The Battle Before the Games: The British Olympic Association Attempts to Keep its Lifetime Ban for Athletes with Doping Offenses

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The Battle Before the Games: The British Olympic Association Attempts to Keep its Lifetime Ban for Athletes with Doping Offenses

Daniel Gandert*

TABLE OF CONTENTS

I. Introduction .........................................................................................................................53A
II. The Organization of the Olympic Movement .................................................................55A
III. The BOA Bylaw .............................................................................................................56A
IV. The World Anti-Doping Code ......................................................................................59A
   A. A Brief History of the World Anti-Doping Code .............................................59A
   B. Proportionality Before the WADC .................................................................60A
   C. Penalties for Doping Under the WADC .........................................................62A
   D. Proportionality Under the WADC .................................................................65A
V. The Osaka Rule ................................................................................................................69A
VI. Osaka Rule Cases ..........................................................................................................71A
VII. USOC v. IOC’s Precedential Value and its Effect on the BOA Bylaw .................75A
VIII. Conclusion ..................................................................................................................79A

I. INTRODUCTION

This year, London is preparing to be the first city to host the Olympic Games three times. Ron Vaccaro, What to Expect at the London Games, NBCOLYMPICS.COM, http://www.nbcolympics.com/2012-preview/index.html (last visited Feb. 27, 2012).

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The Olympic Association (BOA) bylaw prohibits any athlete with a past doping offense from representing Britain in the Olympics for life.  

Dwain Chambers, a sprinter, established himself as the fastest European at the 2000 Olympics in Sydney. Shortly after, he became involved with the Bay Area Laboratory Cooperative (BALCO) scandal, which is perhaps the biggest doping scandal in the history of sports. In this scandal, the BALCO laboratory provided prohibited substances to many elite athletes in both track and field and U.S. professional baseball. As part of the scandal, Chambers consumed the steroid Tetrahydrogestrinone (THG) and upon getting caught, was suspended from competing in athletics for two years. This triggered the BOA’s Bylaw 25 (Bylaw), which prohibits athletes with doping offenses from competing for Britain in the Olympics for life. Chambers admitted to using prohibited substances, came back to the track world, and ended up running faster than he did while he was doping. Nonetheless, because of the Bylaw, Chambers is prohibited from representing Britain at the Olympics again even though athletes from other countries who have completed their doping suspension will have no legal obstacle preventing them from competing in this summer’s games. The Court of Arbitration for Sport (CAS) held a hearing regarding the validity of this rule on March 12th, with a decision to be released in early April.


6 Charlish, supra note 4, at 57.

7 Id.


Part II of this article introduces the organizational structure of the international Olympic movement. Part III describes the background related to the Bylaw. Part IV describes the World Anti-Doping Code (WADC) and the principle of proportionality, as well as how this principle interacts with the code. Part V describes the IOC’s Osaka Rule, which prior to being invalidated by a CAS panel, prohibited athletes with a doping suspension of greater than six months from participating in the next Olympic Games, and Part VI discusses the major cases relating to the Osaka Rule. Part VII examines the reasoning that CAS used to invalidate the rule, which is that it is incompatible with the WADC because it provides athletes with additional penalties to those prescribed by the code. Finally, the article concludes in Part VIII that the same reasoning should be used to invalidate the Bylaw since it also provides sanctions beyond those prescribed by the WADC.

II. THE ORGANIZATION OF THE OLYMPIC MOVEMENT

In order to understand the issues presented in this article, it is helpful to first understand the organization of the Olympic movement. The International Olympic Committee (IOC) is at the top of the Olympic movement. Below the IOC are the International Federations for the various Olympic sports and the National Olympic Committees (NOCs) for the countries competing in the Olympics. International Federations “provide governance for their sport worldwide, doing everything from deciding the official rules of their sport to overseeing their international competitions. NOCs manage the Olympic teams of their country, as well as oversee other elements of the Olympic movement, such as their country’s bid to host the Olympic Games.” NOCs are required to abide by the rules of the IOC in order to be recognized. Individual sports are administered by National Governing Bodies, which must comply with the rules of both their International Federation and NOC.

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14 Id. at 5.
III. THE BOA BYLAW

During the period following the 1988 Olympics, members of the BOA Athletes Commission believed that they needed to take action to prevent doping offenders from representing Britain in the Olympics. After some resistance from the BOA, the athletes were able to convince the BOA Executive Committee to enact BOA Bylaw 25 in March of 1992. The Bylaw states that any athlete found guilty of a doping offense by any authority recognized by the World Anti-Doping Agency (WADA):

[S]hall not, subject as provided below, thereafter be eligible for consideration as a member of a Team GB [meaning the British Olympic team] or be considered eligible by the BOA to receive or to continue to benefit from any accreditation as a member of the Team GB delegation for or in relation to any Olympic Games, any Olympic Winter Games, or any European Olympic Youth Festivals.

The Bylaw sets up an Appeals Panel and allows athletes with minor doping offenses to appeal their ineligibility to this panel. Since the Bylaw was enacted, twenty-seven athletes have been successful with having their lifetime ban overturned.

According to the BOA, ninety percent of British athletes have supported the Bylaw since it was passed. Sebastian Coe, the head of the 2012 Olympic Games organizing committee, and Britain’s Olympic Minister Hugh Robertson have both written letters to support the Bylaw.

19 See infra text accompanying notes 55–57 for background on WADA.
20 Eligibility Bye-Law, supra note 2.
21 Id.
Additionally, Jacques Rogge, the President of the IOC, hinted that he had sympathy for the BOA’s position.\(^{25}\) However, anti-doping officials from around the world with reputations for being tough on doping have spoken against the rule since its lifetime ban on doping offenders is not allowed by the WADC, which requires signatories to implement specific penalties for doping offenses.\(^{26}\) Travis Tygart, the Chief Executive for the United States Anti-Doping Agency, requested that the BOA end the rule since it is outside the WADC,\(^{27}\) while Dick Pound, the former head of WADA, stated that “the BOA’s current conduct is unworthy, especially on the part of the host national Olympic committee when the world comes to London next year.”\(^{28}\)

In 2008, Dwain Chambers challenged the Bylaw in British court.\(^{29}\) Chambers requested an interlocutory prohibitory order to prevent the BOA from using the Bylaw to prevent him from competing in the Olympics.\(^{30}\) In reaching its decision, one of the issues considered by the panel was whether prohibiting Chambers from competing constituted a restraint of trade.\(^{31}\) After considering precedents, the court decided that Chambers did not have strong prospects for arguing that exclusion from the Olympics would affect his livelihood, stating, “Even if there is a sufficiently strong case for arguing that indirect financial benefit from Olympic participation would so qualify, the Defendant argues that, on the current form, Mr Chambers’ prospects of success are, at best, speculative.”\(^{32}\) The court also considered the argument that the Bylaw went against the WADC’s requirements that all members harmonize their rules with the provisions of the WADC.\(^{33}\) However, it found that the IOC, through the Osaka Rule, had its own penalties that were greater than those in the code and seemed to use these as justification for the Bylaw remaining in place.\(^{34}\) The court determined that


\(^{26}\) Harmonizing anti-doping policies is one of the purposes of the WADC, and the Olympic Charter requires all members of the Olympic movement to implement the WADC. See infra text accompanying notes 56–57.


