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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

¹ John Lohn, *Olympics, Swimming: Cesar Cielo Claims 50 Free Gold in Olympic Record Time*, SWIMMINGWORLD (Aug. 15, 2008), <http://www.swimmingworldmagazine.com/lane9/news/18845.asp>.

² *See id.*

³ *Cielo Hands Brazil First Swimming Gold*, S. CHINA MORNING POST (Aug. 16, 2008), <http://olympics.scmp.com/Article.aspx?id=2745>; Ariel Pietrobond, *Mens 50M Freestyle Final—Hombres 50M Estilo Libre Final Beijing 2008*, YOUTUBE (Dec. 4, 2008), <http://www.youtube.com/watch?v=xqffT58tubQ>.

⁴ *Cesar Cielo Cleared To Defend World Titles After CAS Hearing*, GUARDIAN (July 21, 2011), <http://www.guardian.co.uk/sport/2011/jul/21/cesar-cielo-cas-hearing>.

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).

⁶ *See Scope: Doping Control Rules*, FINA, http://www.fina.org/H2O/index.php?option=com_content&view=article&id=382:scope&catid=90:doping-control-rules&Itemid=184 (last visited Jan. 5, 2013); *Whereabouts / ADAMS*, FINA, http://www.fina.org/project/index.php?option=com_content&task=blogcategory&id=121&Itemid=554 (last visited Jan. 5, 2013).

ineligibility from the sport.⁷ 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.⁸

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.⁹ Despite his claims, Cielo's fate hung with the adjudicatory authorities that oversee the sanctioning of athletes who test positive for banned substances.¹⁰ 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.¹¹ 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.¹²

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,

⁷ See WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE DC10.2, at 52 (2009) [hereinafter 2009 WADC], available at http://www.wada-ama.org/rtecontent/document/code_v2009_En.pdf.

⁸ Cf. Alex Miller, *A Pot of Gold! How Britain's Athletes Will Cash in if They Grab Glory at the London Games*, MAIL ONLINE (Nov. 5, 2011), <http://www.dailymail.co.uk/sport/olympics/article-2058031/London-2012-How-Britains-athletes-cash-in.html>.

⁹ *Warnings Given to Cesar Cielo, Three Other Brazilian Swimmers, After Positive Drug Test*, SWIMMINGWORLD, <http://www.swimmingworldmagazine.com/lane9/news/27408.asp> (last updated July 3, 2011) ("I consider myself an exemplary athlete in this regard." (translating and quoting Cielo) (internal quotation marks omitted)).

¹⁰ *Fédération Internationale de Natation v. Cielo*, CAS 2011/A/2495, Arbitral Award, para. 8.32 (Ct. Arb. Sport 2011), available at <http://www.tas-cas.org/d2wfiles/document/5094/5048/0/CAS20249520249620249720249820Award20FINAL20292007202011.pdf>.

¹¹ See, e.g., *World Anti-Doping Agency v. Hardy*, CAS 2009/A/1870, Arbitral Award, para. 111 (Ct. Arb. Sport 2010), available at <http://www.tas-cas.org/d2wfiles/document/4218/5048/0/Award20187020FINAL.pdf>; *Vencill v. U.S. Anti-Doping Agency*, CAS 2003/A/484, Arbitral Award, paras. 40, 61 (Ct. Arb. Sport 2004), available at http://www.usada.org/files/active/arbitration_rulings/arbitration_ruling_3_17_2004_Vencill.pdf.

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

¹³ Jessica Halloran, *Brazilian Swimmer Cesar Cielo Let Off with Warning Despite Positive Test*, HERALD SUN (July 2, 2011), <http://heraldsun.com.au/sport/brazilian-swimmer-cesar-cielo-let-off-with-warning-despite-positive-test/story-e6firfglf-1226086072213> (internal quotation marks omitted).

¹⁴ Andrew Dampf, *Cielo’s Rivals Concerned About CAS Ruling*, SEATTLE TIMES (July 23, 2011), http://seattletimes.nwsourc.com/html/sports/2015703621_apswmworldsdoping.html.

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.¹⁶

With the increase in international sporting events, unique challenges have arisen.¹⁷ Chief among these challenges has been the regulation of drug usage and blood doping (collectively “doping”).¹⁸ Indeed, in 2002, Jacques Rogges, President of the International Olympic Committee (“IOC”), stated that doping was the number one issue facing his organization.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.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.²¹ Although it lacks official government status, the IOC maintains a legal personality, such that “[s]tates acquiesce in its

¹⁶ Other international competitions include, inter alia, the World Championships, Pan American Games, and the Pan Pacific Swimming Championships. *E.g.*, *About Us*, PAN PAC. SWIMMING, <http://www.panpacificswimming.com> (last visited Nov. 2, 2012); *Pan American Games*, ESPN (Nov. 21, 2011, 1:23 PM), http://espn.go.com/oly/topics/_/page/pan-american-games; INT’L ASS’N ATHLETICS FED’NS, <http://daegu2011.iaaf.org/> (last visited Nov. 2, 2012).

¹⁷ See Rebecca Mowrey, *Alternative Dispute Resolution: Negotiation, Mediation, and Arbitration*, in *LAW FOR RECREATION AND SPORT MANAGERS* 44, 52 (Doyice J. Cotton & John T. Wolohan eds., 3d ed. 2003).

