.¹⁷⁸ However, one must be cautious in this approach. The drafters of the Osaka Rule likely did not envision someone in Hardy's situation being banned from two Olympic Games. However, the rule came from the IOC and it was the IOC who initially denied Hardy's waiver of the rule.

Additionally, there is the fact that Hardy became contaminated by taking a nutrition supplement. The WADC specifically warns athletes about the possibility of supplements being contaminated. Athletes are specifically warned about these supplements through other sources as

152 *Id.* at 13-14.

153 *Id.* at 14.

154 See 2003 World Anti-Doping Code. Also, while the case describes the FINA Doping Code (FINA DC), which is the doping code for swimming, it has the same substantive rules as the World Anti-Doping Code, as FINA is a signatory of the WADC.

155 *Hardy*, *supra* note 146 at 14.

156 *Hardy*, *supra* note 146 at 16.

157^{1/2}, *supra* note 150 at 14.

158 *Id.* at 14-15.

159 *Id.* at 15.

160 *Id.* at fn 6.

161 *Id.* at 16. As stated earlier, the FINA DC has the same provisions as the World Anti-Doping Code.

162 *Id.* at 16.

163 *Id.* at 17.

164 *Id.* at 9.

165 *Id.* at 14.

166 *Id.* at 32, 34.

167 *Hardy*, *supra* note 50 at 35.

168 *Id.* at 36-37.

169 *Id.* at 36.

170 *Id.* at 36.

171 *Id.* at 34.

172 *Id.* at 35.

173 *Id.*

174 *Id.*

175 The US Olympic Trials is a USA Swimming event, so a decision allowing Hardy to participate in all USA Swimming events should allow her to participate in the US Olympic Trials.

176 *Id.* at 37.

177 This is referring to the ITF Tribunal case where *Gasquet's* case fell into the *No Significant Fault or Negligence* category. Because the CAS panel left the decision "undisturbed," this is still valid precedent.

178 *Gandert*, *supra* note 37 at 416.

well.¹⁷⁹ Because of this, it is likely that the drafters of the rule might not have been as sympathetic to athletes who become contaminated through supplements as through other forms of inadvertent doping. Supplements provide for an interesting predicament for athletes. As elite athletes try to do everything possible to remain on top of their sport, they often feel that they need to take nutritional supplements.¹⁸⁰ Athletes can feel like they are at a disadvantage if they do not take a supplement when their competitors are taking supplements. Because the supplements are not banned, this forces athletes to make a decision regarding whether to take a substance which is needed to help one's performance and risk the possibility of contamination or to avoid taking the supplement and not have the advantage that other athletes have received.¹⁸¹

While the CAS panel did not provide Hardy with any relief, it mentioned that it was not preventing Hardy from getting judicial relief in the future.¹⁸² Hardy's situation would have been the perfect test case for finding the Osaka Rule to be disproportionate. The case never went any further, however. In April 2011, the IOC informed Hardy that it was going to allow her to compete.¹⁸³ The IOC decided that Hardy could compete because the Osaka Rule came into effect close to the time of Hardy's inadvertent doping.¹⁸⁴ Also, the IOC looked favorably at the way Hardy withdrew from the 2008 Olympics while her case was pending with the hope of being able to compete in the 2012 Olympics.¹⁸⁵ The IOC's reasoning makes sense. It rewards Hardy for voluntarily sitting out of the 2008 Olympics while her case was being heard and, prevents the injustice of her having to miss two Olympics from occurring. There has been criticism regarding the newness of the rule being the basis for this outcome. The international sports columnist Phillip Hersch described the reasoning as 'the IOC quietly decided likely ignorance of the new law at that point was an excuse, and it cleared Hardy to compete in London.'¹⁸⁶ However, the IOC's reasoning makes sense regarding the unique facts of her case. Hardy tested positive on July 4, 2008.¹⁸⁷ Since clenbuterol will stay in an athlete's system for up to 72 hours, Hardy's inadvertent use of the substance could have occurred at any point starting on July 1. This was the first day that the rule was to take effect and only 3 days after the rule was enacted.¹⁸⁸ Because of the strong consequences of the rule, it is fair that the IOC was lenient for an offence that happened during a brief period before it was clear that everyone involved in the Olympic movement was notified about the rule.

