

Drug Testing through the Lens of a Member of the International Court of Arbitration for Sport

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Anti-doping is about deterrence and education. It is not just about catching and punishing athletes who cheat, but also about educating athletes from even wanting to take performance-enhancing drugs. Sports must be about ethics and fair play by all. No one wants to return to the days of the East German doping or the Tour de France scandals. The problem was that at the time there was a variety of sports disciplines and different national and international federation approaches to the fight against doping. In fact, in response to the 1998 Tour, the First World Conference on Doping in Sport was convened. At the First World Conference there was a call of an independent international agency "... to harmonize and marshal the global fight against doping in sport" (Why is worldwide coordination..., World Anti-Doping Agency, 2012b, para. 1). As a result an independent international agency, the World Anti-Doping Agency (WADA) was created to reinforce the ethical principles that are described in the Olympic Charter.

With transparency and input from all stakeholders WADA developed the World Anti-Doping Code (hereafter referred to as the "Code"). As a result, over 1000 delegates to the Second World Conference on Doping in Sport endorsed the Code in 2003. When the delegates, including National Olympic Committees (NOCs) endorsed the Code, they gave up some of their autonomy and rights in exchange for harmonization. Both the United States Olympic Committee (USOC) and the United States Anti-Doping Agency (USADA) are signatories to the Code. The Code's main objectives are prevention and deterrence. As Richard McLaren, the noted arbitrator pointed out:

Blood and urine tests are used to determine whether or not an athlete is doping. The ability to perform these tests is the most powerful tool that sporting administrators have to protect sports from corruption. The authority to test athletes is in the WADA Code, and IFs (International Federations) have incorporated these rules into their anti-doping policies (McLaren, 2011, p. 568).

The International Standards set forth are harmonized and apply to all-Olympic and Paralympic sports and athletes throughout the world. Once the Code is signed, all signatories are bound by all the terms. The intention of the adherence to the rules in the Code is to make sure that it is effort and talent that determine who wins, nothing else.

One of the prices that an athlete has to pay is some loss individual autonomy and loss of privacy for testing. IOC President Jacques Rogge has said, "Sports today has a price to pay for suspicion" (Macur, 2009, para. 6). It is unfortunate that there has to be visual observation during testing; however, there have been cases in which athletes tried to manipulate their samples by art or artifice. For example, consider the case of Michelle Smith de Bruin of Ireland who came literally from nowhere to win four medals, three of them gold, in swimming at the 1996 Summer Olympic Games in Atlanta.

When doping control officers arrived at Smith de Bruin's house to conduct an unannounced out-of-competition testing, it was reported that they were delayed at her gates for several minutes and that doping control officers did not directly observe Ms. de Bruin's sample-taking procedure. When her sample was analyzed, a Fédération Internationale de Natation (FINA) Anti-Doping Panel found there was circumstantial evidence that the Irish swimmer had contaminated a urine sample with alcohol. It was reported that, "The content of alcohol of the sample is in no way compatible with human consumption and the sample shows a very strong whiskey odor" (Penner, 1998, para. 4). The Court of Arbitration for Sport (CAS) dismissed her claim by stating, "Based on the facts of the case and the evidence before them, the arbitrators were of the opinion that FINA had convinced them that (Smith) was the only person who had the motive and opportunity to manipulate the sample." (Associated Press, 2003, para. 5).

There can also be exceptional circumstances. Four-time Olympic diver Troy Dumais was actually in the emergency room with the doping control officer asked for a sample. The problem was that Dumais was blocked-up with kidney stones and could not give a sample. As a result, Dumais was allowed to give a sample the next day. While Dumais considers out-of-competition and invasion of his privacy, to further clean competition, he accepts it, saying, "It's like security at the airport. I'd rather do it, know that I'm safe, than not do it at all" (Zaccardi, 2011, para. 29).

Another possible loss of autonomy and privacy is the “Whereabouts Clause” or the Anti-Doping Administration and Management System (“ADAMS”). Although the adoption of ADAMS has been controversial with stars such as Serena Williams and Rafael Nadal (Bose, 2009, para. 7) opposing it, it is part of Code. Again, testing is the most powerful tool to protect sports from corruption, and signatories have agreed to it. Athletes are assumed to know the rules to which they have agreed. For example, Mark Jelks was the 2009 U.S. indoor track champion in the 60 meters. He was suspended for a combination of a missed test and two filing failures and one missed test. Instead of blaming the system, Jelks accepted responsibility. Even though his suspension includes the 2012 London Olympics, he has decided continue in track and field. Jelks stated, “I’m going to be a lot better...Any situation should teach you a lesson. I’ve learned a few lessons. Just take care of business. And [the suspension] is teaching me patience” (Zaccardi, 2011, para. 24).