¹⁸ International Convention Against Doping in Sport, art. 1, Annex I, Oct. 19, 2005, S. TREATY DOC. 110-14, 2419 U.N.T.S. 201. (“The purpose of this Convention . . . is to promote the prevention of and the fight against doping in sport, with a view to its elimination.”) “Blood doping,” also known as “blood boosting,” involves the removal and subsequent re-injection of an athlete’s blood in order to increase the number of red blood cells within the athlete’s body. *A Brief History of Anti-Doping*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/About-WADA/History/A-Brief-History-of-Anti-Doping> (last updated June 2010) [hereinafter *History of Anti-Doping*].

¹⁹ Christopher Clarey, *I.O.C. Chief Keeps Links to Nations Balanced*, N.Y. TIMES, July 28, 2002, at G11.

²⁰ See CHAMPION, *supra* note 15, at 248–50.

²¹ Int’l Olympic Comm., Olympic Charter, pmbl., r. 2 [hereinafter Olympic Charter], available at http://www.olympic.org/Documents/olympic_charter_en.pdf.

decisions and conduct diplomacy with it.”²² Domestic courts, including the Supreme Court of the United States, have deferred to the IOC in international athletic issues.²³ 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.²⁴

Considering these two bodies in turn, NOCs oversee and organize a country’s participation in the Olympic Games.²⁵ All NOCs must conform to the rules set forth in the Olympic Charter, which is promulgated by the IOC.²⁶ The Charter, in turn, mandates that all NOCs implement the WADC in order to be recognized by the IOC.²⁷ 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.²⁸

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.²⁹ 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.³⁰ With respect to doping, IFs test their athletes in and out of competitions and issue sanctions for

²² JAMES A.R. NAFZIGER, *INTERNATIONAL SPORTS LAW* 25 (2d ed. 2004); *see also* *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 178–79 (Apr. 11) (describing “personality” as having rights, duties, and the capacity to protect its rights and discharge its duties).

²³ *S. F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 537 (1987) (noting that Congress had officially adopted the Olympic Charter’s Rule 1 “to spread the Olympic principles” (quoting Olympic Charter, *supra* note 21, r. 1) (internal quotation marks omitted)).

²⁴ Olympic Charter, *supra* note 21, at rs. 2, 25–27.

²⁵ *See* NAFZIGER, *supra* note 22, at 4–5. Currently, there are 204 NOCs in the world, representing both sovereign countries and non-sovereign territories. *National Olympic Committees*, WORLD ANTI-DOPING AGENCY, <http://www.olympic.org/national-olympic-committees> (last visited Oct. 27, 2012).

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

²⁷ *Id.*; *National Olympic & Paralympic Committees*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/Anti-Doping-Community/NOC--NPC> (last updated July 2012).

²⁸ NAFZIGER, *supra* note 22, at 39; *see, e.g.*, *U.S. Olympic Comm. v. Int’l Olympic Comm.*, CAS 2011/O/2422, *Arbitral Award (Ct. Arb. Sport 2011)*, available at <http://www.tas-cas.org/d2wfiles/document/5314/5048/0/Final20award202422.pdf>. In this case, the United States Olympic Committee (“USOC”), on behalf of several United States athletes, successfully challenged the IOC on the validity of the “Osaka Rule,” which banned athletes who had been suspended for more than six months for a doping violation from the next Olympic Games. *Id.* paras. 2.2., 8.37.

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

³⁰ NAFZIGER, *supra* note 22, at 21.

athletes who violate the WADC.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.³²

IFs rely on NGBs to manage a sport on a national level.³³ As part of their management, NGBs monitor the daily issues within a particular sport on the national playing field.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.³⁵ Still, despite having broad discretion to manage and monitor their athletes, NGBs must adhere to the rules of their respective IF.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.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, 1999,³⁸ WADA is an independent agency that oversees the global fight against doping in sport.³⁹ WADA's goals include

³¹ *International Federations*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/Anti-Doping-Community/IFs> (last updated July 2012).

³² Olympic Charter, *supra* note 21, r. 25.

³³ NAFZIGER, *supra* note 22, at 38. NGBs are also sometimes referred to as “National Federations.” See, e.g., Mica Matsoff, *U.S. National Federations Fully Endorse Chicago 2016 and Its Urban Youth Sport Initiative at SportAccord*, AROUND THE RINGS (Mar. 25, 2009), <http://www.aroundtherings.com/articles/view.aspx?id=31802>.

³⁴ NAFZIGER, *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).

³⁵ *National Governing Bodies*, WORLD SPORT SCI., <http://www.faqs.org/sports-science/Mo-Pl/National-Governing-Bodies.html> (last visited Feb. 13, 2012).

³⁶ NAFZIGER, *supra* note 22, at 21.

³⁷ *About WADA*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/About-WADA> (last updated June 2011).

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. NAFZIGER, *supra* note 22, at 161–62.

⁴¹ See *International Standards*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/International-Standards> (last updated Oct. 2009).

⁴² See *Model Rules*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/Model-Rules--Guidelines/Model-Rules> (last updated Oct. 2009).

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.⁴⁸ 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.⁴⁹ 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.⁵⁰

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.⁵¹ 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.⁵²

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,⁵³ and an appeal before the CAS—an independent, centralized, and specialized adjudicatory authority located in Lausanne, Switzerland.⁵⁴ This Comment discusses the

⁴⁸ NAFZIGER, *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.*

⁵⁰ *Compliance Process*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/Anti-Doping-Community/NADOs/Compliance-process/> (last updated Oct. 2009).