\(^{29}\) Chambers v. British Olympic Ass’n, [2008] EWHC 2028 (QB) (Eng.).

\(^{30}\) Id. ¶ 13.

\(^{31}\) Id. ¶ 28.

\(^{32}\) Id. ¶ 46.

\(^{33}\) Id. ¶ 25.

\(^{34}\) Id. ¶ 27; BOA Bye-Laws Opinion, supra note 18, ¶ 7.3. The Osaka Rule prohibited athletes with a doping suspension of greater than six months from participating in the next Olympic Games. Wilson, supra note 10; see infra Part V.
Chambers did not establish that he would likely succeed at showing that either of these factors, or the lack of proportionality, would justify making an order.\textsuperscript{35} In reaching its decision, the court took into account that if he were to succeed, he would most likely “not take this claim to trial for a final ruling, as on his own evidence he will be too old to be a serious candidate for London 2012.”\textsuperscript{36} While Chambers’ likelihood of winning at trial would be greater now that the Osaka Rule has been invalidated, his claim would likely be more successful at CAS since a CAS panel would likely consider the CAS precedents related to proportionality and find that the ban was disproportionate to his degree of fault.\textsuperscript{37}

In November 2011, shortly after the IOC’s Osaka Rule was struck down, WADA requested an advisory opinion regarding whether the Bylaw is compatible with the WADC.\textsuperscript{38} The opinion used the analysis of the recent CAS decision invalidating the Osaka Rule to determine that based upon the similarities of the two rules, the Bylaw is not compatible with the WADC.\textsuperscript{39} Following this, at the WADA foundation board meeting, the agency voted to declare the Bylaw noncompliant with the WADC.\textsuperscript{40} As a signatory to the WADC, the BOA is required to comply with the WADC.\textsuperscript{41} The BOA has filed an appeal to be heard by CAS in order for a final decision on the issue to be reached.\textsuperscript{42}

\textsuperscript{35} Chambers, [2008] EWHC 2028 (QB), ¶ 54; BOA Bye-Laws Opinion, supra note 18, ¶ 7.2.
\textsuperscript{36} Chambers, [2008] EWHC 2028 (QB), ¶ 15.
\textsuperscript{37} See infra Part VI.C for an analysis of CAS’ consideration of proportionality.
\textsuperscript{38} BOA Bye-Laws Opinion, supra note 18, ¶ 1.1.
\textsuperscript{39} BOA Bye-Laws Opinion, supra note 18, ¶¶ 1.2, 4.2, 7.1.
IV. THE WORLD ANTI-DOPING CODE

A. A Brief History of the World Anti-Doping Code

During the 1950s, concerns developed about Olympic athletes using steroids, especially in weightlifting and wrestling. After IOC President Avery Brundage expressed his concern that athletes were attempting to obtain a competitive advantage by taking pep pills, the IOC Medical Commission was established in 1967 and became responsible for doping prevention. The IOC began testing athletes for performance-related substances at the 1968 Mexico City Olympic Games.

During the following decades, doping was regulated by a number of different organizations within the Olympic movement, such as the various International Federations, National Governing Bodies, and the IOC. These organizations had differences in their rules, procedures, prescribed penalties, and lists of banned substances, which created an atmosphere of confusion. For example, there were differences between policies of governing bodies and international federations for the same sports as well as between the rules for out-of-competition testing and the penalties for athletes of different countries. The problems caused by allowing different organizations to have their own doping rules were illustrated in the case of NWBA v. IPC. In this case, a coach gave the wheelchair basketball player on his team a painkiller after finding that it was not on the list of banned substances. However, a component in the substance was on the list and the athlete tested positive for that component. The panel hearing the case


47 Id.


50 Id. at 1.

51 Id.
stated that the relevant doping rules brought about confusion, such as differences in the way that doping violations were treated based upon whether they occurred before, during, or after an event, as well as differences between what constituted exclusion and disqualification.\textsuperscript{52} 

The World Conference on Doping in Sport took place in 1999 following the widespread doping that was found during the 1998 Tour de France.\textsuperscript{53} At this conference, the Lausanne Declaration recommended that an independent anti-doping agency be created.\textsuperscript{54} As a result, WADA was established in November 1999.\textsuperscript{55} Standardizing anti-doping policies was one of the agency’s main objectives, with one of its first tasks being the creation of the WADC and having the code ratified by the various members of the Olympic movement.\textsuperscript{56} Amendments to the Olympic Charter in 2003 required all members of the Olympic movement to implement the WADC.\textsuperscript{57}

\section*{B. Proportionality Before the WADC}

The idea for CAS came about in 1981 when IOC President “H.E. Juan Antonio Samaranch had the idea of creating a sports-specific jurisdiction.”\textsuperscript{58} The IOC ratified statutes to create CAS in 1983 and the tribunal began operation in 1984.\textsuperscript{59} The tribunal serves as the supreme court of the Olympic sports world and will hear any case submitted to it that is at least indirectly related to sport.\textsuperscript{60} The Olympic Charter provides CAS with exclusive jurisdiction for all disputes related to the Olympic Games and the WADC states that “CAS decisions are final and binding except for any review required by law applicable to the annulment or enforcement of

\begin{thebibliography}{99}
\setlength{\itemsep}{0pt}
\bibitem{52} \textit{Id.} at 6–7.
\bibitem{53} \textit{A Brief History of Anti-Doping}, \textit{supra} note 43.
\bibitem{59} \textit{Id.}
\end{thebibliography}
arbitrary awards." While CAS awards do not serve as binding precedent, CAS panels recognize the precedential value of previous awards and attempt to reach the same legal conclusions as past panels hearing similar cases.

CAS has used the principle of proportionality for reaching its decisions since its early days as a tribunal. This principle, which “has derived from German Law and is a very common principle in European Countries,” requires that “each measure that is adopted should be in proportion (reasonable relation) with the sought result. The measure cannot exceed the necessary limits for the achievement of its objectives.” As related to penalties, “[t]his principle holds that sentences, though indeterminate, cannot be disproportionate to the gravity of the offense.” The first case in which CAS considered this principle was NWBA v. IPC in 1996. The panel described its consideration of the principle of proportionality; however, it determined that the athlete’s penalty of losing a gold medal was proportionate to the offense, and thus refrained from setting a precedent for adjusting an athlete’s suspension based upon this principle. CAS set this precedent later the same year in C. v. Fédération Internationale de Natation Amateur (FINA).

In this case, a coach admitted that he had accidentally given a capsule that contained a prohibited substance to the swimmer who he was coaching. The doping rules at the time, under the FINA Medical Code, required a mandatory suspension of two years. The CAS panel determined that although the swimmer was at fault, the two-year suspension was disproportionate to her offense and needed to be reduced.