6.2 LaShawn Merritt's Case

After Hardy's case was resolved, there were still other cases of athletes who were unable to compete in the 2012 Olympics because of the Osaka Rule. Among these was LaShawn Merritt, another athlete for whom the panel hearing his case believed that it fell into the *No Significant Fault or Negligence* category. After seeing commercials about the enhancement product ExtenZe, Merritt decided to purchase the product at a 7 Eleven convenience store.¹⁸⁹ It never crossed his mind that ExtenZe might contain a steroid derivative and Merritt never looked at the label, although he stated that he would not have known that the ingredients were on the banned substance list had he looked at the label.¹⁹⁰ Merritt purchased the ExtenZe along with condoms and was not thinking about track when he purchased the product.¹⁹¹ The 7 Eleven representative who sold Merritt the condoms provided convincing testimony to support his statements and USADA agreed that ExtenZe was the cause for

Merritt's positive tests.¹⁹² With USADA's agreement upon the cause, the panel determined that there was no dispute that this doping was accidental.¹⁹³ The panel also considered the fact that Merritt purchased the ExtenZe from a 7 Eleven, instead of a vitamin supplement store, since athletes have been warned about the potential dangers of vitamin supplement stores, and the fact that the panel was not aware of specific warnings about the type of product by which Merritt was contaminated.¹⁹⁴ The panel also looked favourably upon Merritt's willingness to publicly confess to taking ExtenZe; the panel believed that this type of confession was humiliating.¹⁹⁵

USADA had requested a two year suspension since Merritt had made several purchases of ExtenZe.¹⁹⁶ However, Merritt took the product multiple times because USADA did not notify him when his first positive test occurred.¹⁹⁷ The panel determined USADA did nothing wrong by waiting to notify Merritt about his positive test. However, it stated that Merritt continued to take ExtenZe since he was not notified which delayed the start of his suspension.¹⁹⁸ After analyzing *No Significant Fault or Negligence* precedents for which the athlete failed to read the label of a product, Merritt's case was classified as falling into the *No Significant Fault or Negligence* category. The panel decided to give Merritt a 21 month suspension.¹⁹⁹

The panel went on to analyze the Osaka Rule's effect on Merritt's case. Merritt made several arguments relating to this issue. First, he argued that because the IOC was a signatory to the WADC, it could not make significant changes to the document.²⁰⁰ Second, he argued that his being required to sit out of the Olympics in 2012 would go against the principle of proportionality, since it would in effect make the penalty for his offence last longer than the two year maximum penalty for his offence under the WADC, and thus would be inconsistent with Swiss law.²⁰¹ Merritt cited the case *LG Munich Krabbe v. IAAF et al.* to make the argument that 'the maximum penalty applies to someone who intends to cheat, not an accidental case.'²⁰² Therefore, with respect to an accidental case, a three year period of ineligibility would obviously fail to comply with the principle of proportionality.²⁰³ Third, Merritt stated that if the Osaka Rule was applied to his case, the panel needed to either give him a suspension that lasted for six months or less or to allow Merritt to receive a waiver of the rule from the IOC while retaining jurisdiction for the case.²⁰⁴ While Merritt's points are correct, it is important to note that even if the Osaka Rule was applied to Merritt's case, it would not result in a three year suspension. A three year suspension would mean that Merritt could not compete in any event during those three years. The Osaka Rule would have only prevented Merritt from competing in the Olympics following the end of his suspension and would have allowed him to compete in other events in his sport.

Unlike the CAS *Hardy* panel, which did not believe that the IOC would be bound by its judgment, the panel hearing *Merritt* determined that it had jurisdiction to reach a decision regarding the Osaka Rule issue. The panel explained how Article 15.4.1 of the WADC required all signatories to recognize the panel's hearing results absent an appeal.²⁰⁵ Since the IOC and USOC are both signatories of the WADC, they are thus required to recognize the results of the North American CAS. This brings about questioning regarding the reason that the Hardy CAS panel did not believe that the IOC and USOC would have been bound by its decision. One can speculate that had WADA not appealed Hardy's case and the North American CAS retained jurisdiction over it following the

179 2009 World Anti-Doping Code, Comment to Rule 10.5.1 and 10.5.2 describes the dangers of nutritional supplements. See page 6 of *Hardy* (CAS) for mention of the warnings that Hardy had received from USADA regarding nutritional supplements.

180 Ron J. Maughan, Doug S. King and Trevor Lea, *Dietary Supplements*, 2004 *Journal of Sports Sciences* at 95.

181 The ATP may be part of a solution to this problem through its involvement in a system that provides nutritional supplements to athletes that are as "doping-free" as possible. Olivier de Hon and

Bart Coumans, *The Continuing Story of Nutritional Supplements and Doping Infractions*, 41 *BR J SPORTS MED* 800 at 802.