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

⁵² Fédération Internationale de Natation v. Cielo, CAS 2011/A/2495, Arbitral Award, para. 1.1, 2.3, 7.6 (Ct. Arb. Sport 2011), available at <http://www.tas-cas.org/d2wfiles/document/5094/5048/0/CAS20249520249620249720249820Award20FINAL20292007202011.pdf>.

⁵³ Court of Arbitration for Sport, CODE OF SPORTS-RELATED ARBITRATION statute S20(b) (2011) [hereinafter CAS CODE], available at www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201220_2001.01.pdf.

⁵⁴ NAFZIGER, *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.⁵⁵ In doping cases, WADA, IFs, NOCs, and athletes may all seek appeal from the CAS.⁵⁶ 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.⁵⁷ 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.⁵⁸ 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.⁵⁹ Once the parties have introduced all their evidence,⁶⁰ the arbitration panel will deliberate and issue a written decision, which will be publicly disseminated unless the parties agree otherwise.⁶¹ 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.⁶²

divisions: (1) Ordinary Arbitration Division and (2) Appeals Arbitration Division. CAS CODE, *supra* note 53, statute S20(b). The Ordinary Arbitration Division has original jurisdiction over any dispute arising on the occasion of or in connection with the Olympic Games. 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.*

⁵⁵ NAFZIGER, *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. 61.2.

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.* rs. 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*.⁶³ 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."⁶⁴ 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.⁶⁵ 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."⁶⁶ According to a former Secretary General, this review is designed to point out discrepancies between the current award and existing CAS precedent.⁶⁷ 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.⁶⁸ Therefore, the panel retains the ultimate decision-making authority in the matter and can depart from precedent.⁶⁹

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

⁶³ In this way, the CAS reflects the International Court of Justice Statute's Article 59, which provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." Statute of the International Court of Justice, art. 59 (June 26, 1945) 59 Stat. 1031.

⁶⁴ E.g., Ian Blackshaw, *The Court of Arbitration for Sport: An International Forum for Settling Disputes Effectively 'Within the Family of Sport'*, 2 ENT. LAW 61, 62 (2003); see also Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity, or Excuse?*, 23 ARB. INT'L 357, 374 (2007).

⁶⁵ See *infra* Part II.C.

⁶⁶ CAS CODE, *supra* note 53, r. R59.

⁶⁷ Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 26 LOY. U. CHI. L.J. 1203, 1257 (2005).

⁶⁸ CAS CODE, *supra* note 53, rs. R46, R59.

⁶⁹ For a discussion on the importance of following precedent in the CAS, see *infra* Part IV.D.

international regulation of doping in sport.⁷⁰ Indeed, the WADC established the framework for harmonized anti-doping policies, rules, and regulations within the various athletic organizations that oversee international competition.⁷¹ Drafted as a “living document”⁷² and most recently amended in 2009,⁷³ 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, 2004,⁷⁴ 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.⁷⁵ Generally, the guiding principles are non-binding procedural guidelines for implementing doping control processes within a country.⁷⁶ 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).”⁷⁷ Together, these articles harmonize the management of doping throughout the world.⁷⁸ That is, the articles set forth uniform standards to quell confusion over questions such as what offenses constitute doping.⁷⁹

The four key areas of doping jurisprudence that the WADC harmonized include (A) due process, (B) the burden and standard of proof, (C) strict

⁷⁰ World Conference on Doping in Sport, Copenhagen, Den., Mar. 2003, *Copenhagen Declaration on Anti-Doping in Sport* (Mar. 3, 2003), available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/Governments/WADA_Copenhagen_Declaration_EN.pdf; see also Meredith Lambert, Comment, *The Competing Justices of Clean Sport*, 23 TEMP. INT’L & COMP. L.J. 409, 414–15 (2009). 193 governments have signed the Copenhagen Declaration. *Copenhagen Declaration: List of Signatories*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/World-Anti-Doping-Program/Governments/Copenhagen-Declaration-on-Anti-Doping-in-Sport/List-of-signatories> (last updated Oct. 2009).

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 *World Anti-Doping Code*, *supra* note 47.

⁷⁹ 2003 WADC, *supra* note 72, intro, at 6 (“[I]t 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.⁸⁰ 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.⁸¹ She agrees, implicitly or otherwise, to abide by the WADC's standards.⁸² 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.⁸³ 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.⁸⁴

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.⁸⁵ Article 8 guarantees an accused athlete the right to a timely, fair hearing before an impartial adjudicatory body.⁸⁶ Further, Article 8 expressly allows an accused athlete the right to respond and present evidence to challenge her alleged doping violation.⁸⁷ After this hearing and upon issuance of that body's decision, an athlete who competes at the

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.

⁸⁴ *Id.* (citing Robyn R. Goldstein, Note, *An American in Paris: The Legal Framework of International Sport and the Implications of the World Anti-Doping Code on Accused Athletes*, 7 VA. SPORTS & ENT. L.J. 149, 170 (2007)).

⁸⁵ Andrew Goldstone, Note, *Obstruction of Justice: The Arbitration Process for Anti-Doping Violations During the Olympic Games*, 7 CARDOZO J. CONFLICT RESOL. 361, 370 (2006).

