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## USADA the Unconquerable: The One-Side Nature of the United States Anti-Doping Administration's Arbitration Process

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**USADA THE UNCONQUERABLE: THE ONE-SIDE NATURE OF THE  
UNITED STATES ANTI-DOPING ADMINISTRATION'S  
ARBITRATION PROCESS**

*Pain is temporary. It may last a minute, or an hour, or a day, or a year, but eventually, it will subside and something else will take its place. If I quit, however, it lasts forever. That surrender, even the smallest act of giving up, stays with me. So when I feel like quitting, I ask myself, which would I rather live with?*<sup>1</sup>

INTRODUCTION

The fight-at-all-costs attitude that helped Lance Armstrong survive cancer and win seven Tours de France<sup>2</sup> seemed to have left him when he chose to end his fight with the United States Anti-Doping Agency (USADA). It seemed the years of constantly fighting allegations had gotten the best of him. Armstrong conceded, “There comes a point in every man’s life when he has to say, ‘Enough is enough.’ For me, that time is now.”<sup>3</sup> This seemed odd because Armstrong had been in a constant fight to protect his image since he won his first Tour de France.<sup>4</sup> That fight even included a near two-year investigation by the United States Department of Justice as to whether or not he doped.<sup>5</sup> But again, as with every doping allegation in Armstrong’s past, as though he was made of Teflon, nothing stuck to him and the Justice Department dropped its case.<sup>6</sup> This seemed to be the end of Armstrong’s fighting; it seemed as though he could finally live in peace. It seemed as if he would finally be exonerated

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1. Lance Armstrong, *Exploring the Human Heart*, AWAKIN.ORG (Jan. 24, 2006), <http://www.awakin.org/read/view.php?tid=445>.

2. Terri Lynn Helge, *The Taxation of Cause-Related Marketing*, 85 CHI.-KENT L. REV. 883, 890 (2010).

3. *Lance Armstrong’s Statement*, HERALD SUN, Aug. 24, 2012, <http://www.heraldsun.com.au/sport/lance-armstongs-statement/story-fnecrvvd-1226457391846> [hereinafter *Armstrong’s Statement*].

4. *Id.* “I have been dealing with claims that I cheated and had an unfair advantage in winning (#) [sic] my seven Tours since 1999.”

5. *Id.*

6. Terry Frieden, *Prosecutors Drop Lance Armstrong Doping Investigation*, CNN.COM (Feb. 3, 2012, 8:52 PM), [http://articles.cnn.com/2012-02-03/worldsport/sport\\_lance-armstrong\\_1\\_lance-armstrong-american-tyler-hamilton-doping?\\_s=PM:WORLDSPORT](http://articles.cnn.com/2012-02-03/worldsport/sport_lance-armstrong_1_lance-armstrong-american-tyler-hamilton-doping?_s=PM:WORLDSPORT).

because if the federal government, with its nearly unlimited resources,<sup>7</sup> could not find evidence of doping, then his fight had to be over. He won. He did not dope.

Unfortunately for Lance, Travis Tygart, CEO of USADA,<sup>8</sup> did not share the same feeling. Tygart was able to “piggy-back” off of the federal investigation to start his own “unconstitutional witch hunt.”<sup>9</sup> At its inception, USADA’s investigation appeared like all the rest, but then the whispers started. Lance’s former teammates were testifying under oath to USADA.<sup>10</sup> The testimony of Tyler Hamilton and Floyd Landis was expected, as both had made accusations claiming Lance doped subsequent to their own doping admissions and suspensions.<sup>11</sup> It was also no surprise when Frankie Andreu testified, especially because he had testified against Lance in 2006.<sup>12</sup> However, new names came out—names of former teammates who were still racing, or who had never spoken out before.<sup>13</sup> Yet, the cycling world waited with one question: did George Hincapie testify? Hincapie had testified.<sup>14</sup> Hincapie’s testimony carried great weight because he had raced in all seven of Armstrong’s Tour de France victories and was seen as his right-hand man.<sup>15</sup> It

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7. *Department of Justice: The Federal Budget, Fiscal Year 2012*, WHITEHOUSE.GOV, [http://www.whitehouse.gov/omb/factsheet\\_department\\_justice](http://www.whitehouse.gov/omb/factsheet_department_justice) (last visited Aug. 19, 2013) (indicating that the Department of Justice’s budget is over twenty-eight billion dollars).