182 *Hardy*, *supra* note 150 at 36-37.

183 *IOC Declares Jessica Hardy Eligible*, ESPN, at <http://sports.espn.go.com/oly/news/story?id=6444781>, Apr. 28, 2011.

184 *Id.*

185 *Id.*

186 Phillip Hersch, *Reigning Champ Merritt Can Compete in 2012 Olympics*, *The Chicago Tribune*, at <http://www.chicagotribune.com/sports/globetrotting/>

chi-merritt-can-compete-in-2012-olympics-20111005,0,2660099.column, Oct. 6, 2011.

187 AAA *Hardy* at 9.

188 *Id.* at 9 describes the length of time for which clenbuterol will remain in an athlete's urine specimen. For information about the enactment of the Osaka rule, see *USOC v. IOC* (CAS 2011/0/2422) at ¶2.

189 *USADA*, *supra* note 28 at ¶7.9.

190 *Id.*

191 *Id.*

192 *Id.* at ¶ 1.2.

193 *Id.*

194 *Id.*

195 *Id.* at 35.

196 *USADA* *supra* note 28 at 31.

197 *Id.* at 32.

198 *Id.*

199 *Id.* at 33.

200 *Id.* at 36.

201 *Id.*

202 *Id.* at 137 citing *LG Munich Krabbe v.*

IAAF et al. in *SPURT* 1995, May 17, 1995 p. 161, 167.

203 *Id.*

204 *Id.*

205 *Id.* at 39.

Law and Sports in India

Development Issues and Challenges

This book is the first endeavour in elucidating the anomalies in the passionate and popular sports industry in India. This book is a must have for every sports lover, sportsperson, sports administrator and anyone connected with the sports industry. This work seeks to create legal awareness about the issues that are of vital importance in sports.

Justice M. Mudgal and the assistant authors Vidushpat Singhania and Nitin Mishra have taken into perspective the incidents and decisions worldwide in the sporting sector while applying their expertise in law. The authors have managed to derive a paradigm for sports in India, which should form the legal framework for the sports industry.

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MEMORANDUM OF UNDERSTANDING FOR COOPERATION BETWEEN THE ASSER INTERNATIONAL SPORTS LAW CENTRE (THE HAGUE) AND THE SPORTS LAW RESEARCH CENTER (MILAN)

Considering the close, traditional ties between the Republic of Italy and the Kingdom of the Netherlands, both being founding members of the European Union,

Considering that close cooperation in the field of international sports law between our institutions would be conducive to strengthening these ties,

Considering that close cooperation in the field of education and research in international sports law between our institutions would be an important contribution to the promotion and development of international sports law –our institutions being seated in the western and eastern hemisphere of the world respectively,

We have decided –by signing this Agreement –to create a framework for cooperation, in particular focusing on the following forms of cooperation:

- the exchange of information and library services;
- the joint organization of specialized courses;
- the joint organization of conferences, seminars and workshops on topical issues of international sports law;
- the exchange of students and trainees in sports law;
- the joint undertaking of studies;
- the publication of books.

All decisions regarding this cooperation will be taken after mutual consultations between the institutions. The Agreement is valid for a period of four years, to be renewed by mutual agreement.

The Hague/Milan, 1 September 2011

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IOC's denial of her request for an Osaka Rule waiver, the North American CAS might have determined that the IOC and USOC were required to allow her to compete. One can also speculate over how CAS would have handled a possible appeal of this issue. The *Merritt* panel described the scenario in *Hardy* as 'biased and one sided' since the IOC, was able to appeal rules related to Olympic eligibility while Hardy was unable to do so 'because AAA decision was decided under FINA rules the IOC Rule was not part of the AAA case and Hardy did not have the right to join the IOC to her appeal.'²⁰⁶ Since the panel believed that the lack of symmetry went against justice and that the panel was required to grant any relief within the scope of the parties' agreement, the panel believed that it had jurisdiction over all parties related to the Osaka Rule part of the case.²⁰⁷

The panel also explained how, if it did not provide Merritt with the opportunity to challenge the "Osaka Rule," he would likely have no forum for which to take the issue. It mentioned how a civil court would be the only other place to which Merritt could take his issue, and this was only if a civil court was willing to hear the case.²⁰⁸ Based upon the Ted Stevens Amateur and Olympic Sports Act, it is unlikely that a US Court would have jurisdiction over this case.²⁰⁹ Because of this, any appeals would likely need to be to the Swiss Federal Tribunal for issues relating to proportionality. The panel described how Article 8.1 of the WADC provided athletes with the 'right to respond to the asserted anti-doping rule violation and resulting consequences' and that the panel's not being able to hear the case would make this statement a lie.²¹⁰