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 *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. *Id.* art. 13.2.2, at 38.

⁸⁹ Critics have argued that the 2003 WADC did not adequately protect athletes' due process rights. *See, e.g.,* Goldstone, *supra* note 85, at 370; Lambert, *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. 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. *Id.*

⁹⁰ 2003 WADC, *supra* note 72, art. 3, at 12–13.

⁹¹ Richard McLaren, *CAS Doping Jurisprudence: What Can We Learn?*, 2006 INT'L SPORTS L.R. 4, 9–10.

⁹² 2003 WADC, *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. *Id.* art. 3.2, at 12–13. However, an athlete may offer evidence to rebut this presumption. *Id.* In all the cases referenced in this Comment, the prosecuting body met its burden of proof by direct evidence.

⁹³ McLaren, *supra* note 91, at 10. *See, e.g.,* B. v. Fédération Internationale de Natation, CAS 98/211, Arbitral Award, para. 56 (Ct. Arb. Sport 1998), 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).

⁹⁴ Dan Whitcomb, *U.S. Anti-Doping Agency Strips Armstrong of Titles for Cheating*, REUTERS, Aug. 24, 2012, available at <http://www.reuters.com/article/2012/08/24/us-cycling-armstrong-doping-idUSBRE87N03N20120824>.

implicate an athlete for a doping offense, a prosecuting body must prove the doping offense to the “comfortable satisfaction” of the hearing body.⁹⁵

C. *Strict Liability*

The WADC has adopted strict liability for all anti-doping infractions.⁹⁶ Pursuant to this rule, if a testing agency determines that an athlete possessed a banned substance, then the athlete has violated the WADC.⁹⁷ 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.⁹⁸ 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.⁹⁹ Cielo suffered this consequence when he tested positive for furosemide while competing in May 2011.¹⁰⁰

WADA’s rationale behind the strict liability is simple: to preserve fair competition.¹⁰¹ 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”¹⁰² because every prosecutorial body would have to present evidence of an athlete’s desire to improve her performance.¹⁰³ Collecting this evidence would not only be practically difficult, but it would also slow down

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 8–9.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Fédération Internationale de Natation v. Cielo, CAS 2011/A/2495, Arbitral Award, para. 2.6 (Ct. Arb. Sport 2011), *available at* <http://www.tas-cas.org/d2wfiles/document/5094/5048/0/CAS20249520249620249720249820Award20FINAL20292007202011.pdf>.

¹⁰¹ Connolly, *supra* note 34, at 182.

¹⁰² C. v. Fédération Internationale de Natation, CAS 95/141, Arbitral Award, para. 13 (Ct. Arb. Sport 1996), *in* COURT OF ARBITRATION FOR SPORT, DIGEST OF CAS AWARDS I, 1986–1998, at 215, 220 (Matthieu Reeb ed., 1998) [hereinafter DIGEST I].

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

¹⁰⁴ See *USA Shooting & Q. v. Union Internationale de Tir*, CAS 94/129, Arbitral Award, para. 15 (Ct. Arb. Sport 1995), in DIGEST I, *supra* note 102, at 187, 193.

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.*

¹¹² See, e.g., *World Anti-Doping Agency v. Hardy*, CAS 2009/A/1870, Arbitral Award, para. 128 (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 (one year of ineligibility); *Vencill v. U.S. Anti-Doping Agency*, CAS 2003/A/484, Arbitral Award, para. 63 (Ct. Arb. Sport 2003), available at http://www.usada.org/files/active/arbitration_rulings/arbitration_ruling_3_17_2004_Vencill.pdf (two years of ineligibility).

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.¹²³ To meet this standard, an athlete had to prove her negligence was not significant in relation to the violation under the totality of circumstances.¹²⁴

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."¹²⁵ 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*.¹²⁶ 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.¹²⁷ 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.¹²⁸ 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 10.5.2.¹²⁹

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.

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.*

¹²⁹ *See, e.g.,* World Anti-Doping Agency v. Hardy, CAS 2009/A/1870, Arbitral Award, para. 128 (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 (reducing the athlete's sentence from two years to one year of ineligibility).

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 tribunal¹³⁴ 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

¹³⁰ Despres v. Canadian Ctr. for Ethics and Sport, CAS 2008/A/1489, Arbitral Award, para. 2.2 (Ct. Arb. Sport 2008), http://www.wada-ama.org/rtecontent/document/CAS_2008_A_1510_Despres.pdf.

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.*

¹⁴⁰ Beverley Smith, *Despres Fights Back Against Doping Penalty*, GLOBE & MAIL, Feb. 21, 2008, at S5, available at 2008 WLNR 3356530 (internal quotation marks omitted).

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

¹⁴¹ World Anti-Doping Agency v. Hardy, CAS 2009/A/1870, Arbitral Award, paras. 5–6 (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.

