

The World Anti-Doping
Agency &
International Law

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Introduction: The “Tour of Shame” & the Creation of a Global Agency

The Tour de France is by far the world’s largest annual sporting event. Originating in 1903, this 3 week, 2,175-mile race in the summer months is viewed by 3.5 billion people on television across 188 different countries. 2000 journalists flock to France and surrounding countries to report on what has been referred to the “most demanding endurance events in sporting history”.¹ Further, it brings in £88m to the southeastern economy of France, and generates £35m worth of media coverage for the area.² This global spectacle has served as a symbol of triumph, perseverance and determination for many individuals since its inception, and it truly is one of the most exciting sporting events on the planet. However, the integrity and reputation of the event was forever tarnished in the summer of 1998. Commonly referred to by major news outlets as the “Tour of Shame”³, Willy Voet, a soigneur (assistants responsible for feeding, clothing, massaging, and escorting riders) for the Festina racing team, was arrested shortly before the start of the race with erythropoietin (sometimes referred to as EPO), growth hormones, testosterone and amphetamine, which were found in the racing teams vehicle. All of these drugs are all forms of doping, and would undoubtedly give any of the participants in the race a major and unfair advantage over the other bicyclists. An investigation was followed by the opening of a separate case into the Dutch bicycling team, TVM, and the subsequent searching of many teams before, throughout, and after the race. The investigation revealed systematic doping, and suspicion was raised that there may have been a widespread network of doping involving

¹ Suffer score: how demanding is Le Tour de France?, The Conversation (2012), <http://theconversation.com/suffer-score-how-demanding-is-le-tour-de-france-8040>.

² Id.

³ William Fotheringham, William Fotheringham: Ten years on from the Tour of Shame that blew the lid off organised doping The Guardian (2008), <http://www.theguardian.com/sport/2008/jul/10/tourdefrance.cycling>.

many teams of the Tour de France during the 1998 race, as well as earlier races in the year.⁴ Hotels were searched by police, and an alarming number of confessions were made by retired and current riders with regard to these performance enhancing drugs. A great number of team personnel were arrested or detained, and protests were made by certain riders in the race. Only half of the original participants actually finished the 1998 Tour de France, and several full teams withdrew from the race after months of intense preparation, including the number one ranked team in the world at that time.⁵ For the first time in a single major sport, systematic doping at the highest level had been exposed, and the integrity of all professional sports was thrown into the international spotlight.

The chaos surrounding the 1998 Tour de France was followed by an International Olympic Committee Congress in February 1999, in which ultimately led to the foundation of the World Anti-Doping Agency. The World Anti-Doping Agency was set up on November 10, 1999 in Lausanne, Switzerland, as a result of what was called the "Declaration of Lausanne", to "promote, coordinate and monitor the fight against drugs in sports".⁶ Since 2002, the organization's headquarters have been located in Montreal, Quebec, Canada. The Lausanne office became the regional office for Europe. Other regional offices have been established in Africa, Asia/Oceania and Latin America.⁷

The World Anti-Doping Agency is responsible for the World Anti-Doping Code, adopted by more than 600 sports organizations, including international sports federations, national anti-doping organizations, the International Olympic Committee, and the International Paralympic

⁴ Id.

⁵ Id.

⁶ Who we are, World Anti-Doping Agency (2013), <https://www.wada-ama.org/en/who-we-are>

⁷ Id.

Committee.⁸ As of 2014, its president is Sir Craig Reedie, who is a British sports administrator, a former Chairman of the British Olympic Association from 1992 to 2005, and a Vice-President of, and a serving representative on, the International Olympic Committee.⁹ Initially funded by the International Olympic Committee, the World Anti-Doping Agency now receives half of its budgetary requirements from them, with the other half coming from various national governments across the globe. Its governing bodies are also composed in equal parts by representatives from the sporting movement (which includes professional athletes and other executives) and certain governments of the world. The agency's key activities include scientific research, education, development of anti-doping capacities and monitoring and enforcement of the World Anti-Doping Code.¹⁰

The World Anti-Doping Code is the core document that harmonizes anti-doping policies, rules and regulations within sport organizations and among public authorities around the world.¹¹ It works in conjunction with five International Standards which aim to foster consistency among anti-doping organizations in various areas: standard of testing; laboratories; Therapeutic Use Exemptions (TUEs); the List of Prohibited Substances and Methods; and the protection of privacy and personal information. The Prohibited List is updated every year by World Anti-Doping Agency and names all of the substances that are prohibited both in competition and out of competition.¹² The International Standard for Testing provides requirements for test distribution planning, notification of athletes, preparing for and conducting sample collection,

⁸ Id.