The IOC refused to participate in the hearing after being invited by the panel.²¹¹ Because of this, the panel drew an adverse inference relating to the Osaka Rule, as prescribed by Article 3.2.4 of the WADC before analyzing the legality of the Osaka Rule as relating to Merritt's case.²¹² The panel then cited *Hardy* and its analysis to describe that as a signatory of the WADC, it could not add penalties that altered the effect of the WADC.²¹³ Since the Osaka Rule would greatly add to the penalties for many athletes beyond what was in the WADC, the rule was prohibited based upon this analysis.

The panel also determined that *Advisory Opinion IAAF* followed the same reasoning as *Hardy* and the facts of the case, in which the European Athletic Championships was prohibited from preventing people with doping offences that had expired prior to the event from entering, was analogous to the Osaka Rule issue.²¹⁴

Another issue addressed by *Merritt* is that of *ne bis in idem*, which is essentially that of double jeopardy. The panel determined that the case *Prusis* had already established that refusing to allow an athlete to enter an event because of a suspension after it has expired constitutes double jeopardy.²¹⁵ This is interesting as it appears that the IOC had done exactly what the *Prusis* panel had advised when it added to the Olympic Charter that athletes do not have any expectation of participation in the Olympics.

Double jeopardy is likely not the best argument against the Osaka Rule. In the case *Jessica Foschi v. FINA*, the swimmer Jessica Foschi tested positive for a metabolite of the prohibited substance mesterolone.²¹⁶ It remained a mystery how she was contaminated but the US Swimming National Board of Review hearing the case gave Foschi two years of probation, during which she would be required to receive additional drug tests, and stated that she would be banned from swimming for life if she received any future positive tests.²¹⁷ Foschi appealed her case to the US Swimming Board of Directors, as she was allowed to do under the organization's rules. The board changed Foschi's sanction from probation to a two year suspension. However, the board reduced Foschi's sanction following the CAS decision *Lehtinen v. FINA*, and changed her sanction back to those that the earlier panel had imposed.²¹⁸ Foschi appealed her case to the AAA which reversed her sanctions, claiming that she was innocent and that the sanctions were arbitrary and that they violated fundamental fairness since neither Foschi nor anyone connected to her had any knowledge of how she became contaminated.²¹⁹ Following this, FINA determined that Foschi's violation was not handled in accordance with FINA rules.²²⁰ Eventually, Foschi appealed the case to CAS. The panel hearing her case determined that while the FINA proceedings were for the same set of facts as the US Swimming and AAA panel's case, they are for dif-

ferent rules.²²¹ This panel went on to state that this situation did not constitute double jeopardy.²²²

Based upon the precedent of *Foschi*, it seems that an athlete can be sanctioned multiple times, but under different rules, for the same offence and not have it constitute double jeopardy. This falls in line with the way the principle works in US criminal law. While double jeopardy is prohibited by the US Constitution, both the state and the federal government can prosecute a criminal defendant for the same charge, since they are considered separate sovereigns.²²³ Based upon this theory, the IOC and the International Federation of every sport can be viewed as separate sovereigns, with each being able to bring about its own charges. In addition to a federation's doping rules which govern the athlete during the season, the IOC has its own doping rules for each Olympic Games.²²⁴ Because of this, these rules and the Olympic Charter can be considered a separate set of rules from those of International Federations just as the *Foschi* panel determined that FINA and US Swimming had separate sets of rules.

A counterargument against using *Foschi* as precedent that the Osaka Rule does not constitute double jeopardy is the fact that all of the institutions involved in Osaka Rule cases are in effect using the same rules, the WADC. While there may be differences in the labeling of the rules, such as one institution labeling the rules as the FINA DC, the fact that these institutions have ratified the WADC means that an argument cannot be made that an athlete is being prosecuted under two separate sets of rules. If the Osaka Rule makes the Olympic rules substantially different enough for there to be two separate rules, then it brings back the earlier argument that the rule is out of compliance with the WADC.