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.”¹⁴⁸ Rejecting this argument, the CAS panel held that the circumstances of Hardy’s positive test met the “truly exceptional” standard.¹⁴⁹ 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.¹⁵⁰ Indeed, citing *Despres*, the panel ruled that Hardy made a good faith effort “to leave no reasonable stone unturned.”¹⁵¹ 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.¹⁵²

In a subsequent discussion of the appropriate length of Hardy’s suspension, the panel rendered two important thoughts in dicta.¹⁵³ First, the panel noted that the “level of diligence due by an athlete” had risen over the years.¹⁵⁴ 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.¹⁵⁵ 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.”¹⁵⁶ Despite this statement, the CAS did not discuss precedent when determining the length of Hardy’s sanction.¹⁵⁷ Instead, the CAS merely denounced WADA’s appeal for two years of ineligibility as “too harsh” and without “sufficient basis in the rules.”¹⁵⁸

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.¹⁵⁹ Still, the panel invoked *Despres*, suggesting an implicit comparison of the facts

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.¹⁶⁰ 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.¹⁶¹ 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.¹⁶² In 2006, WADA initiated a WADC revision process, calling for input from "anyone."¹⁶³ 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").¹⁶⁴ Two general themes emerged from the revisions—firmness and fairness.¹⁶⁵ Although these themes permeate the entire 2009 WADC, this Part focuses on these themes within the provisions on sanctions, Article ("DC") 10.¹⁶⁶

¹⁶⁰ *Id.*

¹⁶¹ *Ensuring a Level Playing Field*, PLAY TRUE, Issue 3, 2008, at 4, available at http://www.wada-ama.org/Documents/Resources/Publications/PlayTrue_Magazine/PlayTrue_2008_3_Levelling_the_Playing_Field_EN.pdf (an official publication of the World Anti-Doping Agency).

¹⁶² *Q&A: 2009 Code*, WORLD ANTI-DOPING AGENCY (Jan. 1, 2009), www.wada-ama.org/rtecontent/document/qa_2009_code_en.pdf. Article 23.6 expressly provided for amendments after a sufficient consultative process that involved review and feedback from athletes, signatories, and governments. 2009 WADC, *supra* note 7, DC23.6, at 121.

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 In

¹⁶⁷ 2009 WADC, *supra* note 7, DC10.1, at 51.

¹⁶⁸ *Id.* arts. 10.4, 10.5, at 54–62.

¹⁶⁹ *Id.* arts. 10.5.1, 10.5.2, at 5657; 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.

¹⁷² See, e.g., *The 2012 Prohibited List*, WORLD ANTI-DOPING AGENCY (Aug. 24, 2011), http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-Prohibited-list/2012/WADA_Prohibited_List_2012_EN.pdf [hereinafter *WADA Prohibited List*]. As alluded to earlier, testing positive for a “specified substance” under certain circumstances could result in a less severe sanction—at a minimum a warning, at a maximum two years of ineligibility—for the first offense. 2009 WADC, *supra* note 7, art. 4.2.2, at 31, art. 10.4, at 5455.

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.¹⁷³ 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.¹⁷⁴

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”).¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷

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.¹⁷⁸ 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.¹⁷⁹

The third major revision in the 2009 WADC appears in DC10.7. Here, the drafters sought to increase sanctions in cases involving multiple anti-doping

¹⁷³ 2009 WADC, *supra* note 7, DC4.2.2, at 31.

¹⁷⁴ *See id.* DC10.4, at 54–55.

¹⁷⁵ *Id.*; 2003 WADC, *supra* note 72, art. 10.3, at 27–28.

¹⁷⁶ 2009 WADC, *supra* note 7, DC10.4, at 54–55.

¹⁷⁷ *Id.*

¹⁷⁸ *Ensuring a Level Playing Field*, *supra* note 161, at 4–6.

¹⁷⁹ *See infra* Part IV.C.

violations.¹⁸⁰ 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).¹⁸¹ 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*.¹⁸²

In total, the 2009 WADC revisions regarding sanctions promoted WADA's two broad goals: firmness and fairness.¹⁸³ 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,¹⁸⁴ but despite possessing the same substance, the athletes received different sanctions—a four-month ban for Melnychenko and a warning for Cielo.¹⁸⁵ This Subpart will analyze the athletes' sanctions, inspecting each case's attendant circumstances to explain why the CAS panels reached such divergent results.

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.

¹⁸⁴ World Anti-Doping Agency v. Melnychenko, CAS 2011/A/2403, Arbitral Award para. 2.3 (Ct. Arb. Sport 2011), available at http://www.tas-cas.org/d2wfiles/document/5179/5048/0/Award20240320_internet_.pdf; Fédération Internationale de Natation v. Cielo, CAS 2011/A/2495, Arbitral Award, para. 2.3 (Ct. Arb. Sport 2011), available at <http://www.tas-cas.org/d2wfiles/document/5094/5048/0/CAS20249520249620249720249820Award20FINAL20292007202011.pdf>.

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.¹⁹⁷ Weighing the parties' interests against each other, the panel increased Melnychenko's two-month suspension to four months.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.¹⁹⁹ Indeed, the opinion avoided an extensive analysis of how a particular factor translates into a finite number of months of ineligibility.²⁰⁰ The panel cited two cases (*Squizzato*, CAS 2005/A/830 and *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.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."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.

¹⁹⁷ *Id.* para. 7.5.

¹⁹⁸ *Id.* para. 7.9.

¹⁹⁹ *See id.* paras. 7.5–7.9.

²⁰⁰ *See id.*

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 *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, *A Constant Battle: The Evolving Challenges in the International Fight Against Doping in Sport*, 16 DUKE J. COMP. & INT'L L. 457 (2006).