Following the introduction of the WADC, Richard McLaren, one of the arbitrators deciding the BOA case, wrote, “The subsequent case law

64 Id.
67 Id. at 10.
69 Id. at 1.
70 Id. at 2.
71 Id. at 8.
involving WADA Code-based anti-doping rules suggests that the introduction of the WADA Code will eliminate the application of the doctrine of proportionality in future cases, except as provided for in the WADA Code itself.\textsuperscript{72} In a case that came about just prior to the WADC’s implementation, the panel suggested that “the doctrine of proportionality was incorporated into the WADA Code.”\textsuperscript{73} However, recent CAS jurisprudence includes a line of cases through which proportionality has been used to reduce an athlete’s penalty further than prescribed by the WADC.\textsuperscript{74}

C. Penalties for Doping Under the WADC

Under the WADC, the standard penalty for an athlete’s first doping offense is a two year suspension, and the standard penalty for a second offense is a lifetime ban.\textsuperscript{75} An athlete’s suspension can be reduced if it is believed that the athlete’s case constitutes an exceptional circumstance.\textsuperscript{76} An athlete whose case falls into the No Fault or Negligence category is considered blameless and does not receive any period of ineligibility as a penalty.\textsuperscript{77} An athlete must provide a satisfactory explanation of how a prohibited substance entered into his or her system, without knowledge of the contamination when it occurred, in order for a case to fall into this category.\textsuperscript{78} Sabotage by an opponent, despite the athlete’s exercising due diligence in trying to remain clean, is an example of a case that would fall into this category.\textsuperscript{79} Sabotage by a member of an athlete’s inner circle and contaminated nutritional supplements are specifically listed as cases that would not fall into this category.\textsuperscript{80} This means that if an athlete is sabotaged by his or her coach or relative, his or her case will not fall into the No Fault or Negligence category.\textsuperscript{81} Cases that have fallen into this category include The Appeal of Todd Perry, where a tennis player’s inhaler was filled by an ATP tournament doctor with a substance different from what the player had requested, without his knowledge,\textsuperscript{82} and Adams v. Canadian Centre for Ethics in Sport, where the athlete was forced to ingest a prohibited substance which resulted in his catheter being contaminated.

\begin{itemize}
  \item \textsuperscript{72} McLaren, \textit{supra} note 66, at 17.
  \item \textsuperscript{73} \textit{See id.}
  \item \textsuperscript{74} \textit{See infra} Part IV.C.
  \item \textsuperscript{75} 2009 World Anti-Doping Code, \textit{supra} note 41, art. 10.2.
  \item \textsuperscript{76} \textit{Id.} art. 10.5.
  \item \textsuperscript{77} \textit{Id.} art. 10.5.1.
  \item \textsuperscript{78} \textit{Id.}
  \item \textsuperscript{79} \textit{Id.} cmt. to arts. 10.5.1 and 10.5.2.
  \item \textsuperscript{80} \textit{Id.}
  \item \textsuperscript{81} \textit{Id.}
  \item \textsuperscript{82} Appeal of Todd Perry, ¶ 13–23, 56 (ATP Tour Anti-Doping Trib. Nov. 30, 2005).
\end{itemize}
which resulted in a positive drug test.\textsuperscript{83}

Athletes whose cases do not fall into the No Fault or Negligence category can have their suspensions reduced if they can establish that their violations fall into the No Significant Fault or Negligence category. An athlete can have his or her case fall into this category by establishing that in relationship to the doping violation, his or her negligence or fault was not significant.\textsuperscript{84} For cases in this category, arbitrators can reduce an athlete’s ineligibility up to half of the prescribed period for suspension for the athlete’s violation.\textsuperscript{85} If the normal penalty would be a lifetime ban, arbitrators can reduce the athlete’s suspension to eight years.\textsuperscript{86} Cases that have fallen into this category include Cañas v. ATP, where the tennis player Guillermo Cañas took the wrong medication that was left for him without reviewing it to ensure he had received the right medicine after it had changed hands many times to get to him,\textsuperscript{87} and Decision in the Case of John Paul Fruttero, in which the athlete took medicine for jetlag that was prescribed by his doctor after verifying that the name of the medicine was not on the prohibited substances list, but failed to realize that the drug had a generic name which was on the list.\textsuperscript{88}

There are also other ways that athletes can have their suspensions reduced. Suspensions can be reduced to up to three quarters of the ineligibility period for an offense when an athlete aids anti-doping organizations in the fight against doping.\textsuperscript{89} Athletes can also have their ineligibility reduced up to half of the normal ineligibility period for their cases by admitting to a doping offense when it constitutes the only reliable evidence that can be used for their prosecution.\textsuperscript{90} Finally, athletes can have their suspension reduced to receiving only a reprimand by establishing the source of contamination to be a Specified Substance and that the athlete did not use the substance in an attempt to improve performance or to mask a substance that would enhance the athlete’s performance.\textsuperscript{91} The 2003 WADC defined Specified Substances as those “which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be


\textsuperscript{84} Anne Amos, Inadvertent Doping and the WADA Code, 19 BOND L. REV. 1, 9 (2007).

\textsuperscript{85} 2009 World Anti-Doping Code, supra note 41, art. 10.5.2.

\textsuperscript{86} Id.

\textsuperscript{87} Cañas v. ATP Tour, CAS 2005/A/951, at 14–17 (Ct. Arb. Sport May 23, 2006).

\textsuperscript{88} Decision in the Case of John Paul Fruttero, at 2–3, 10 (Int’l Tennis Fed’n Indep. Anti-Doping Trib. Jan. 21, 2008).

\textsuperscript{89} 2009 World Anti-Doping Code, supra note 41, art. 10.5.3.

\textsuperscript{90} Id. art. 10.5.4.

\textsuperscript{91} Id. art. 10.4.
successfully abused as doping agents.‘\textsuperscript{92} Under this rule, the list of prohibited substances issued each year listed the specific substances that fell into this category.‘\textsuperscript{93} Under the 2009 WADC, “all Prohibited Substances shall be ‘Specified Substances’ except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List.”‘\textsuperscript{94} This provides arbitrators with a large range of discretion for most cases in which an athlete accidentally takes a prohibited substance.

In the case FIFA & WADA, a disagreement broke out between Fédération Internationale de Football Association (FIFA), the International Federation for football (soccer), and WADA regarding whether FIFA’s rules were compliant with the WADC. This resulted in both parties asking CAS for an advisory opinion.‘\textsuperscript{95} One of WADA’s responsibilities is monitoring the compliance of WADC signatories, and FIFA is a signatory of the WADC.‘\textsuperscript{96} Among the rules that were contested was FIFA’s treating a two year suspension as a maximum penalty for a doping offense instead of following the mandatory two year suspension prescribed by the WADC, and FIFA’s belief in assessing sanctions individually based on the objective and subjective circumstances of each doping case.‘\textsuperscript{97} The panel determined that there were areas where FIFA’s rules were out of compliance with the code and that as a member of the Olympic Movement, it was required to bring its rules into compliance in order to avoid exclusion from the Olympic movement, which could include soccer being removed from the Olympic Games.‘\textsuperscript{98} However, the panel also stated “that the endeavours to defeat doping should not lead to unrealistic and impractical expectations the athletes have to come up with.”‘\textsuperscript{99} This case provides precedent that there cannot be unreasonable expectations placed on athletes in order for them to avoid doping offenses.‘\textsuperscript{100} It provides additional precedent that all members


‘\textsuperscript{93} Id.

‘\textsuperscript{94} 2009 World Anti-Doping Code, supra note 41, art. 4.2.2.

‘\textsuperscript{95} Fédération Internationale de Football Association (FIFA & WADA), Advisory Opinion, CAS 2005/C/976 & 986 (Ct. Arb. Sport Apr. 21, 2006).


‘\textsuperscript{97} FIFA & WADA, CAS 2005/C/976 & 986, ¶ 2.

‘\textsuperscript{98} Id. ¶¶ 180–96.