The *Merritt* panel also disagreed with the CAS advisory opinion that found that the Osaka Rule did not constitute a penalty since it was an eligibility rule.²²⁵ According to the panel, 'if it looks like a duck, walks like a duck and quacks like a duck, it's a duck.'²²⁶ The panel explained how it believed that the opinion went against CAS precedents of *Prusis* and *Advisory Opinion IAAF* and that *Prusis* was controlling precedent for describing the rule as constituting double jeopardy.²²⁷ The panel also explained how the *IOC Advisory Opinion* specifically stated that it did not constitute legal precedent, meaning that it did not need to be followed, and how the opinion made no reference to the WADC when listing the applicable law for the case.²²⁸ As the IOC is required to abide by the WADC, the panel determined that it prevents the IOC from implementing policies that do not conform to the code.²²⁹

As consequence of its findings, the *Merritt* panel stated that Merritt was allowed to compete in all competitions held by signatories of the WADC.²³⁰ Additionally, it prohibited the Osaka Rule from being used to prevent Merritt from competing in either the Olympic Trials or the Olympic Games. The panel concluded its case by explaining that the legality of the Osaka Rule needed to be resolved soon and that there would likely be many issues for other athletes until this was resolved.²³¹ This indicated that while the panel exercised its discretion to allow Merritt to compete in the Olympics, it did not believe that it would be the final word on the issue.

206 *Id.* at 39.

207 *Id.*

208 *Id.* at 40.

209 See 36 U.S.C. § 220501.

210 *USADA, supra* note 28 at 40.

211 *Id.*

212 *Id.* at 41.

213 *Id.* at 42.

214 *Id.* at 42 citing *Advisory Opinion IAAF*.

215 *Id.* at 42-43.

216 *Jessica Foschi v. FINA* (CAS 96/156) at 8-9.

217 *Id.* at 9. This case took place before the WADC was in place, so the sanctions and testing procedures were different from how they are today for the sport of swimming.

218 *Id.* at 13-14.

219 *Id.* at 14. The reasoning for this part of the decision is not valid following the introduction of the WADC.

220 *Id.* at 15.

221 *Id.* at 39.

222 *Id.* at 39-40.

223 See Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 *Wash. U. L. Rev.* 769.

224 See the International Olympic Committee Anti-Doping Rules Applicable to the Games of the XXIX Olympiad, Beijing 2008 for an example of the specific doping rules in-place for the 2008 Olympic Games.

225 *Merritt* at 43.

226 *Id.* at 44.

227 *Id.* at 44.

228 *Id.*

229 *Id.*

230 *Id.* at 50.

231 *Id.* at 48-49.

6.3 CAS Reaches Decision Regarding the Osaka Rule

The day before the IOC announced that it would allow Hardy to compete, the IOC and USOC agreed to have CAS reach a decision regarding the validity of the Osaka Rule.²³² The panel hearing the case was chaired by Richard McLaren, who was one of the arbitrators for the *Gasquet* decision expanding the principle of proportionality.²³³ In addition to the arguments raised by the parties, the panel received amicus briefs expressing support for the USOC's position from nine national anti-doping organizations, two national Olympic committees, three national governing bodies for sport, and the Valparaiso Sports Law Clinic.²³⁴ It is of interest that various national anti-doping agencies took a position against the Osaka Rule since many of them, including USADA, have a reputation for always taking a strict stance on doping. Additionally, WADA submitted a brief that did not support either of the parties but instead raised a couple of other issues with the rule.²³⁵ First, it brought up that there is belief that many tribunals have been looking for ways to reduce the suspensions of athletes to lesser than six months in order to avoid triggering the Osaka rule.²³⁶ For these instances, the rule would actually be unintentionally hurting the fight against doping since it leads to shorter suspensions for athletes than what they would have received if the rule was not in existence. WADA also mentioned that allowing athletes to have their suspension reduced by providing information that would assist WADA, through article 10.5.3 of the WADC, is not as successful as WADA had expected that it would be.²³⁷ WADA's belief was that this might be in part because athletes have chosen to litigate their case in hopes of receiving a sanction of six months or less instead of cooperating, which would only reduce the athlete's suspension to six months in the most extreme cases.²³⁸ An athlete who believes that his or her cooperation would only reduce his or her sanction to one year may feel that he or she has no incentive to cooperate if the athlete's sole aim is to compete in the next Olympic Games.