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 2011.²⁰³ On July 1, 2011, the athletes attended a sanction hearing before the CBDA.²⁰⁴ 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 DC10.²⁰⁵ 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.²⁰⁶ 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.²⁰⁷ 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 DC10.4.²⁰⁸ Accordingly, FINA sought immediate appeal.

FINA challenged the CBDA's ruling on three fronts.²⁰⁹ 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*.²¹⁰ 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."²¹¹ Third, FINA

²⁰³ Fédération Internationale de Natation v. Cielo, CAS 2011/A/2495, Arbitral Award, paras. 2.1–2 (Ct. Arb. Sport 2011), available at <http://www.tas-cas.org/d2wfiles/document/5094/5048/0/CAS20249520249620249720249820Award20FINAL20292007202011.pdf>.

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.²²² 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.²²³

In answering this medication/supplement question, the panel made a three-part investigation, ultimately concluding caffeine was a supplement.²²⁴ First, the panel inspected the FINA Rules and WADC for a definition of “medication” or “supplement.”²²⁵ Both were silent on the issue, thus highlighting the need to define these terms in future versions of the WADC.²²⁶ 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.²²⁷ The panel, however, rejected Dr. Magliocca’s view because it was neither supported by medical literature nor corroborated by an independent medical practitioner.²²⁸ Third, the panel performed its own inquiry.²²⁹ 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.²³⁰ 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 DC10.4.²³¹ 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.”²³² Substantiating this holding, the panel cited the

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.

²²⁷ *Cielo*, CAS 2011/A/2495, paras. 8.13–14.

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.

²³² *Cielo*, CAS 2011/A/2495, para. 8.24.

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,

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(l).

²³⁶ *Id.* para. 3.4(z).

²³⁷ *Id.*

²³⁸ *See id.* para. 3.4(i).

²³⁹ *See id.* para. 3.4(j).

²⁴⁰ *See id.* para. 3.4(r).

²⁴¹ *See id.*

²⁴² *See id.* para. 3.4(s).

²⁴³ *See id.* para. 3.4(u).

²⁴⁴ *Id.* para. 8.25.

the panel opined that the athletes could have tested each pill individually or refrained from using caffeine,²⁴⁵ 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.²⁴⁶

The final contributing factor to the panel’s conclusion of minimal fault was evidence provided by the Anna Terra Pharmacy.²⁴⁷ 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.²⁴⁸ Notably, de Souza did not definitively state that the pills had been contaminated at the pharmacy.²⁴⁹ Although the evidence was not unequivocal, the panel accepted the possibility that the furosemide “inadvertently contaminated” the caffeine.²⁵⁰ As a result, the panel accepted this third party human error as the source of the contamination.²⁵¹

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.”²⁵² 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”²⁵³ 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.”²⁵⁴ Therefore, it determined the “only appropriate sanction” for the athletes, save Waked, was a warning.²⁵⁵ 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 2010.²⁵⁶ 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 DC10.7.²⁵⁷ 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.²⁵⁸ 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.²⁵⁹ Many derided the panel for a poor ruling—letting Cielo off with a mere warning or for setting a “dangerous precedent.”²⁶⁰ 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.

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.²⁶¹ 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.²⁶² 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.²⁶³ 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."²⁶⁴ 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.²⁶⁵ 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.²⁶⁶

Using a textual approach, the panel rejected the CBDA's *No Fault or Negligence* ruling²⁶⁷ because a strict reading of DC10.5 explicitly forbids the elimination of a sanction where a contaminated supplement caused a positive test.²⁶⁸ 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.

²⁷⁶ See, e.g., *Cielo*, CAS 2011/A/2495; World Anti-Doping Agency v. Hardy, CAS 2009/A/1870, Arbitral Award (Ct. Arb. Sport 2010), available at <http://www.tas-cas.org/d2wfiles/document/4218/5048/0/Award20187020FINAL.pdf>; Vencill v. U.S. Anti-Doping Agency, CAS 2003/A/484, Arbitral Award (Ct. Arb. Sport 2004), available at http://www.usada.org/files/active/arbitration_rulings/arbitration_ruling_3_17_2004_Vencill.pdf.

²⁷⁷ See 2009 WADC, *supra* note 7, app. at 128–35 (listing all the defined terms in the WADC).

²⁷⁸ 21 U.S.C. § 321(g)(1)(B) (2006). The U.S. Code also defines drug as an article “intended to affect the structure or ay function of the body of man” *Id.* § 321(g)(1)(C).

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.²⁸⁰ Second, both the pharmaceutical and dietary supplement industries champion innovation, continuously pushing the boundaries of science to create new products for consumers.²⁸¹ 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.²⁸² 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.²⁸³ Second, the WADC’s drafters placed too much importance on what substance caused an athlete’s failed drug test.²⁸⁴ Considering these points independently, this Subpart argues that DC10.4 and DC10.5 need redrafting to remedy their inherent flaws.

²⁸⁰ *Cielo*, CAS 2011/A/2495, para. 8.18 (stating that caffeine is not a “curative or healing substance”).

²⁸¹ See Bernard Munos, *Lessons from 60 Years of Pharmaceutical Innovation*, 8 NATURE REVS. DRUG DISCOVERY 959, 959–68 (2009) (documenting innovation in pharmaceuticals from 1950 to 2008).