⁹ Sir Craig Reedie's Biography, World Anti-Doping Agency (2014), <https://www.wada-ama.org/en/sir-craig-reedies-biography>.

¹⁰ Who we are, World Anti-Doping Agency (2013), <https://www.wada-ama.org/en/who-we-are>.

¹¹ Id.

¹² Id.

post-test administration, and transport of samples; it also requires national anti-doping organizations to conduct regular testing.¹³

The unified approach of the code addresses problems that previously arose from disjointed, uncoordinated and unorganized anti-doping efforts amongst the nations of the world, including, among others: a scarcity and splintering of resources required to conduct research and testing; a lack of knowledge about specific substances and procedures being used and to what degree; and an inconsistent approach to sanctions for those athletes found guilty of doping.¹⁴ The code provides objective and unambiguous guidelines to prevent the illegal use of performance enhancing drugs in sports and creates a universal, international standard amongst the participating countries.¹⁵

UNESCO International Convention against Doping in Sport & Professional Sports in the United States

The United Nations Educational, Scientific and Cultural Organization (UNESCO) is a specialized agency of the United Nations (UN). Its purpose is to contribute to peace and security by promoting international collaboration through educational, scientific, and cultural reforms in order to increase universal respect for justice, the rule of law, and human rights along with fundamental freedom proclaimed in the United Nations Charter. UNESCO has 195 member states and nine associate members.¹⁶

Given that many governments cannot be legally bound by a non-governmental document such as the World Anti-Doping Agency's World Anti-Doping Code, they took steps in implementing it by individually ratifying the UNESCO International Convention against Doping

¹³ Id.

¹⁴ Id.

¹⁵ Id.

¹⁶ Introducing UNESCO, UNESCO (2012), <http://en.unesco.org/about-us/introducing-unesco>.

in Sport, which was the first global international treaty against doping in professional sports. It was unanimously adopted by 191 governments at the UNESCO General Conference in October 2005 and came into force in February 2007. As of September 2015, the Convention has been ratified by 182 states, which includes 180 UN member states plus the Cook Islands and State of Palestine.¹⁷

The UNESCO Convention serves as an objective as well as legally binding tool which enables governments to align and organize their own domestic policy on eliminating performance enhancing drug use in sports with the World Anti-Doping Code, in which helps to universalize the cause.¹⁸ It organizes and formalizes each governments' commitment to the fight against doping in sport, including by facilitating doping controls and supporting national testing programs; encouraging the establishment of "best practice" in the labeling, marketing, and distribution of products that might contain prohibited substances; withholding financial support from those who engage in or support doping; taking measures against manufacturing and trafficking; encouraging the establishment of codes of conduct for professions relating to sport and anti-doping; and funding education and research.¹⁹

Although the idea of the Convention was certainly done with the best of intentions, there have been a myriad of issues surrounding implementation of the program in a number of powerful countries. For example, the United States has ratified the treaty for the purpose of its Olympic athletes being able to take part in the Olympic games, however it does not apply to its very popular major professional sports such as baseball, football, basketball, hockey and soccer. Many observers argue that the value of international anti-doping efforts, including the

¹⁷ International Convention against Doping in Sport. Ratifications., Conventions-UNESCO, <http://www.unesco.org/eri/la/convention.asp?ko=31037>.

¹⁸ Id.

¹⁹ Governments, World Anti-Doping Agency (2013), <https://www.wada-ama.org/en/governments>.

International Convention Against Doping in Sport, are limited by a lack of effective anti-doping tests that can positively and accurately identify prohibited substances.