The panel hearing *USOC* determined that the Osaka Rule can be characterized as a disciplinary sanction, not merely an eligibility measure.²³⁹ The IOC argued that athletes who are prohibited from participating in the Olympics can still participate in other competitions.²⁴⁰ However, the panel described the Olympic Games as 'the pinnacle of success and the ultimate goal of athletic competition' for many athletes.²⁴¹ The panel decided that because of this, prohibiting athletes from participating in the Olympics after their suspension is complete would provide additional penalties to the suspended athlete.²⁴² Because the athlete's suspension comes from the WADC, this means that the additional penalty is one which is above that of the WADC. This statement can also be applied to the principle of proportionality. An athlete who is forced to sit out for the next Olympics following a one year *No Significant Fault or Negligence* suspension has an additional penalty that is disproportionate to the athlete's offence.

The IOC also argued that it did not have the jurisdiction to discipline athletes prior to the Olympics and that because of this, the Osaka Rule could not be of a disciplinary nature.²⁴³ However, the panel hearing the case determined that when the rule prohibits an athlete from participating in the Olympic Games, the rule becomes disciplinary and can then be classified as a sanction.²⁴⁴ This analysis can be applied to future instances related to other rules as it provides precedent that eligibility standards become disciplinary whenever they take the effect of

disciplining an athlete, whether they are intended to or not. The panel went further in determining that rules that operate as both an eligibility rule and a sanction have elements of both, thus meaning that they need to be treated as a disciplinary sanction.²⁴⁵

The panel then determined that the Osaka Rule was not in compliance with the WADC. In reaching its decision, the panel cited Article 23.2.2 of the WADC, which prohibits signatories from bringing about substantive changes to the WADC and states that 'no additional provision may be added to a Signatory's rules which change the effect of [...] the periods of Ineligibility provided for in Article 10 of the WADA Code.'²⁴⁶ Because the Osaka Rule provided for an additional ineligibility period, the panel determined that the rule was out of compliance with the WADC.²⁴⁷ The panel concluded that the Osaka Rule was invalid and thus unenforceable.²⁴⁸

While the panel found the Osaka Rule to be unenforceable, it mentioned that it could still be possible for the IOC to prevent athletes with doping offences from entering the Olympics if it could get the WADC amended.²⁴⁹ WADA had mentioned in its amicus brief that it will again be reviewing the WADC in the near future and that additional sanctions could be added to the code as long as they fall in-line with the principle of proportionality.²⁵⁰ The *USOC v. IOC* panel explained that if the WADC was amended to include the additional sanctions, the proportionality issue would likely be decided by the first case related to the amendment.²⁵¹ However, it stated that there would no longer be any double jeopardy issues if this were the case, since it would fall under a single set of rules.²⁵²

It was also brought to the panel's attention that the Osaka Rule may have gone against Article 23.6 of the WADC.²⁵³ This article describes how the WADC is amended and the requirement for signatories to incorporate the WADC into their rules.²⁵⁴ An argument could be made that since the Osaka Rule provided for an additional penalty beyond what is prescribed by the WADC, including it in an organization's rules means that the WADC is not adequately incorporated into the IOC's rules. The *USOC v. IOC* panel decided not to reach a finding regarding this issue since it had already found the Osaka Rule to be out of compliance with the WADC.²⁵⁵ The panel also decided not to explore any other issues related to Swiss law and the fundamental principles that it requires.²⁵⁶

6.4 The Effect of the CAS Decision on the Osaka Rule

The *USOC v. IOC* decision will allow a significant number of athletes to compete in the 2012 Olympics who would otherwise be prohibited from doing so. Just counting athletes from the US, this will remove the prohibition on competing for at least 33 athletes.²⁵⁷ Similarly, the International Association of Athletics Federations predicted that about 50 athletes for the sport of track and field will be affected by the verdict.²⁵⁸

Additionally, this precedent will likely help athletes with other doping bans. For example, in 2004, the Danish National Olympic Committee adopted a rule that prohibited any athlete with a doping suspension for greater than six months from participating in the next Olympic Games.²⁵⁹ The ban was repealed following the CAS decision regarding the Osaka Rule. There are plans to reinstate the rule if the IOC finds "loopholes, interpretations" in the CAS decision,²⁶⁰ which further indicates that this is related to the Osaka Rule decision.

232 3473 Declares Jessica Hardy Eligible, *supra* note 185.

233 *USOC v. IOC* (CAS 2011/o/2422) at 1 and *Gasquet, ITF, supra* note 63 at 1.

234 *USOC v. IOC* at 6-7.

235 *Id.* at 7.

236 *Id.*

237 *Id.*

238 *Id.*

239 *Id.* at 18.

240 *Id.*

241 *Id.*

242 *Id.*

243 *Id.*

244 *Id.* at 17.