‘\textsuperscript{99} Id. ¶ 73.

‘\textsuperscript{100} One could argue about the precedential value of this case since it is an advisory opinion. However, the arbitrators in at least one CAS case, International Tennis Federation
of the Olympic movement are required to abide by the WADC. This can be applied to the BOA case since it is a member of the Olympic movement which has also ratified the WADC.

D. Proportionality Under the WADC

In *Puerta v. International Tennis Federation (ITF)*, the tennis player Mariano Puerta and his wife drank from similar-looking water cups.\(^{101}\) After Puerta left to prepare for his match, his wife put drops of Effortil, which she was consuming because of her menstrual issues, in her glass.\(^{102}\) Upon learning that his next match was delayed, Puerta returned and accidentally drank from his wife’s cup.\(^{103}\) Puerta subsequently tested positive for the prohibited substance etilefrine and it was established that this was the most likely cause for his contamination based “on the balance of probabilities.”\(^{104}\) This means that one can consider this to be the cause of Puerta’s contamination since a “balance of probability” is the standard of proof for establishing “specified facts or circumstances” under the WADC.\(^{105}\) The ITF Tribunal panel initially hearing Puerta’s case found that while it did not fall into the *No Fault or Negligence* category, it did fall into the *No Significant Fault or Negligence* category.\(^{106}\) The panel believed that Puerta should have acted with greater caution, especially since he knew about his wife’s taking Effortil.\(^{107}\) Since this was Puerta’s second doping offense, the panel suspended him for eight years, which was the sanction prescribed by the WADC.\(^{108}\)

On appeal, CAS agreed with the ITF Tribunal that *No Significant Fault or Negligence* was the correct category for Puerta’s case.\(^{109}\) However, it determined that for his situation, a penalty of eight years of ineligibility would be unjust.\(^{110}\) The panel looked at the fact that Puerta’s prior doping offense, resulting from his inadvertently using the prohibited substance clenbuterol for asthma, was also inadvertent.\(^{111}\) The panel then reached its decision by considering that at the age of 26, an eight year suspension would end Puerta’s career and would effectively constitute a


\(^{102}\) *Id.* ¶ 4.5.

\(^{103}\) *Id.* ¶ 4.6.

\(^{104}\) *Id.* ¶ 2.2, 5.1.

\(^{105}\) 2009 World Anti-Doping Code, *supra* note 41, art. 3.1.

\(^{106}\) *Puerta*, CAS 2006/A/1025, ¶¶ 5.5, 5.13.

\(^{107}\) *Id.* ¶¶ 5.5, 5.6.

\(^{108}\) *Id.* ¶ 5.13; see 2003 World Anti-Doping Code, *supra* note 92, arts. 10.2, 10.5.2.

\(^{109}\) *Puerta*, CAS 2006/A/1025, ¶ 11.5.9.

\(^{110}\) *Id.* ¶ 11.7.14.

\(^{111}\) *Id.* ¶ 2.8.
lifetime ban. It determined that this did not fit with the principles of proportionality and justice and that it is not “necessary for there to be undeserving victims in the war against doping.” This led to the panel finding a lacuna in the rules that had to be filled by “applying the overarching principle of justice and proportionality on which all systems of law, and the WADC itself, is based.” The panel reduced Puerta’s suspension to two years; however, it stated that the case was exceptional and that it would be rare for this type of circumstance to occur. This provides precedent supporting the use of the principle of proportionality for cases following the introduction of the WADC.

Arbitrators expanded upon the precedent of Puerta in the case In the Matter of Richard Gasquet. This case came about after tennis player Richard Gasquet traveled to Miami for the Sony Ericsson ATP tennis tournament. After being informed by his doctor that an MRI scan showed significant inflammation of his shoulders, he decided not to play in the tournament. He decided to wait to formally withdraw from the tournament, which included submitting to doping control, until the next day since he was not scheduled to play right away. That evening, Gasquet went to a restaurant where he met a woman named Pamela. They went with other members of their party to the nightclub “Set,” where they were invited to the DJ’s table and Gasquet consumed apple juice from an open topped jug. Later that night, the couple kissed each other, and Gasquet formally withdrew from the tournament the following day. Gasquet went to doping control the next day upon formally withdrawing from the tournament and tested positive for the cocaine metabolite benzoylecgonine.

The ITF Tribunal panel hearing Gasquet’s case determined that the most likely cause of his contamination was kissing Pamela. Because of the miniscule amount of the cocaine metabolite that Gasquet tested positive for, it was able to rule out the other likely causes of contamination, such as

112 Id. ¶¶ 11.7.16, 11.7.14.
113 Id. ¶ 11.7.18.
114 Id. ¶ 11.7.23.
115 Id. ¶¶ 11.7.17, 11.8.2.
117 Id. ¶ 2.4.
118 Id. ¶ 2.6.
119 Id. ¶ 2.7.
120 Id. ¶ 2.9.
121 Id. ¶¶ 2.10–2.11.
122 Id. ¶¶ 2.12–2.14, 2.17–2.18.
recreational use or his drink being spiked, and found that the balance of probability pointed to his kiss being the cause for contamination.124 It was determined that Pamela was a regular cocaine user and that she had spent a lot of time in the restroom during the night of Gasquet’s contamination.125 The panel decided that Gasquet’s case fell into the No Significant Fault or Negligence category.126 Instead of applying the one year suspension prescribed by the WADC, the panel found a lacuna in the code and agreed with “the player’s submission that if we were to impose a one year period of ineligibility, applying the rules rigidly, we would be penalising a person whom the rule was not intended to catch.”127 The arbitrators believed that based upon the way that the tennis rankings worked, a one year suspension would prevent Gasquet from being able to move back into the sport’s top rankings.128 The panel gave him the penalty of ineligibility for the period that he had already sat out while waiting for his hearing, effectively constituting “time served.”129 The arbitrators also made the unprecedented decision of allowing Gasquet to keep the ranking points and prize money that he earned between his positive test and finding out about the result after determining that Gasquet’s small quantity of cocaine metabolite could not have aided his performance.130

The ITF and WADA both decided to appeal the Gasquet ITF decision to CAS. For the appeal, WADA and the ITF asked CAS to set the ITF Tribunal’s ruling aside, while Gasquet only asked for the appeal to be dismissed.131 The panel decided that when determining whether the case constituted No Fault or Negligence, it needed to only focus on the facts relating to Gasquet’s kissing Pamela and not on other potential sources of contamination that were determined not to have occurred based upon a balance of probability.132 This means that any negligence that Gasquet might have exercised that could have led to other sources of contamination was to be disregarded in determining whether he had exercised the utmost

124 Id. ¶ 89.
125 Id. ¶ 86, 88. The quantity of cocaine that Gasquet tested positive for was so small that it did not show up in subsequent tests. This illustrates that most likely, his contamination resulted during the night prior to his test. Id. ¶ 89.
126 Id. ¶ 97.
127 Id. ¶ 116.
128 Id. ¶ 119. The arbitrators were probably correct with their analysis. According to the ESPN commentators for the 2009 U.S. Open, the short suspension that Gasquet served hurt his rankings significantly and made it difficult for him to move up.
129 Id. ¶ 130. It should be noted that one of the arbitrators, Tim Kerr, was the same arbitrator who decided the ITF Tribunal Puerta case. One of the other arbitrators, Richard McLaren, is one of the arbitrators deciding the BOA case.
130 Id.
132 Id. ¶¶ 5.28–5.29.
caution required for his case to fall into the *No Fault or Negligence* category.