The National Football League, which is one of the most popular and lucrative professional sport leagues in not only the United States, but in the entire world, has notoriously stayed away from the World Anti-Doping Agency's policies on drug testing. David Howman, the director-general of the The World Anti-Doping Agency, has publicly stated that the National Football Leagues drug policy needs to be more transparent, otherwise people will believe the sport has "something to hide", and that the notoriously strong National Football League players' union has tried "every possible way to avoid testing", specifically referring to the National Football Leagues lack of transparency with regard to its testing for human growth hormone, which is banned under the World Anti-Doping Agency code.²⁰ The National Football League currently hosts annual games at Wembley stadium in London, and there has been talk of placing an official American football team there permanently. But there could be implications for the drug-testing of National Football League players in Britain. As previously stated, the World Anti-Doping Agency has no jurisdiction over the National Football League's drug policies, and, unless the rules changed, the NFL, rather than the United Kingdom anti-doping agency, would be responsible for testing players from a London franchise.²¹ "We haven't looked at the issue yet, but I assume it would be the case". Aldopho Birch, the National Football League's senior vice-president of law and labor policy, said, "We would need to have consistency in the application of our laws. You can't have one team subject to different laws than everyone else."²² Although the NFL has taken strides to strengthen its anti-drug policy, it is still not close to what the World

²⁰ Sean Ingle, NFL faces battle with Wada over transparency of drug-testing The Guardian (2013), <http://www.theguardian.com/sport/2013/sep/27/nfl-wada-drugs-testing>.

²¹ Id.

²² Id.

Anti-Doping Agency would like it to be. Even as the National Football League has recently developed a test for human growth hormone, according to Travis Tygart, CEO of the United States Anti-Doping Agency, which is a non-profit, non-governmental organization and the national anti-doping organization for the United States, “you pretty much have to be a fool to test positive”, and that “...positive tests are just highly unlikely, because the players have known it’s coming and probably stopped well in advance, to have it clear from their system.”²³ As the NFL continues to expand globally, one must assume that the current drug-policies will either have to be changed or altered to mirror that of the World Anti-Doping Agency’s code.

Unlike the National Football League, the United States’ second most popular professional sport, Major League Baseball, has recently made strides to enact certain drug policies that fall in line with the World Anti-Doping Agency’s code. In 2010, The President of the World Anti-Doping Agency, John Fahey, called on Major League Baseball and its players’ association to implement human growth hormone testing. “We continue to read statements from the MLB Commissioner and MLBPA representatives questioning the appropriateness of implementing blood testing in their league. This is nonsense,” said Mr. Fahey. “The blunt reality is that a number of doping substances and methods, including human growth hormone, are currently detectable only through blood testing. International scientific experts agree that human growth hormone is found in extremely small quantities in urine and that a potential detection method for this substance in urine is years away. Joint blood and urine testing is the only way to go for sports organizations to ensure that they use proper means to protect the integrity of their sport.”²⁴ Since then, Major League Baseball has enacted a much harsher and proactive drug-testing

²³ HGH blood-testing setup has flaws, ESPN (2014), http://espn.go.com/nfl/story/_/id/11832255/nfl-hgh-blood-testing-setup-flaws.

²⁴ WADA President Calls on Major League Baseball to Implement Human Growth Hormone Testing , World Anti-Doping Agency (2010), <https://www.wada-ama.org/en/media/news/2010-03/wada-president-calls-on-major-league-baseball-to-implement-human-growth-hormone>.

policy, in which the World Anti-Doping Agency referred to as “groundbreaking”.²⁵ They began unannounced random blood testing during the 2013 season for not only human growth hormone, but for elevated levels of testosterone (a common side effect of performance enhancing drugs). Along with this, in 2013, it was reported that All-Star baseball player Alex Rodriguez received human growth hormone from an anti-aging clinic in Coral Gables, Florida. Rodriguez, along with 13 other players, were suspended for 211 regular season games, plus any post-season games that following year. Rodriguez would end up appealing the suspension, ultimately having it denied. Ultimately, Rodriguez had his suspension reduced to 162 games, since he was able to play during the appeals process.²⁶ The World Anti-Doping Agency had high praise for the process that led to Alex Rodriguez’s suspension. World Anti-Doping Agency president Sir Craig Reddie commended Major League Baseball, by saying that “MLB has approached the matter in a professional manner throughout, and has set a high standard for how investigations should be pursued in anti-doping cases, and we look forward to continuing our close relationship with the MLB as we aim to protect the rights of the clean athlete and support doping-free sport.”²⁷

Although Major League Baseball, and to a lesser extent, the National Football League, have both made strides to emulate the rules laid out in the World Anti-Doping Agency Code, there are still many critics. Historically, the search and subsequent implementation of better methods to detect doping substances has lagged behind the discovery and use of new, undetectable substances.²⁸ Further, the cost of enforcing these anti-doping regulations has been a

²⁵ Steve Inskip, Major League Baseball Enacts Anti-Doping Policies NPR (2013), <http://www.npr.org/2013/01/11/169117506/major-league-baseball-enacts-new-anti-doping-policies>.