245 *Id.* at 18.

246 *Id.* citing 2009 World Anti-Doping Code, article 23.2.2.

247 *Id.*

248 *Id.*

249 *Id.* at 19.

250 *Id.* at 7.

251 *Id.* at 19.

252 *Id.*

253 *See Id.* at 20.

254 2009 World Anti-Doping Code Article 23.6.

255 *USOC v. IOC* at 20.

256 *Id.* at 21.

257 Martyn Ziegler, *Merritt Victory Opens Door to Drug Cheats*, PA Newswire: Sports News October 6, 2011.

258 *Johnson Backs Olympic Ban Despite CAS Verdict*, Times of India, at articles.timesofindia.indiatimes.com/2011-11-02/london-olympics/30350032_1_olympic-ban-british-olympic-association-cas, Nov. 2, 2011.

259 *Doping: New Twist in Games Sanctions Saga as Danes Drop Ban*, at keirradnedge.com/2011/11/08/doping-new-twist-in-games-sanctions-

saga-as-denmark-drops-ban/?utm_source=rss&utm_medium=rss&utm_campaign=doping-new-twist-in-games-sanctions-saga-as-denmark-drops-ban, and *Denmark Repeals Olympic Doping Ban Rule*, Nov. 8, 2011 and *The State*, at www.thestate.com/2011/11/08/2038848/denmark-repeals-olympic-doping.html, Nov. 8, 2011.

260 *Denmark drops rule that would ban athletes from Olympics for doping violations*, *The Washington Post*, at www.washingtonpost.com/sports/denmark-drops-rule-that-would-ban-

Another organization with its own anti-doping rules that provides penalties beyond the scope of the WADC is the British Olympic Association (BOA). In 1992, the BOA introduced a rule prohibiting any athlete from participating in the Olympics for life if the athlete has been suspended for a doping offence.²⁶¹ Travis Tygart, the Chief Executive for the United States Anti-Doping Agency, found the rule to be problematic, stating that it does not work for one country to have increased sanctions when the rest of the world does not have them.²⁶² The BOA has claimed that the bylaw is supported by WADA.²⁶³ However, WADA has asked the BOA to review its rule following the *USOC v. IOC* decision.²⁶⁴ According to Frederic Donze, WADA's European director, a lifetime ban for an athlete's first doping offence would likely bring about legal challenges in court which would make things more difficult for those trying to fight doping.²⁶⁵ Additionally, the head of UK Anti-Doping has stated that the ban hinders athletes cooperating with anti-doping authorities, since it removes any incentive for athletes to cooperate.²⁶⁶

One difference between the Osaka Rule and that of the BOA is that under the BOA's rule, athletes have the ability to appeal their suspension.²⁶⁷ Twenty-nine out of the thirty-one athletes who have challenged their ban succeeded at doing so and the BOA has claimed that had Merritt been subject to its rules, the lifetime ban for his case would have likely been overturned.²⁶⁸ The BOA has at times labeled its bylaw as a selection policy instead of as a doping rule.²⁶⁹ BOA Chairman Colin Moynihan has stated that the big difference between the Osaka Rule and its bylaw is that 'the BOA rule is based on eligibility rather than being a sanction.'²⁷⁰ It appears that Moynihan's perspective comes from the view that the BOA can select whoever it wants as part of its Olympic team and that this bylaw is not in place to sanction athletes but instead, is part of its team's eligibility criteria. However, as mentioned earlier, the *USOC v. IOC* panel determined that eligibility criteria becomes disciplinary when it prohibits athletes from participating in the Olympic Games.²⁷¹ This logic should also apply to the BOA bylaw, meaning that as soon as it prevents athletes from being able to compete in the Olympics, the bylaw becomes a disciplinary sanction.

The *USOC v. IOC* panel's determination that the Osaka Rule goes against the WADC should serve as precedent that the BOA rule goes against the WADC. As a member of the Olympic movement, the BOA was required to sign the WADC.²⁷² As a WADC signatory, it is not permitted to make substantive changes to the WADC.²⁷³ Similarly, a lifetime ban will likely bring about issues regarding proportionality. It will be interesting to see what ends up developing regarding this rule.

7. Conclusion

The *USOC v. IOC* decision left proportionality in place, kept athletes engaged in inadvertent doping in separate categories from intentional

cheaters, and strengthened the uniformity of doping rules in the Olympic movement. This brought about the notion of fairness, which is central to trust in any system that imposes sanctions. Additionally, the decision demonstrated CAS's independence, as well as added to the legitimacy of its proceedings.