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 title²⁸⁵ but also in its body.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*."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,"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."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 10.5.²⁹⁰ If DC10.4 applies, a panel may reduce a sanction to a warning.²⁹¹ However, if DC10.5 applies, a panel may only reduce the sanction by up to "one-half of the period of *Ineligibility*

²⁸⁵ *Id.* DC10.4, at 54 ("Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances.") (emphasis omitted).

²⁸⁶ *Id.*, at DC10.5, at 55 ("To justify any elimination or reduction . . .").

²⁸⁷ *Id.*

²⁸⁸ THE AMERICAN HERITAGE DICTIONARY 598 (Houghton Mifflin Co., 3d ed. 1992).

²⁸⁹ 2009 WADC, *supra* note 7, DC10.5.1, at 56.

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.

²⁹¹ *Id.* DC10.4, at 54–55.

otherwise applicable” unless the athlete can prove *No Fault or Negligence*, an extremely high standard.²⁹² Under DC10.2 the period of ineligibility imposed for a first-time violation is two years;²⁹³ 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.²⁹⁴

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 10.5.²⁹⁵ 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 DC10.4.²⁹⁶

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.²⁹⁷ Do these athletes choose what

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).

²⁹⁷ See, e.g., Fédération Internationale de Natation v. Cielo, CAS 2011/A/2495, Arbitral Award, paras. 2.3, 2.6 (Ct. Arb. Sport 2011), available at <http://www.tas-cas.org/d2wfiles/document/5094/5048/0/CAS20249>

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.²⁹⁸ 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.²⁹⁹ 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.³⁰⁰ 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.³⁰¹

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

520249620249720249820Award20FINAL20292007202011.pdf; *Hardy*, CAS 2009/A/1870, paras. 12–13; *Vencill v. U.S. Anti-Doping Agency*, CAS 2003/A/484, Arbitral Award, para. 11 (Ct. Arb. Sport 2004), available at http://www.usada.org/files/active/arbitration_rulings/arbitration_ruling_3_17_2004_Vencill.pdf.

²⁹⁸ 2009 WADC, *supra* note 7, DC10.4 cmt., at 54–55.

²⁹⁹ See *supra* note 297.

³⁰⁰ See, e.g., *Vencill*, CAS 2003/A/484, para. 5.

³⁰¹ See *Vencill Was Suspended Two Years, Missed Olympics*, ESPN, <http://sports.espn.go.com/oly/news/story?id=2059714> (last updated May 13, 2005).

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.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.³⁰³ Another study found, at the 2008 Beijing Olympics, the number of athletes using supplements had surged to ninety percent of all Olympic athletes.³⁰⁴ The psychological and economic reasons for such high use are outside the scope of this Comment;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.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.

³⁰² *Dietary Supplements: Q&A*, WORLD ANTI-DOPING AGENCY, http://www.wada-ama.org/rtecontent/document/ds_english.pdf (last visited Feb. 22, 2012).

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).

³⁰⁴ *Dietary Supplements Win Olympic Gold*, FOODNAVIGATOR-USA.COM (Sept. 15, 2008), <http://www.foodnavigator-usa.com/Business/Dietary-supplements-win-Olympic-gold>.

³⁰⁵ For discussion on the possible reasons why athletes consume supplements, see Huang et al., *supra* note 303, at 31.

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.³⁰⁷ 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*.³⁰⁸ 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.³⁰⁹ 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,³¹⁰ 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

³⁰⁷ See *supra* Part I.B-C.

³⁰⁸ See, e.g., Doping Auth. Neth. v. Zuijkerbuijk, CAS 2009/A/2012, Arbitral Award, para. 34 (Ct. Arb. Sport 2010), available at <http://www.tas-cas.org/d2wfiles/document/4329/5048/0/Award202012.pdf>.

³⁰⁹ See *supra* Introduction.

³¹⁰ See, e.g., Fédération Internationale de Natation v. Cielo, CAS 2011/A/2495, Arbitral Award, para. 2.9 (Ct. Arb. Sport 2011), available at <http://www.tas-cas.org/d2wfiles/document/5094/5048/0/CAS20249520249620249720249820Award20FINAL20292007202011.pdf> (noting that the CBDA's decision was "internally inconsistent and in error"); Braden Keith, *Zero-Hour is Thursday Morning for Cielo, Brazilian Doping Scandal*, SWIM SWAM (July 20, 2011), <http://swimswam.com/2011/07/zero-hour-is-thursday-morning-for-cielo-brazilian-doping-scandal/> ("I can't see any clear contradiction of the rules or precedents in the CBDA's decision.").

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”³¹¹ 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.³¹²

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.³¹³ 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.”³¹⁴ 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

³¹¹ *Cielo*, CAS 2011/A/2495, para. 8.24.

³¹² *Compare Cielo*, CAS 2011/A/2495, para. 3.4, with *World Anti-Doping Agency v. Hardy*, CAS 2009/A/1870, Arbitral Award, para. 112 (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.

³¹³ *Compare* 2003 WADC, *supra* note 72, art. 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, “[It] 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.*

³¹⁷ *Id.* (quoting Int’l Assoc. Athletics Fed’ns v. Y., CAS 2004/A/628, Arbitral Award, para. 73 (Ct. Arb. Sport 2008), <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/628.pdf>).