8. *U.S. Anti-Doping Agency v. Armstrong*, REASONED DECISION OF THE UNITED STATES ANTI-DOPING AGENCY ON DISQUALIFICATION AND INELIGIBILITY 10 (2012) [hereinafter REASONED DECISION], available at <http://d3epuodzu3wuis.cloudfront.net/ReasonedDecision.pdf>.

9. *Armstrong’s Statement*, *supra* note 3. Armstrong took to referring to the investigation as unconstitutional and even used the hashtag #unconstitutional when tweeting about the topic.

10. REASONED DECISION, *supra* note 8, at iii–iv.

11. *U.S. Anti-Doping Agency v. Hamilton*, AAA No. 30 190 00130 05, at 11 (2005) (Campbell, Arb.); *U.S. Anti-Doping Agency v. Landis*, AAA No. 30 190 00847 06, at 83 (2007) (Brunet, McLaren & Campbell, Arbs.). See also *Tyler Hamilton Aff.* ¶¶ 14–15, 29, 35, 89–90, Sept. 28, 2012 (Hamilton was Armstrong’s teammate for four years); and *Floyd Landis Aff.* ¶ 8, Sept. 26, 2012 (Landis was teammate of Armstrong’s for three years).

12. *Frankie Andreu Aff.* ¶¶ 17, 88–90, Sept. 18, 2012 (Andreu was Armstrong’s teammate for nine years and claimed to have only testified against Armstrong in 2006 out of fear of being held in contempt for violating a subpoena).

13. Michael Barry, who raced with Armstrong for four years, testified. *Michael Barry Aff.* ¶¶ 26, 78, Oct. 8, 2012. Tom Danielson, who raced with Armstrong for one year, testified. *Tom Danielson Aff.* ¶ 41, Sept. 26, 2012. Levi Leipheimer, who raced with Armstrong for three years, testified. *Levi Leipheimer Aff.* ¶ 12, Sept. 21, 2012. Christian Vande Velde, who raced with Armstrong for six years, testified. *Christian Vande Velde Aff.* ¶¶ 15, 133, Sept. 25, 2012. Jonathan Vaughters, who raced with Armstrong for two years, testified. *Jonathan Vaughters Aff.* ¶ 12, Sept. 12, 2012. David Zabriskie, who raced with Armstrong for four years, testified. *David Zabriskie Aff.* ¶¶ 21, 31, Oct. 4, 2012.

14. *George Hincapie Aff.* ¶¶ 1–5, Sept. 24, 2012.

15. Alasdair Fotheringham, *Cycling: George Hincapie’s Confession Will Hurt Lance Armstrong the Most*, THE INDEPENDENT (Oct. 11, 2012), <http://www.independent.co.uk/sport/>

appeared as though Armstrong's fate was sealed. Armed with these affidavits, Tygart officially charged Armstrong with an anti-doping violation.<sup>16</sup> Contrary to a statement earlier in the year, Lance did fight back.<sup>17</sup> This time, instead of fighting USADA on its charges, he tried to fight USADA in federal court.<sup>18</sup> Although the court found aspects of USADA's prosecution troubling, it ultimately dismissed Armstrong's case.<sup>19</sup> Thus, Armstrong had two choices: (1) fight USADA through arbitration; or (2) not fight and accept the charges and a lifetime ban.<sup>20</sup> Armstrong chose the latter.

In a statement, claiming he was done fighting, Armstrong blamed the cumulative effects of the investigations on his family and his work with his cancer foundation as the reasons he was "finished with this nonsense."<sup>21</sup> Armstrong further stated:

If I thought for one moment that by participating in USADA's process, I could confront these allegations in a fair setting and—once and for all—put these charges to rest, I would jump at the chance. But I refuse to participate in a process that is so one-sided and unfair.<sup>22</sup>

After years of viciously fighting allegations,<sup>23</sup> it seemed the once great champion was going out with a whimper rather than a roar; it seemed that Armstrong would go quietly into the night. Did Armstrong really stop because of the toll it had taken on his family?<sup>24</sup> Is the process so one-sided that

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general/others/cycling-george-hincapias-confession-will-hurt-lance-armstrong-the-most-8205986.html.

16. USADA charged Armstrong with: (1) use and/or attempted use of prohibited substances; (2) possession of prohibited substances; (3) trafficking of prohibited substances; (4) administration and/or attempted administration of prohibited substances; (5) assisting, encouraging, aiding, abetting, covering up, and other complicity involving one or more anti-doping rule violations or attempted anti-doping rule violations; and (6) aggravating circumstances. REASONED DECISION, *supra* note 8, at 7–9.