Near the conclusion of its *Prusis* decision, the panel wrote that it had considerable sympathy with the IOC's position.²⁷⁴ It is appropriate for one to continue to have sympathy for the position of the IOC following the *USOC v. IOC* decision. The IOC is trying to keep the Olympics clean in a world where new methods of doping continue to be developed.²⁷⁵ Cheaters have caused a lot of harm to the Olympic movement over the past few decades and it is reasonable for the IOC to wish for clean games where the main news stories are about the true athletic accomplishments instead of those of athletes who are caught for doping. Nonetheless, in the fight against doping, it is important to make sure that the athletes who are accidentally engaged in inadvertent doping are not placed into the same category as athletes involved in intentional doping. Keeping the two categories separate legitimizes the doping controls and provides a sense of fairness to everyone involved in sport.

- athletes-from-olympics-for-doping-violations/2011/11/08/glQAukjroM_story.html, Nov. 8, 2011.
- 261 Owen Gibson, *Olympic Games: British Olympic Drugs Ban May Face Challenge After US Appeal*, THE GUARDIAN, Sports Pg. 8, Aug. 18, 2011.
- 262 Matt Slater, *Team GB's Lifetime Ban for Doping 'Should be Scrapped'*, BBC Sport, at <http://news.bbc.co.uk/sport2/h/olympics/15159806.stm>, Oct. 3, 2011.
- 263 *BOA Vows to Stick to its Olympic Ban Rule*, KKTv.Com, at www.kktv.com/sports/headlines/BOA_Vows_To_Stick_To_Its_Olympic_Ban_Rule_131222969.html, Oct. 6, 2011.
- 264 Rob Harris, *WADA Director Says Lifetime Bans Not Enforceable*, at <http://sports.yahoo.com/olympics/news?slug=ap-wada-doping>, Oct. 11, 2011.
- 265 *Id.*
- 266 Martyn Ziegler, *Anti-Doping Chief Concerned By Lack of Incentives*, PA Newswire: Sport News Dec. 15, 2010.
- 267 Jack Mollart-Solity, *BOA Right in Their Strong Stance on Doping*, The Mancunion, at <http://www.student-direct.co.uk/2011/11/03/boa-right-in-their-strong-stance-on-doping/>, Nov. 3, 2011.
- 268 *Id.*
- 269 Owen Gibson, *WADA Asks British Olympic Association to Review its Drugs-Ban Policy*, THE GUARDIAN, at <http://www.guardian.co.uk/sport/2011/oct/08/wada-boa-olympics-2012>, Oct. 8, 2011.
- 270 Paul Kelso, *London 2012 Olympics: BOA Defends Lifetime Ban on Drug Cheats After LaShawn Merritt Ruling*, The Telegraph, at <http://www.telegraph.co.uk/sport/olympics/8811273/London-2012-Olympics-BOA-defends-lifetime-ban-on-drug-cheats-after-LaShawn-Merritt-ruling.html>, 15 Nov. 2011.
- 271 *USOC v. IOC*, *supra* note 24 at 17.
- 272 See Olympic Charter, Article 43, stating "The World Anti-Doping Code is mandatory for the whole Olympic Movement."
- 273 2009 World Anti-Doping Code, Article 23.2.2.
- 274 *Prusis* at 7.
- 275 See Gandert and Ronisky, *supra* note 32.

A Right To Sport: Theory, Evidence And Implications

By Genevieve Lim*

The evolution of sport as unifying social tool and an international commercial force has caused many commentators to assert that participation in sport is a human right. This paper investigates this claim and reviews legal instruments and decisions to determine whether a right to sport can be considered to exist in law. This evidence is not conclusive and the rhetoric of the transformative power of sport is not matched by mainstream legal mechanisms to protect general access to sporting opportunities. A future right to participate in sport would be difficult to establish in mainstream law, but might be effectively progressed in a private system of international sports law established by the rules of international sporting organizations.

A Introduction

'I have always believed that sport is a right, not a privilege' Nelson Mandela¹

It is the age of the ascendancy of sport, where through the visual power of mass media, sporting activities and events have developed unforeseen transformative powers and functions on the international stage. Global fans follow sport with religious zeal and enormous personal dedication. Behemoth sporting events such as the FIFA World Cup and the

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and Recreation Victoria in Legislation. 1 Jennifer Crwys-Williams (ed), *In the Words of Nelson Mandela* (Profile Books, London, 2004).