²⁶ Ray Sanchez, Alex Rodriguez drops lawsuits, accepts 162-game suspension CNN (2014), <http://www.cnn.com/2014/02/07/us/alex-rodriguez-lawsuit/>.

²⁷ AJ Cassavell, World Anti-Doping Agency president supports process in Alex Rodriguez suspension Major League Baseball (2014), <http://m.mlb.com/news/article/66638786/world-anti-doping-agency-president-supports-process-in-alex-rodriguez-suspension>.

²⁸ “The Secret Steroid,” The Economist, October 23, 2003; Jessica K. Foschi, “A Constant Battle: The Evolving Challenges in the International Fight against Doping in Sport,” Duke

topic of controversy. In order to keep up with new testing methods and improving technology, each participant is making an enormous financial commitment for the future. There will always be chemists and scientists out there looking to come up with a new type of performance enhancing drug that is undetectable by modern drug tests, since there will always be a market for these types of products, in which will result in consistent spending over time. Moreover, some critics even argue that the cost of certain anti-doping activities, especially legal costs of adjudicating doping cases, outweighs the benefits of deterring the use of performance enhancing substances in professional sports.²⁹

Accountability, Human Rights & The “Whereabouts” Rule

According to the World Anti-Doping Agency’s “whereabouts” rule found in their code, all athletes must make themselves available to drug testers for one hour a day, between 6 a.m. and 11 p.m., ninety days in advance, for out-of-competition testing. Failure to be present at the specified time on three occasions within an eighteen-month period results in a doping offense, which can be punishable by a one-year suspension.³⁰ According to the Agency, these rules are extremely important “...because out-of-competition doping controls can be conducted without notice to athletes, they are one of the most powerful means of deterrence and detection of doping and are an important step in strengthening athlete and public confidence in doping-free sport. Accurate whereabouts information is crucial to ensure efficiency of the anti-doping programs, which are designed to protect the integrity of sport and to protect clean athletes. The concept of out-of-competition is not new. Experience has shown that out-of-competition testing is crucial to the fight against doping, in particular because a number of prohibited substances and methods

Journal of Comparative and International Law, vol. 16, 2006, pp. 457-486.

²⁹ “(EU) EP/Sport: Mavrommatis Report on Sport Adopted,” Agence Europe, May 9, 2008.

³⁰ Whereabouts, World Anti-Doping Agency (2014), <https://www.wada-ama.org/en/questions-answers/whereabouts>.

are detectable only for a limited period of time in an athlete's body while maintaining a performance-enhancing effect. The only way to perform such testing is by knowing where athletes are, and the only way to make it efficient is to be able to test athletes at times at which cheaters may be most likely to use prohibited substances and methods.”³¹

The first challenge to the rule was in the case of Ohuruogu v. UK Athletics Limited in 2004. Christine Ohuruogu, a very successful British track star and Olympian, was suspended on August 6, 2006, for one year by UK Athletics Limited (known as the UKA) for committing a doping offense after violating its “whereabouts” rules. UKA is the National Governing Body for sports in the United Kingdom, and it had adopted the out-of-competition drug testing rules of the International Association of Athletics Federations (IAAF), the world governing body for athletics.³² The IAAF strictly adheres to the code set forth by the World Anti-Doping Agency. According to IAAF rules, Ohuruogu committed a doping offense after she failed to be present for three out-of-competition tests within an eighteen-month period.³³ “Ohuruogu gave her schedule details to UKA as required, but changed the schedule and did not notify changes on three occasions and was not available for testing where her schedule indicated she would be.”³⁴ Ohuruogu appealed the UKA's decision to the Court of Arbitration for Sport, which is an international quasi-judicial body established to settle disputes related to sport through arbitration with headquarters in Lausanne, Switzerland and courts in New York and Sydney, Australia. She argued that the IAAF's “whereabouts” rules should be construed narrowly in favor of the athlete and that a doping violation should only occur after the athlete has been given notice of the

³¹ Id.