³¹⁸ In *Cielo*, the Panel dismissed a discussion of precedent as irrelevant to the factual and legal issues at hand. *Fédération Internationale de Natation v. Cielo*, CAS 2011/A/2495, Arbitral Award, para. 8.33 (Ct. Arb. Sport 2011), <http://www.tas-cas.org/d2wfiles/document/5094/5048/0/CAS20249520249620249720249820Award20FINAL20292007202011.pdf>. But the CAS had previously considered cases regarding the “degree of fault” standard, which could have served as a point of comparison. *See, e.g.*, *Doping Auth. Neth. v. Zuijkerbuijk*, CAS 2009/A/2012, Arbitral Award, para. 41, *available at* <http://www.tas-cas.org/d2wfiles/document/4329/5048/0/Award202012.pdf>.

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.³¹⁹ 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.³²⁰ 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.”³²¹ 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.³²² 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.³²³

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 Contador³²⁴ 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

³¹⁹ *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>.

³²⁰ *Id.* (describing photograph).

³²¹ *Id.*

³²² *Olympics Swimming: Florent Manaudou Wins Shock Gold*, BBC SPORT (Aug. 3, 2012), <http://www.bbc.co.uk/sport/0/olympics/18916967>.

³²³ *Ensuring a Level Playing Field*, *supra* note 161, at 5.

³²⁴ 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/d2wfiles/document/5648/5048/0/FINAL20AWARD202012.02.06.pdf>.

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

³²⁵ *Wada President: Alberto Contador Is a 'Cheat,'* ESPN, http://espn.go.com/olympics/cycling/story/_/id/7550222/alberto (last updated Feb. 7, 2012).

³²⁶ 2009 WADC, *supra* note 7, at 14.

³²⁷ Press Release, U.S. Anti-Doping Agency, Lance Armstrong Receives Lifetime Ban and Disqualification of Competitive Results for Doping Violations Stemming from His Involvement in the United States Postal Service Pro-Cycling Team Doping Conspiracy (Aug. 24, 2012), http://www.usada.org/files/active/resources/press_releases/Press%20Release-Armstrong%20-August%202012.pdf.

that is fairer, more predictable, and more understandable for the greater international athletic community.

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APPENDIX

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

	2003 WADC	2009 WADC
Distinction between Prohibited Substances and Specified Substances	A Prohibited Substance is “[a]ny substance so described on the Prohibited List.” (Definitions section). “The <i>Prohibited List</i> may identify specified substances . . . which are less likely to be successfully abused as doping agents.” (Article 10.3).	“[A]ll <i>Prohibited Substances</i> 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 <i>Prohibited List</i> .” (Article 4.2.2).
Sanctions		
Article 10.2: Sanction for Possession of a Prohibited Substance	“[T]he period of <i>Ineligibility</i> imposed for a violation of Article 2.1 (presence of <i>Prohibited Substance</i> or its <i>Metabolites</i> or <i>Markers</i>) . . . shall be: <i>First violation</i> : Two (2) years’ <i>Ineligibility</i> . <i>Second violation</i> : Lifetime <i>Ineligibility</i> .”	“The period of <i>Ineligibility</i> imposed for a violation of Article 2.1 (Presence of <i>Prohibited Substance</i> or its <i>Metabolites</i> or <i>Markers</i>) . . . shall be as follows . . . : <u>First violation</u> : Two (2) years <i>Ineligibility</i> .”
Article 10.3 (2003) and 10.4 (2009): Sanction for Possession of a Specified Substance	“ <i>First violation</i> : At a minimum, a warning and reprimand and no period of <i>Ineligibility</i> from future Events, and at a maximum, one (1) year’s <i>Ineligibility</i> . <i>Second violation</i> : Two (2) years’ <i>Ineligibility</i> . <i>Third violation</i> : Lifetime <i>Ineligibility</i> .”	“ <u>First violation</u> : At a minimum, a reprimand and no period of <i>Ineligibility</i> from future Events, and at a maximum, two (2) years of <i>Ineligibility</i> .”

	<p>“However, the <i>Athlete</i> . . . 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.”</p>	<p>“To justify any elimination or reduction, the <i>Athlete</i> . . . 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 <i>Use</i> of a performance-enhancing substance. The <i>Athlete</i>’s . . . degree of fault shall be the criterion considered in assessing any reduction of the period of <i>Ineligibility</i>.”</p>
<p>Article 10.5.2: Mitigating a Sanction for <i>No Significant Fault or Negligence</i></p>	<p>“If an <i>Athlete</i> establishes in an individual case . . . that he or she bears <i>No Significant Fault or Negligence</i>, then the period of <i>Ineligibility</i> may be reduced, but the reduced period of <i>Ineligibility</i> may not be less than one-half of the minimum period of <i>Ineligibility</i> otherwise applicable.”</p>	<p>“If an <i>Athlete</i> . . . establishes in an individual case that he or she bears <i>No Significant Fault or Negligence</i>, then the otherwise applicable period of <i>Ineligibility</i> may be reduced, but the reduced period of <i>Ineligibility</i> may not be less than one-half of the period of <i>Ineligibility</i> otherwise applicable.”</p>
<p>Article 10.7 (2009): Aggravating Circumstances (Multiple Violations)</p>	<p>[None]</p>	<p>“For a second anti-doping rule violation the period of <i>Ineligibility</i> shall be within the range set forth in the table [in Article 10.7, which ranges from one-year ineligibility to a lifetime ban].”</p>

GLOSSARY

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