In determining this, the panel decided that Gasquet lacked constructive knowledge that kissing a woman could result in being contaminated with a prohibited substance. It believed that it should not expect him to be aware of that possibility since the panel needed expert research to determine whether this cause of contamination was possible. It then found that “an obligation on an athlete not to go out to a restaurant where he might meet an attractive stranger whom he might later be tempted to kiss” would place the type of unrealistic expectation on an athlete that *FIFA & WADA* spoke about. The panel used this reasoning to find that Gasquet acted with the utmost caution required for his case to fall into the *No Fault or Negligence* category.

Because Gasquet only asked the panel to dismiss the appeals of FIFA and WADA and did not ask for anything else, the CAS panel hearing his case decided to leave the ITF Tribunal panel’s decision undisturbed. This means that, to the extent that such a decision may constitute precedent, the ITF Tribunal panel case remains valid relating to the principle of proportionality.

One of the reasons that arbitrators are concerned about proportionality is that they are concerned about their awards being valid under Swiss law. CAS, WADA, and the IOC are seated in Switzerland, making the Swiss Federal Tribunal the only body that can review CAS awards related to doping. CAS is subject to the laws of Switzerland. The Federal Code on Private International Law for Switzerland allows for arbitration awards that are incompatible with Swiss public policy to be attacked.

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133 *Id.* ¶ 5.31.
134 *Id.*
135 *Id.* ¶ 5.32.
136 *Id.* ¶ 5.33.
137 *Id.* ¶ 5.43. The panel did this in addition to reclassifying his case into the *No Fault or Negligence* category.
138 See Puerta v. Int’l Tennis Fed’n, CAS 2006/A/1025, ¶ 11.7.24 (Ct. Arb. Sport July 12, 2006) (“It would be a disaster for the WADC, and for the fight against doping in sport, if the WADC were to be struck down in any jurisdiction as not producing a just and proportionate sanction.”).
140 Mitten, *supra* note 139, at 51.

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Since proportionality is among the primary principles governing Swiss administrative law and is guaranteed by the Swiss Federal Constitution, CAS awards could likely be attacked if members of the Swiss Federal Tribunal view them as going against the principle of proportionality.

V. THE OSAKA RULE

The BOA Bylaw is similar to Rule 45, also known as “the Osaka Rule,” of the Olympic Charter, which a CAS panel determined to be invalid in October of 2011. In 1990, prior to its amendment to include the Osaka Rule, Rule 45 of the Olympic Charter was approved as the new rule defining Olympic eligibility. This rule allowed all athletes who met the requirements of their NOC and International Federation to participate in the Olympics and did not give the IOC any authority to limit this participation. This was challenged in 2002 in the case *Prusis & the Latvian Olympic Committee v. International Olympic Committee.*

In 2001, the Latvian bobsleigh athlete Sandis Prusis became contaminated with the prohibited substance nandrolone and believed that its source was a food supplement that the seller assured him was clean. He received a three-month suspension which retroactively started on November 9, 2001, and allowed him to complete the suspension prior to the 2002 Winter Olympic Games. The IOC believed that the suspension was “carved out” to allow him to compete in the Olympics and refused to allow Prusis to compete. Prusis appealed this and the Ad-Hoc CAS panel hearing the case determined that because nothing in either the Olympic Charter or Fédération Internationale de Bobsleigh et de Tobogganing rules allowed the IOC to become involved, athletes had the expectation of participating in the Olympics following the end of their ineligibility. The panel stated that there was a risk of double jeopardy if a decision was

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144 ALLEN GUTTMANN, THE OLYMPICS: A HISTORY OF THE MODERN GAMES 178 (2d ed. 2002). This rule replaced Rule 26, which was the previous rule on this subject.

145 *Id.*


147 *Id.* at 1.

148 *Id.* at 2.

149 *Id.* at 2–3.

reached that affected an athlete’s expectation to participate.\textsuperscript{151} However, it stated that the IOC could amend the Olympic Charter to gain the ability to intervene in the future.\textsuperscript{152}

The IOC amended the Olympic Charter in 2004 to give itself the right to deny entry to any athlete for any reason.\textsuperscript{153} In 2008, the IOC introduced the Osaka Rule, prohibiting any athlete who receives a doping suspension of greater than six months from participating in the next Olympic Games for the athlete’s sport.\textsuperscript{154} The IOC claimed that this was an eligibility rule instead of a sanction;\textsuperscript{155} arguments in favor of the rule have stated that “[i]t was supposed to protect the integrity and value of the Olympic Games.”\textsuperscript{156}

The IOC requested CAS to issue an advisory opinion regarding the rule and the panel hearing the case decided that the Osaka Rule constituted an eligibility rule.\textsuperscript{157} The panel explicitly stated that it did not hold precedential value, however, and did not mention the WADC as applicable law for its decision.\textsuperscript{158} Other CAS cases point in the direction of the Osaka Rule being classified as a disciplinary rule. The panel for \textit{Advisory Opinion IAAF} determined the European Athletics Association’s (EAA) rules prohibiting athletes who have been suspended for at least two years from competing in the European Athletics Championships constituted a penalty and that the rule brought the EAA out of compliance with the WADC.\textsuperscript{159} Other cases that support classifying the rule as a penalty include \textit{Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto Futebol SAD}, in which CAS found a disciplinary element in rules prohibiting clubs from participating in the Champion’s league if they went against UEFA’s values,\textsuperscript{160} and \textit{RFEC & Alejandro Valverde v. UCI} in which the CAS panel stated that, generally, eligibility rules do not penalize an athlete’s undesirable behavior.\textsuperscript{161}

\begin{footnotesize}
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\item \textsuperscript{151} \textit{Prusis}, CAS OG 2/001, at 6.
\item \textsuperscript{152} \textit{Id}.
\item \textsuperscript{154} Wilson, \textit{supra} note 10.
\item \textsuperscript{155} U.S. Anti-Doping Agency v. Merritt (USADA v. Merritt), AAA No. 77 190 00293 10, ¶¶ 11.21--11.22 (Am. Arb. Ass’n Oct. 15, 2010).
\item \textsuperscript{157} \textit{USADA v. Merritt}, AAA No. 77 190 00293 10, ¶¶ 11.21--11.22.
\item \textsuperscript{158} \textit{Id}.
\item \textsuperscript{159} \textit{Id.} ¶ 11.18.
\item \textsuperscript{160} \textit{Sport Lisboa e Benfica Futebol SAD, Portugol v. Union of European Football Ass’ns}, CAS 2008/A/1583 & 1584 (Ct. Arb. Sport Sept. 15, 2008).
\item \textsuperscript{161} Real Federacion Espanola de Ciclismo v. Union Cycliste Internationale, TAS 2007/0/1381, ¶ 38 (Ct. Arb. Sport Sept. 26, 2007); \textit{IOC ‘Osaka Rule’: Prohibition of Dopers}
\end{itemize}
\end{footnotesize}
VI. OSAKA RULE CASES

Since it was composed, the Osaka Rule has been a major issue for two cases. The first is that of the U.S. swimmer Jessica Hardy. After her coach advised her to take the nutritional supplement AdvoCare, she contacted the manufacturer, the supplement’s distributor, and other elite athletes taking the supplement to make sure that it was clean. Despite her diligence, she became contaminated with the prohibited substance clenbuterol shortly before the 2008 Olympics. It was determined that the AdvoCare supplements constituted the most likely cause for her contamination. Her case was first heard by a North American CAS panel which found that it fell into the No Significant Fault or Negligence category and gave her a one year suspension.