³² Ohuruogu v. UK Athletics Ltd., CAS 2006/A/1165 4 (2007).

³³ Id. at 6

³⁴ Id. at 7

evaluation for all three offenses.³⁵ Additionally, Ohuruogu contended that given her circumstances, a one-year suspension for violating the rule was a disproportionate penalty.³⁶

The CAS arbitration panel disagreed with Ohuruogu and upheld the IAAF's decision, noting that “out-of-competition testing is at the heart of any effective anti-doping program.”³⁷ The CAS panel backed the IAAF's “whereabouts” rules, declaring that if the athlete failed to provide adequate whereabouts information or was unable to be located for a no-notice test on three occasions within eighteen months that athlete had committed a doping offense.³⁸ In addition, CAS held that the one-year suspension imposed under IAAF rules was just and proportionate because it fell within the range set by World Anti-Doping Agency, “the oracle of the anti-doping movement” for these types of offenses.³⁹

This ruling ultimately set a precedent for issues arising with the “whereabouts rule”, with CAS stressing the importance of the “whereabouts” rules for no-notice drug testing and the need for effective penalties against athletes who do not provide accurate “whereabouts” information. Further, the court held that “...the burden on an athlete to provide accurate and up-to-date whereabouts information is no doubt onerous. However, the anti-doping rules are necessarily strict in order to catch athletes that do cheat by using drugs and the rules therefore can sometimes produce outcomes that many may consider unfair. This case should serve as a warning to all athletes that the relevant authorities take the provision of whereabouts information extremely seriously as they are a vital part in the ongoing fight against drugs in the sport.”⁴⁰

³⁵ Id. at 12-13

³⁶ Id. at 10-11

³⁷ Id. at 12

³⁸ Id. at 13

³⁹ Id. at 12

⁴⁰ Id. at 13

Some years later, in January of 2009, a group of sixty-five Belgian athletes, which included cyclists, soccer players, and volleyball players, unsuccessfully brought a challenge to the Agency's "whereabouts" rule under European privacy laws. In particular, the group believed that the "whereabouts" rule "runs afoul of Article 8 of the European Convention on Human Rights (ECHR), which protects an individual's right to privacy."⁴¹ Article 8 provides a right to respect for one's "private and family life, his home and his correspondence", subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society".⁴² The Belgian lawyer, Kristof de Saedeleer, who helped put the legal challenge together, likened the current system "to putting a whole town in prison to catch one criminal".⁴³

In addition, the Fédération Internationale Des Associations de Footballeurs Professionels (FIFPro), the international group of soccer players' unions, also challenged the "whereabouts" rule in early 2009. FIFPro urged its forty-two member associations to complain about the rule to their respective data protection agencies.⁴⁴ Specifically, the organization based its challenge on the European Union Working Time Directive, which states that every employee is entitled to twenty days of holiday a year, and questioned the validity of having to be available year-round.⁴⁵ It could be argued that the "whereabouts" rule forces an athlete to stay in a particular location for one hour out of every day. Further, the athlete is not free to go wherever he chooses at any time, but rather, the athlete must stay at the the specific location for the full duration of the hour.⁴⁶ Vacation time is generally considered a period of time when the athlete has the luxury to go

⁴¹Matt Slater, Legal threat to anti-doping code BBC News (2009), http://news.bbc.co.uk/sport2/hi/front_page/7844918.stm.

⁴² European Convention of Human Rights, Article 8, (2002), http://www.echr.coe.int/documents/convention_eng.pdf.

⁴³ Slater, supra note 25.

⁴⁴ Darren Ennis, EU Regulator Wants 'Whereabouts' Rule on Hold, Reuters.com, Feb. 21, 2009, <http://in.reuters.com/article/worldOfSport/idINIndia-38138720090221>.

⁴⁵ Slater, supra note 25.