The Code is currently going through proposed revisions and the signatories such as the United States Olympic Committee (USOC) and the United States Anti-Doping Agency (USADA) can suggest changes, such as changes to the Whereabouts Clause. It will be up for endorsement at the Fourth World Conference on Doping in Sport in Johannesburg in November, 2013. Regardless of any reviews or changes, it is important to remember that the Code’s continued main objectives are prevention and deterrence.

In cases similar to Mark Jelks’ USADA has made it easier for athletes and their support personnel to contact USADA Athlete Express for immediate assistance regarding Whereabouts, Testing, Therapeutic Use Exemptions, and Prohibited substances as well as other areas (United States Anti-Doping Agency, 2012). There is also the Global Drug Reference Online, supported by a partnership between United Kingdom Anti-Doping (UKAD), the Canadian Centre for Ethics in Sport (CCES), and USADA that provides athletes and support personnel with information about the current WADA Prohibited List. In these days of smartphones USADA has made it possible to keep updated through an Online Account Change of Plan, via e-mail, via text, or by Free Mobile Application for iPhones, Droids and BlackBerrys.

In a similar vein, doping control forms have been converted into an interactive web application. USADA claims that the new paperless system is secure and will reduce the time spent with the Doping Control

Officer. Athletes will be able to log in to their USADA online account and view all completed sessions and corresponding sample collection documentation. Additionally, athletes will be able to request a paper copy of the form (United States Anti-Doping Agency, 2011). Presently, under the Code and International Testing Standards, athletes have rights including to have a representative and if available, an interpreter; to ask questions about the sample collection process; to request modifications if you are an athlete with a disability; and to requesting a delay in reporting to the Doping Control Station for valid reasons (World Anti-Doping Code, 2012a).

Education is equally important, especially in the growing area of supplements. Because of a tainted supplement, world champion swimmer Jessica Hardy served a suspension and missed the 2008 Olympic Games after testing positive. Two years ago fourteen Indian athletes tested positive for the banned substance methylhexaneamine that is found in many supplements (Deccan Herald, 2010). This is the same substance that a female Sryian hurdler tested positive for resulting in her disqualification from the 2012 London Olympic Games (Associated Press, 2012). Methylhexaneamine, also known as Geranamine, can easily be taken accidentally there have been explicit warnings to US, Canadian and Australian athletes to avoid its use (Canadian Centre for Ethics in Sport, 2012). There is a greater need for education dealing with supplements, but I believe that athletes taking supplements do so at their own risk

Athletes want and deserve a fair and level playing field. They also should know that if they feel if they have been wronged or mistreated that they have a right to an immediate appeal by a fair and independent organization (Oliveau, 2004). That independent body is the Court of Arbitration for Sport (CAS) which is nearing the 30th anniversary of its creation. Also known by its French title, Tribunal Arbitral du Sport (TAS), the CAS has the “... *aim of ensuring the protection of the rights of the parties before the CAS and the absolute independence of this institution*” (emphasis added) (Court of Arbitration for Sport, 2012, para. 2). When CAS arbitrators are chosen they disclose any possible conflicts of interest and sign a declaration that they carry out their functions with total objectivity and independence. This has been my experience and I have the highest respect for fellow arbitrators.

Although, the CAS has been in existence for approximately 30 years, it has already developed a body of sports law or “*lex sportiva*” in

that short time. The fundamental principles of due process, consistency and specificity are more harmonized because of CAS decisions (Oliveau, 2004). The recent decisions of *USOC v. IOC* (2011) and *British Olympic Association v. The World Anti-Doping Association* (2011) have recognized the harmonized approach in this complex war against doping in sport. When athletes are on the starting blocks, they should not have **to even think** that the athlete next to them may have cheated to get there. It is important that every athlete is confident that the competition is clean with a level playing field. You win with honor and respect, not by cheating and the best drugs.

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