The panel then considered the effect of the Osaka Rule on Hardy’s case. Although Hardy sat out of the 2008 Olympic Games, the rule would have prevented her from competing in the 2012 Olympic Games; Hardy believed that this would be “shockingly disproportionate to her degree of fault.” Hardy also argued that the rule would prevent her from being able to compete to qualify for the Olympics since the USOC’s policies only allow athletes who are eligible for Olympic competition to participate in the Olympic trials. The panel agreed that this would be disproportionate and decided to keep Hardy’s suspension at one year; however, it allowed her to request a waiver of the Osaka Rule from the IOC while retaining jurisdiction over her case. This would have allowed the panel to review the situation and adjust Hardy’s suspension if the IOC denied or ignored her request for a waiver as long as the case was not appealed to CAS.

The IOC rejected Hardy’s request for a waiver. WADA appealed the panel decision to CAS, which agreed that her case fell into the No Significant Fault or Negligence category and with the penalty of one year

*from the Olympics, WORLD SPORTS L. REP., May 2011, at 2, 2.*

162 For another case, the issue was skirted by the arbitrators only providing the athlete with a six month suspension. U.S. Anti-Doping Agency v. Brunemann, AAA No. 77 190 E 00447 08 JENF (Am. Arb. Ass’n Jan. 26, 2009).
164 Id. ¶ 6.
165 Id. ¶ 12.
167 Id. ¶ 7.38.
168 Id. ¶ 7.30.
169 Id. ¶ 8.4.
170 Id. If the panel was appealed to CAS, it would lose jurisdiction over the case to the CAS panel hearing the case.
of ineligibility.\textsuperscript{172} The CAS panel also decided that it could not further reduce her suspension because of the Osaka Rule and that failing to follow the FINA Doping Code would be analogous to rewriting the rules.\textsuperscript{173} The panel denied Hardy’s request for a declaratory judgment allowing her to compete in the 2012 Olympic Games and stated that a declaratory judgment could not help her since it would not bind either the USOC or IOC.\textsuperscript{174}\textsuperscript{175} The IOC eventually decided to allow Hardy to compete.\textsuperscript{176} The reason for this was that Hardy’s inadvertent doping occurred around the time when the rules went into effect.\textsuperscript{177} Additionally, the IOC found favor with the way that Hardy voluntarily sat out the 2008 Olympics while she waited for the results of her case.\textsuperscript{178} Had the IOC not decided to allow Hardy to compete, this would have been an ideal test case to challenge the Osaka Rule based upon proportionality.\textsuperscript{179}

The IOC declared Jessica Hardy eligible.\textsuperscript{180} The reason for this was that Hardy’s inadvertent doping occurred around the time when the rules went into effect.\textsuperscript{181} Additionally, the IOC found favor with the way that Hardy voluntarily sat out the 2008 Olympics while she waited for the results of her case.\textsuperscript{182} Had the IOC not decided to allow Hardy to compete, this would have been an ideal test case to challenge the Osaka Rule based upon proportionality.\textsuperscript{183}

The other major case relating to the Osaka Rule is that of the athlete LaShawn Merritt. Merritt purchased the enhancement product ExtenZe at a 7-Eleven without it crossing his mind that it could contain a steroid derivative.\textsuperscript{184} The United States Anti-Doping Agency, which is the anti-doping agency responsible for managing the testing and adjudication process of athletes in the U.S. Olympic and Paralympic Movement,\textsuperscript{185} agreed that ExtenZe was the most likely cause for Merritt’s contamination and the North American CAS panel hearing the case looked favorably upon his making the embarrassing confession about taking the product.\textsuperscript{186} It decided that by composing the Osaka Rule, the IOC submitted itself to the panel’s jurisdiction for determining whether the rule is in compliance with the WADC.\textsuperscript{187} It invited the IOC to participate in the hearing, but the IOC refused to do so.\textsuperscript{188} The panel classified Merritt’s offense into the No Significant Fault or Negligence category and gave him a suspension of 21

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\item \textsuperscript{172} \textit{Id.} \textsuperscript{¶} 122, 129.
\item \textsuperscript{173} \textit{Id.} \textsuperscript{¶} 139.
\item \textsuperscript{174} \textit{Id.} \textsuperscript{¶} 133–34.
\item \textsuperscript{175} \textsl{IOC Declares Jessica Hardy Eligible}, ESPN (Apr. 28, 2011, 8:37 PM), http://sports.espn.go.com/oly/news/story?id=6444781.
\item \textsuperscript{176} \textit{Id.}
\item \textsuperscript{177} \textit{Id.}
\item \textsuperscript{178} This would only have been possible if Hardy had been able to have her case heard, though. This would be difficult as she would not be able to challenge the rule until she had made the Olympic team. If the rule prevented her from making the team, she would have been left without a place to challenge it.
\item \textsuperscript{179} \textit{USADA v. Merritt}, AAA No. 77 190 00293 10, \textsuperscript{¶} 7.9 (Am. Arb. Ass’n Oct. 15, 2010).
\item \textsuperscript{180} \textit{FAQS, U.S. ANTI-DOPING AGENCY}, http://www.usada.org/faq (last visited Feb. 28, 2012).
\item \textsuperscript{181} \textit{USADA v. Merritt}, AAA No. 77 190 00293 10, \textsuperscript{¶} 10.6.
\item \textsuperscript{182} \textit{Id.} \textsuperscript{¶} 11.9.
\item \textsuperscript{183} \textit{Id.} \textsuperscript{¶} 11.15.
\end{itemize}
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The panel then addressed the Osaka Rule. It described how according to WADC Article 15.4.1, all code signatories are required to recognize the panel’s decision except in cases where there is an appeal. It also explained that if it did not hear Merritt’s case, there would likely not be any forum that could hear his issue except for perhaps a civil court if it was willing to hear the case. U.S. civil courts have generally refused to review cases related to Olympic sports, so it would not be likely that a civil court would hear his case.

Because of the IOC’s refusal to participate, the panel used WADC Article 3.2.4, which allows an adverse inference to be drawn against someone who refuses to participate in a hearing, to draw an adverse inference against the IOC. The panel then used the argument from Hardy to explain that as a signatory to the WADC, the IOC could not add penalties beyond what is prescribed by the code. It classified the Osaka Rule as a penalty instead of as an eligibility rule and stated that Merritt was eligible to compete in all competitions held by WADC signatories. The panel also specifically stated that Merritt could not be prevented from competing in either the Olympic Games or the Olympic Trials because of the rule.