⁴⁶ World Anti-Doping Code, World Anti-Doping Agency (2014), <https://www.wada-ama.org/en/resources/the-code/world-anti-doping-code>.

anywhere and do as he or she pleases, without any sort of employment obligations tying him or her down or hindering his or her desired actions. Under the World Anti Doping Agency's "whereabouts" rule, an athlete technically does not have this luxury. The athlete is responsible for his "whereabouts" everyday and cannot come and go as he or she pleases, and must immediately update any changes to his or her schedule.⁴⁷ The World Anti-Doping Agency's requirement that an athlete remains in a particular location for one hour out of every day for drug testing does not leave an athlete with even one day of holiday time, let alone the four weeks guaranteed to workers under Article 7 of the European Union Directive, which deals with paid annual leave.⁴⁸

In regards to Article 5 of the European Union law, one could first look at whether the World Anti-Doping Agency's anti-doping rule obstructs an athlete's right to have a weekly rest period. A strong case can be made that the "whereabouts" rule clearly infringes on this type of right.⁴⁹ Under the rule, an athlete is subject to a potential no-notice drug test for one hour out of every day, 7 days a week, 365 days a year. By having to provide information on where the athlete can be located during this sixty-minute time period, the athlete is essentially put "on call" every day.⁵⁰ There is no point in time when the athlete would be able to enjoy an uninterrupted twenty-four hours of rest and relaxation as guaranteed by Article 5. The athlete must be present at the "specified location" during the "specified time" no matter what. The World Anti-Doping Agency's "whereabouts" rule requires compliance every day and clearly obstructs an athlete's right to a weekly rest period.⁵¹

⁴⁷ Id.

⁴⁸ James Halt, Where Is the Privacy in Wada's "Whereabouts" Rule?, 20 Marq. Sports L. Rev. 267, 289 (2009)

⁴⁹ Id. at 284.

⁵⁰ Id.

⁵¹ Id. at 285.

In February of 2009, World Anti-Doping Agency president at the time, John Fahey, rejected a Fédération Internationale de Football Association's (FIFA) request for athletes to be left alone from out-of-competition testing during holidays.⁵² Michel Platini, the president of the Union of European Football Associations (UEFA) at the time, also petitioned for athletes to be given a break from testing during one holiday stretch per year.⁵³ In response, Fahey stated that “FIFA and UEFA's suggestion to give athletes a holiday break from testing would undermine anti-doping controls and give cheats time to start doping with impunity. The “whereabout” rules are the cornerstone of an effective drug policy and that without these rules out-of-competition testing would be impossible.”⁵⁴ This all but ended any potential challenge based on the European Unions’ Working Time Directive.

Armstrong v. Tygart: The World Anti-Doping Agency, Due Process, & International Arbitration

Lance Armstrong is a former United States professional road-racing cyclist. A cancer survivor, he served as an inspiration to millions of people after he returned to racing following numerous surgeries and exhaustive treatments for his testicular cancer in 1998. He then went on a streak never before seen in professional cycling and won seven straight Tour de France races. He was the face of racing for this period of time, and at one point, was one of the most popular athletes in the world. Professional cycling had never been more popular in the United States, and it was solely due to Lance Armstrong.⁵⁵

⁵² Ennis, supra note 28.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Michael Bradley, Lance Armstrong (2005).

However, for much of his career, Lance Armstrong faced persistent allegations of doping, including a detailed account of his use of performance-enhancing drugs in the 2004 book “L.A. Confidential: Les secrets de Lance Armstrong”, written by sports journalists Pierre Ballester and David Walsh. In June of 2012, the United States Anti-Doping Agency accused Armstrong of doping and trafficking of drugs, based on blood samples from 2009 and 2010, and testimonies from witnesses including former teammates. Armstrong, denying all doping use in a statement, was suspended from competition in cycling and triathlon. Armstrong was charged in a letter from the United States Anti-Doping Agency, along with five others including former team manager Johan Bruyneel. The United States Anti-Doping Agency said Armstrong used banned substances, including the blood-booster EPO and steroids, as well as blood transfusions dating back to 1996. They gave Armstrong the option to either contest the charges through arbitration or accept sanctions, which potentially included lifetime ineligibility from certain athletic competitions, and forfeiture of any competitive results, medals, points and prizes he obtained on or after the date of his first violation.⁵⁶