In April 2011, the IOC and USOC agreed to have CAS determine the Osaka Rule’s validity. For this case, labeled USOC v. IOC, two NOCs, three National Governing Bodies for sport, nine national anti-doping organizations, and the Valparaiso Sports Law Clinic all filed amicus briefs against the validity of the rule. WADA also submitted an amicus brief explaining that for some cases, arbitrators have worked to reduce athletes’ suspensions to six months or less to avoid application of the rule, and that it believed that the rule may be responsible for fewer athletes providing helpful information to anti-doping authorities in exchange for having their suspensions reduced than what was initially expected. The CAS panel determined that the Osaka Rule becomes disciplinary once it prevents an

185 *Id.* ¶ 11.10 (citing 2009 World Anti-Doping Code, *supra* note 41, art. 15.4.1).
186 *Id.* ¶ 11.13.
188 *USADA v. Merritt*, AAA No. 77 190 00293 10, ¶ 11.16 (citing 2009 World Anti-Doping Code, *supra* note 41, art. 3.2.4).
189 *Id.* ¶ 11.17.
190 *Id.* ¶ 11.23.
191 *Id.* ¶ 11.32.
192 *IOC Declares Jessica Hardy Eligible*, *supra* note 175.
194 *Id.* ¶ 3.11.
athlete from participating in the Olympics and, thus, it is to be classified as a sanction instead of an eligibility standard. As such, the panel found that the rule was not compliant with the WADC. Because WADC Article 23.2.2 prevents signatories from making substantive changes to WADC penalties and the IOC is a signatory to the WADC, the panel decided that the rule could not be enforced. After making its determination, the panel decided to avoid making a decision regarding the other arguments, such as proportionality.

Had the CAS panel not struck down the Osaka Rule for being incompatible with the WADC, it would have likely needed to reach a decision on the principle of proportionality. Especially for the cases of athletes engaged in inadvertent doping, such as Hardy and Merritt, one could apply the Puerta doctrine and find that in order for justice to occur, the principle of proportionality needs to be applied instead of a strict interpretation of the rule. Based upon the panel’s description of the Olympic Games as “the pinnacle of success and the ultimate goal of athletic competition,” most cases in which the Osaka Rule is applied will likely bring about a disproportionate result, especially since the rule only affects an athlete’s case once his or her suspension is over. This is especially the case for sports, such as gymnastics, where, because of the average age of competitors, athletes are only able to participate in one Olympics during their career.

The Bylaw has the potential to create even more disproportionate outcomes than the Osaka Rule. Providing a lifetime ban for a first doping offense brings about a disproportionate result for most cases. Even for cases of aggravated doping offenses, the WADC only provides a penalty of four years of ineligibility, and even this penalty has brought about discussion regarding whether a penalty of this severity incorporates the principle of proportionality. The Bylaw’s one-size-fits-all approach makes it further incompatible with proportionality. The rule is problematic in that it provides the same lifetime ban to all athletes regardless of the severity of their offense. Even though some athletes have the ability to appeal their cases to have this rule waived, there are still a large number of

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195 Id. ¶¶ 8.15–8.19.  
196 Id. ¶ 8.37.  
197 Id. ¶ 8.24.  
198 Id. ¶ 8.35.  
199 Id. ¶ 8.17.  
cases for which the rule brings about disproportionate results.

VII. USOC V. IOC’S PRECEDENTIAL VALUE AND ITS EFFECT ON THE BOA BYLAW

In addition to finding the Osaka Rule to be invalid, the USOC v. IOC panel provided precedent for finding that any rule that provides a doping penalty greater than what the WADC has prescribed is out of compliance with the Code. While FIFA & WADA established that WADC signatories cannot provide lesser penalties than what is prescribed by the code, which seemed to be obvious from the way the code was written, it is foreseeable that some might have interpreted the code as providing minimum penalties because the WADC came out as part of the fight against doping.\(^{201}\) It is now clear that the current language of the WADC also prevents organizations from imposing sanctions that are more severe than those prescribed by the code. Also, establishing the Osaka Rule as a disciplinary rule follows the line of precedents finding that rules penalizing undesirable behavior constitute disciplinary sanctions instead of eligibility standards. Specifically, it sets the precedent of interpreting eligibility rules related to doping as disciplinary sanctions. In 2004, the Danish Olympic Committee established its own rule preventing athletes with past doping suspensions from competing for Denmark at the Olympic Games.\(^{202}\) Because of the Osaka Rule decision, the organization decided to end its ban.\(^{203}\) In contrast, the BOA has taken the approach of fighting to keep its ban.\(^{204}\)

The BOA’s argument in support of the Bylaw is that the rule “is a matter of eligibility and they should be able to select who they wish for the team.”\(^{205}\) This is similar to the IOC’s argument that the Osaka Rule was an eligibility rule instead of a sanction, meaning that the CAS opinion invalidating the Osaka Rule should also invalidate the Bylaw.\(^{206}\) However,


\(^{203}\) Owen, supra note 202; Degun, supra note 202.


the BOA has stated that there is no relation between the two rules. The BOA has, in some instances, framed the Bylaw as a selection policy, which may make their argument seem different from the IOC’s prior statements about the Osaka Rule.\textsuperscript{207} Nonetheless, the BOA’s description of the policy as “a direct expression of the commitment British athletes have made to the values of fair play, integrity and clean competition—values that are at the heart of Olympic sport”\textsuperscript{208} resonates in similarity to the IOC’s arguments about the Osaka Rule being designed to protect the Olympic values. Since the Rule penalizes the undesirable behavior of doping, it should be considered a disciplinary rule.

One argument that has been raised in favor of the BOA Bylaw is that based upon the Olympic Charter, “each National Olympic Committee (NOC) has the right to establish eligibility of their own athletes.”\textsuperscript{209} Looking solely at this clause, it appears that a NOC can use whatever criteria it chooses to create eligibility rules and that it can use any reason that it wishes, including an athlete’s history of doping offenses, to prevent an athlete from participating in the Olympic Games. However, the Olympic Charter as a whole does not support this argument. The Charter requires all athletes to “respect the spirit of fair play and non violence, and behave accordingly.”\textsuperscript{210} One could interpret this as allowing athletes to be disqualified based upon doping offenses, as those engaged in doping do not respect fair play. However, the same article of the Charter requires athletes to “comply in all aspects with the World Anti-Doping Code.”\textsuperscript{211} This implies that athletes who are eligible to compete based upon the WADC should not be considered ineligible to compete based upon their doping offenses.

The Olympic Charter also requires athletes to be entered by their NOC.\textsuperscript{212} It requires NOCs to “decide upon the entry of athletes proposed by their respective national federations” and states that “such selection shall be based not only on sports performance of an athlete but also on his ability to serve as an example to the sporting youth of his country.”\textsuperscript{213} This could

\begin{footnotes}
\item[208] Id.
\item[210] Olympic Charter, supra note 61, r. 40.
\item[211] Id.
\item[212] Id.
\item[213] Id. at Bye-law to Rules 27 and 28, art. 2.1.
\end{footnotes}
be argued as supporting the BOA in not selecting athletes engaged in doping since these athletes do not set good examples for young athletes. However, the same rule states that “the NOCs must ensure that the entries proposed by the national federations comply in all respects with the provisions of the Olympic Charter.” The Charter provides that adopting and implementing the WADC is one of the roles of NOCs. Because the WADC requires NOCs to abide by the code’s prescribed penalties, the BOA would be violating the Olympic Charter if it refused the entry of an athlete who is eligible to compete based upon the WADC.