Eventually, Lance Armstrong would file a lawsuit in the U.S. District Court for the Western District of Texas against the United States Anti-Doping Agency and its CEO, Travis Tygart. In the lawsuit, Armstrong challenged the United States Anti-Doping Agency’s authority to bring these types of charges against him; disputed he had a valid agreement to arbitrate such matters with the United States Anti-Doping Agency; and alleged the United States Anti-Doping Agency’s charging and arbitration procedures violated his due process rights.⁵⁷

Armstrong ultimately lost his battle with the United States Anti-Doping Agency, as the District Court found sufficiency within USA Cycling’s agreement with the United States

⁵⁶ Amy Shipley, Lance Armstrong refiles USADA suit; team members decline arbitration, receive lifetime bans Washington Post (2012), https://www.washingtonpost.com/sports/2012/07/10/gjqav4r3aw_story.html.

⁵⁷ Armstrong v. Tygart, 886 F. Supp. 2d 572 (W.D. Tex. 2012)

Olympic Committee to adhere to the United States Anti-Doping Agency protocol. The District Court found, that as a member of USA Cycling, Armstrong was thereby beholden to the United States Anti-Doping Agency protocol, which required that all contested charges of doping be tried through the Court of Arbitration for Sport.⁵⁸ In its decision, the District Court noted that other federal courts have held similar, limited views on the role that federal courts should play regarding eligibility and arbitration issues within Olympic sports.⁵⁹ Further, the District Court then focused on the Amateur Sports Act of 1978, which empowers National Governing Bodies such as United States Cycling to establish procedures for determining eligibility for participation in competition.⁶⁰ The District Court clarified this by holding that “...there can be little doubt, as other courts have observed, that Congress intended for eligibility questions to be decided through arbitration, rather than federal lawsuits. Whether or not this was a good choice is, of course, debatable—but it is not this Court's place to judge the wisdom of Congress's enactments, so long as they are constitutional.”⁶¹

The District Court then referred to Slaney v. The Int'l Amateur Athletic Fed'n⁶², in which Slaney, an amateur athlete, brought a variety of Indiana state law contract and tort claims against the United States Olympic Committee in relation to the International Amateur Athletic Federation (IAAF) arbitral panel's determination she had committed a doping offense. In affirming the district court's dismissal of Slaney's claims for lack of subject matter jurisdiction, the Seventh Circuit stated, “when it comes to challenging the eligibility determination of the

⁵⁸ Id. at 576-577

⁵⁹ Id. at 586

⁶⁰ 36 U.S.C. §§ 220502(a)

⁶¹ Armstrong at 585.

⁶² Slaney v. The Int'l Amateur Athletic Fed'n, 244 F.3d 580 (7th Cir.2001)

United States Olympic Committee, only a very specific claim will avoid the impediment to subject matter jurisdiction that [36 U.S.C.] § 220503(3) poses.”⁶³

Moreover, in Harding v. U.S. Figure Skating Ass'n⁶⁴, the District Court of Oregon cautioned that “courts should rightly hesitate before intervening in disciplinary hearings held by private associations.... Intervention is appropriate only in the most extraordinary circumstances, where the association has clearly breached its own rules, that breach will imminently result in serious and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies.” Yet, while carving out this limited exception to the preemption created by the Amateur Sports Act, the opinion forewarned that while examining whether internal rules had been complied with, the courts “should not intervene in the merits of the underlying dispute.”⁶⁵

Echoing the holdings of Slaney and Harding, the District Court held that “federal courts should not interfere with an amateur sports organization’s disciplinary procedures unless the organization shows wanton disregard for its rules, to the immediate and irreparable harm of a plaintiff, where the plaintiff has no other available remedy.”⁶⁶

Days after the District Court dismissed Armstrong’s suit, Armstrong, while publicly maintaining his innocence, decided to not officially challenge the United States Anti-Doping Agency allegations. In a statement, Armstrong said that the United States Anti-Doping Agency had engaged in “an unconstitutional witch hunt” based on “outlandish and heinous claims.”⁶⁷ He added that he would have been more than willing to fight the charges, what he described as USADA’s “one-sided and unfair” arbitration process was not worth the toll on his foundation and

⁶³ Id. at 595

⁶⁴ Harding v. U.S. Figure Skating Ass'n, 851 F.Supp. 1476, 1479 (D.Or.1994)

⁶⁵ Id. at 1479

⁶⁶ Armstrong at 586.