Another problem with the Bylaw is that it goes contrary to the principle *ne bis in idem*, meaning that it could constitute double jeopardy. The BOA has used the argument that its Bylaw is a selection policy instead of a sanction to counter double jeopardy arguments. There is a better argument that could be used to support the Bylaw not constituting double jeopardy, however. During the era prior to the WADC when different organizations had different sets of rules, the swimmer Jessica Foschi tested positive for a mesterolone metabolite but was unable to determine the source for her contamination. After receiving a suspension from the U.S. Swimming (USS) Board of Directors, Foschi “invoked her right under the USS and USOC rules to make a final appeal to the American Arbitration Association (AAA).” The AAA panel hearing her case, using the rules of USS, determined the sanctions to be arbitrary and in violation of fairness, since neither Foschi nor anyone she knew could figure out her source of contamination, and decided to allow her to compete again. FINA, the international federation for swimming, decided that this did not correspond with its rules and eventually, the case ended up being heard by CAS. The CAS panel hearing the case determined that while the FINA proceedings and AAA proceedings were for the same facts, they fell under different sets of rules, with one being under FINA rules and one being under USS rules. The panel determined that an athlete being sanctioned multiple times under different rules does not constitute double jeopardy.

The precedent of Foschi’s case could be applied to the Bylaw. The BOA rules and the WADC can be considered different sets of rules, just as

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214 *Id.*
215 *Id.* at r. 27, art. 2.6.
218 *Id.* ¶ 4.4.
219 *Id.*
220 *Id.* ¶ 4.5, 4.11.
221 *Id.* ¶ 11.2.
222 *Id.*
the USS rules and FINA rules were considered different sets of rules in Foschi’s case. Because of this, based upon the precedent, having one penalty for an athlete under the WADC and a different one under the BOA rules should not constitute double jeopardy. However, since the BOA has incorporated the WADC into its rules, arguments could be made that these are not really two sets of rules.\textsuperscript{223} Even if the BOA rules were viewed as not incorporating the WADC, it would still be problematic as the BOA would be acting out of compliance with its requirement to abide by the WADC. Additionally, the panel in \textit{Merritt} established that \textit{Prusis} provided precedent that preventing an athlete from entering an event based upon a suspension that he or she has already completed constitutes double jeopardy.\textsuperscript{224} Based upon this precedent, any use of the Bylaw to prevent an athlete who has completed his or her suspension from competing in the Olympics should be interpreted as constituting double jeopardy.

One issue that differentiates the Bylaw from the Osaka Rule is the fact that the Bylaw provides athletes with a way to appeal their suspension.\textsuperscript{225} This helps resolve the proportionality issues with the rule for some cases. For example, an athlete engaged in inadvertent doping that is considered \textit{No Significant Fault or Negligence} would likely be able to have his or her BOA ban overturned on appeal and would not have any issue with the rule. However, the rule only allows for some athletes to have their case appealed.\textsuperscript{226} For example, Dwain Chambers was ineligible to use the Bylaw’s appellate process because the Bylaw only allows athletes with minor doping offenses, offenses falling into the \textit{No Fault or Negligence} category, and athletes with “significant mitigating circumstances” to appeal their case.\textsuperscript{227} Chambers’ case did not fall into any of these categories.\textsuperscript{228} For many athletes, the lack of an appeals process will bring about disproportionate results under the Bylaw. Also, since the appeals process is not included in the WADC, the inclusion of the process does not make the Bylaw consistent with the code. Additionally, the lack of some cases being allowed appeals under the Bylaw makes the results for the same offense very different under both sets of rules. For example, there are some cases that would provide an athlete with a two-year suspension under the WADC,

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\item See \textit{British Gymnastics, Anti Doping Policy} art. 1.1.1 (Jan. 1, 2009), http://www.british-gymnastics.org/site/index.php?option=com_docman\&task=doc_download\&gid=426\&Itemid=290 (”These UK Anti-Doping Rules . . . are intended to implement the requirements of the World Anti-Doping Code . . .”).
\item \textit{Reedie Fears for BOA By-Law, supra note 205}.
\item Eligibility Bye-Law, \textit{supra note 2}.
\item \textit{Id}.
\end{enumerate}
\end{footnotesize}
yet the athlete would receive a lifetime ban from competing in the Olympics under the Bylaw. Additionally, the WADC allows athletes to have their suspension reduced in some cases based upon an admission, while the Bylaw does not allow this. This could actually make it more difficult to catch athletes engaged in doping in some circumstances. The Bylaw also takes away the incentive for athletes to aid anti-doping authorities, which is one of the criticisms that WADA had about the Osaka Rule.

VIII. CONCLUSION

Later this month, the fate of both the Bylaw and all of the athletes ineligible to compete under it will be decided by a CAS arbitration panel in London. The panel reaching the decision, chaired by Richard McLaren, is the same panel of arbitrators that struck down the Osaka Rule. It is most likely that this panel will follow its own precedent and will determine the Bylaw to be invalid based upon its providing athletes with more severe sanctions than those authorized by the WADC. In the USOC v. IOC decision, the panel found that that the Osaka Rule constituted a substantial change to Article 10 of the WADC. This is the section of the WADC that establishes the sanctions for individuals found guilty of doping offenses. Article 3.2.2 of the WADC prohibits substantial changes to the code being made. The panel found that under the Osaka Rule, the period of ineligibility for a first offense “becomes 2 years (or whatever lesser sanction in excess of 6 months is ordered) plus at least the number of days of the Olympic Games,” which constitutes a substantial change. Using the same analysis, one would find that the Bylaw constitutes a substantial change to Article 10 of the WADC by making an athlete’s period of ineligibility two years plus an infinite number of days for future Olympic Games.

In addition to constituting a substantial change to the WADC, adding an infinite number of days to an athlete’s ineligibility is disproportionate. It

229 Eligibility Bye-Law, supra note 2.
230 Id. at 3–4; 2009 World Anti-Doping Code, supra note 41, art. 10.5.4.
231 See USOC v. IOC, CAS 2011/0/2422, ¶ 3.11 (Ct. Arb. Sport Oct. 4, 2011), for a description of WADA’s amicus brief describing the organization’s belief that the Osaka Rule likely prevented athletes from aiding anti-doping authorities in exchange for a shorter suspension.
233 Id.
235 2009 World Anti-Doping Code, supra note 41, art. 10.
236 Id. art. 3.2.2.
237 USOC v. IOC, CAS 2011/0/2422, ¶ 8.25.
is likely that the panel determining the Bylaw’s future will avoid addressing this argument the way that it avoided dealing with this issue in the Osaka Rule case. However, if the panel addresses this argument, it is likely that it will determine the Bylaw to be disproportionate, at least as applied to the cases of some athletes. It is likely that the panel hearing this case will also avoid dealing with the double jeopardy argument. However, if it is addressed, it is likely that the panel will determine that the Bylaw constitutes double jeopardy. With the BOA claiming to incorporate the WADC into its bylaws, it would not make sense to view the BOA rules and the WADC as two sets of rules.

The decision for this case is important for the entire Olympic world. The precedent that it sets will determine which doping regulations other institutions in the Olympic movement are allowed to impose. While it is important to have doping sanctions that are just and proportional for athletes, it is also important to remember that doping is a real problem in sport that needs to be addressed.\(^{238}\) Although there may be issues with the way that strict anti-doping rules that have been composed in the last couple of decades are set-up, the authors of these rules composed them with the noble intention of combating doping in sport. Continued efforts are needed to keep Olympic sport clean. Thus, regardless of the outcome of the decision on the Bylaw, we should be hoping for a clean Olympic Games in London later this year.