⁶⁷ Juliet Macur, Armstrong Drops Fight Against Doping Charges The New York Times (2012), <http://www.nytimes.com/2012/08/24/sports/cycling/lance-armstrong-ends-fight-against-doping-charges-losing-his-7-tour-de-france-titles.html>.

his family.⁶⁸ "There comes a point in every man's life when he has to say, 'Enough is enough.'" Armstrong said. "For me, that time is now."⁶⁹ Under the World Anti-Doping Code, by failing to contest such serious charges of doping offenses, Armstrong was automatically banned from all sports that follow the World Anti-Doping Code--effectively ending his competitive career. He also forfeited all awards and prizes earned after August 1, 1998, including his seven Tour titles. Eventually, in January of 2013, in an interview with Oprah Winfrey, Armstrong finally admitted to using performance-enhancing drugs throughout much of his career, including all seven of his Tour de France wins.

The impact of the Lance Armstrong court decision was immense in a myriad of ways. For one, it further strengthened the World Anti-Doping Agency's code by having it adopted, and subsequently used, by a domestic court in a major country. It also legitimized the power that an international arbiter has with regard to settling disputes involving Olympic sports. Although the District Court in the case of Lance Armstrong did not specifically defer to the World Anti-Doping Agency, it deferred to the United States Anti-Doping Agency, which essentially serves as an agent to the former, solidifying its role in battling the use of performance enhancing drugs in professional and Olympic sports.

Criticisms: Statistical Validity & Logic Issues Surrounding the World Anti-Doping Agency

Although the guidelines and rules laid out in the World Anti-Doping Agency's code are extremely detailed and meticulous, there has been some criticism with certain aspects of the testing process. One of the most common forms of criticism has to do with the statistical validity of the tests that are performed on these athletes.

⁶⁸ Id.

⁶⁹ Id.

One individual that has opposed certain aspects of the drug testing process by the World Anti-Doping Agency is University of Texas biostatistician Donald Berry, who is currently the head of the Division of Quantitative Sciences and chair of the Department of Biostatistics. In an article for *Nature* magazine, Berry outlined what he sees as problems with the way doping tests are conducted. He argues that anti-doping officials have not satisfactorily defined and publicized how they arrived at particular criteria that used to determine whether or not a test result is positive or negative.⁷⁰ The ability of an anti-doping test to detect a banned substance in an athlete is calibrated in part by testing a small number of volunteers taking the substance in question.⁷¹ But Berry says that individual labs need to verify these detection limits in larger groups that include known dopers and non-dopers under blinded conditions that mimic what happens during competition.⁷² Further, Berry believes that accepting “legal limits” of specific metabolites without such rigorous verification goes against the foundational standards of modern science, and results in an arbitrary test for which the rate of false positives and false negatives can never be known.⁷³ Essentially, since these rates are a current unknown, and by not publishing and opening to broader scientific scrutiny the methods by which testing labs engage in study, it is Berry’s view that the anti-doping authorities have fostered a sporting culture of suspicion, secrecy and fear.

Berry stresses the importance of detecting cheaters in sports in order to promote fairness, however drug testing should not be exempt from the scientific principles and standards that apply

⁷⁰ Donald A Berry, The Science of Doping, 454 *Nature*, 2008, at 692–693.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

to other biomedical sciences, such as disease diagnostics.⁷⁴ He states that the alternative could see the innocent being punished while the guilty escape on the grounds of reasonable doubt.⁷⁵

Conclusion: The Future

Since its inception in 1999, the World Anti-Doping Agency has brought uniformity and objectiveness in helping to combat the use of performance enhancing drugs in countries all over the world. As seen by the Lance Armstrong case, as well as the adoption of the code in professional sports in the United States, the acceptance and implementation into government and domestic law has come a long way, and it is on an upward trend. Although the World Anti-Doping Agency is certainly flawed and has received its fair share of criticisms, there is little doubt that it serves as one of the most successful and most widely ratified international treaties since the beginning of the 21st century.

⁷⁴ Id.

⁷⁵ Id.