17. See Josh Eells, *Lance's Next Challenge*, MEN'S JOURNAL.COM (May 3, 2012), <http://archive.mensjournal.com/in-the-june-issue-lance-armstrong>. ("In my mind, I'm truly done. You can interpret that however you want. But no matter what happens, I'm finished. I'm done fighting. I've moved on. If there are other things that arise, I'm not contesting anything. Case closed.").

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

19. *Id.* at 590–91. The court also found that Armstrong had not "exhausted his internal remedies, namely the arbitration procedures in the USADA protocol," but if those procedures were "manifestly unjust and devoid of any reasonable legal basis, Armstrong may have a judicial remedy. . . ." *Id.* at 587.

20. Similar to a default and default judgment under the Federal Rules of Civil Procedure. See FED. R. CIV. P. 55.

21. *Armstrong's Statement*, *supra* note 3.

22. *Id.*

23. See *supra* note 4 and accompanying text.

24. It was an expensive fight to stop as Armstrong lost approximately seventy-five million dollars in sponsorships over two days. See *Lance Turns Emotional in part 2*, ESPN (Jan. 22,

Armstrong would not have a fair chance to defend himself?<sup>25</sup> Or did Armstrong just stop fighting because he was guilty and was trying to look for a way out?<sup>26</sup>

The biggest question raised by Armstrong is the question about the one-sided nature of the USADA arbitration process. Despite his admission of guilt, Armstrong's claims about the process remain. This Comment will attempt to explain USADA's arbitration process and why it might cause an athlete to walk away as opposed to staying and fighting the charges. However, this Comment will absolutely not attempt to argue for Armstrong's innocence or exoneration.<sup>27</sup> Rather it will analyze the (one-sided) process USADA uses and offer changes, which would hopefully help to procure rightful decisions based on the merits. Therefore, cases like Armstrong's, where an athlete can simply walk away and blame the process, will be eliminated.

## I. BACKGROUND

### A. *The Lance "Saga"*

#### 1. Pre-Cancer

Lance Armstrong's brazen, defiant, competitive persona has been a lifetime in the making.<sup>28</sup> This persona, combined with natural talent, helped make Armstrong a great competitor from the beginning of his foray into sport. At thirteen years-old, without training, Armstrong entered and won, by a significant margin, his first triathlon.<sup>29</sup> However, endurance sports are so

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2013, 11:34 PM), [http://espn.go.com/sports/endurance/story/\\_/id/8858591/lance-armstrong-says-son-trust-makes-even-sicker](http://espn.go.com/sports/endurance/story/_/id/8858591/lance-armstrong-says-son-trust-makes-even-sicker).

25. See *supra* text accompanying note 22.

26. Armstrong subsequently admitted to doping during his historical run of seven consecutive victories in the Tour de France during an interview with Oprah Winfrey. *Lance Turns Emotional in part 2*, *supra* note 24.

27. I have probably been affected by this controversy more than most. As a member of the Jelly Belly Professional Cycling Team, in 2007, I raced against nearly all the riders who admitted to using drugs and testified against Armstrong. I saw, and *felt*, first-hand the effects that doping products can have on an athlete as I suffered every day, on two different continents, racing as a clean rider against dopers. I have no sympathy for these men who cheated me and many others out of money and our dreams of having a career as a professional cyclist. However, I feel the adjudicative process for doping offenses should be fair, just as a criminal trial should be fair no matter how heinous the crime the defendant is accused of is.

28. As a child Armstrong created a game called "fireball." The game consisted of lighting a tennis ball on fire and playing catch with it. The goal was to throw it before it burned through the gardening gloves he was wearing. Ironically it is a metaphor for his career of avoiding anti-doping controls. LANCE ARMSTRONG & SALLY JENKINS, *IT'S NOT ABOUT THE BIKE: MY JOURNEY BACK TO LIFE* 25–26 (2000).

29. *Id.* at 23–24.

difficult that natural talent alone is insufficient; an athlete must also have psychological strength. Armstrong's mental toughness, like his natural talent, blossomed at a young age.<sup>30</sup> Within two years of his first triathlon victory, Armstrong was achieving results against professionals, and developing a name racing bikes, beating older, more experienced racers.<sup>31</sup>

It did not take long for Armstrong's success in Texas to transfer to the international level. In 1990, Armstrong was selected to race the Junior World Championships in Moscow and was thought to be one of the best young cyclists in years.<sup>32</sup> This strong performance earned Armstrong a spot on the United States National Team, during which time he became the first American to ever win the prestigious Italian stage race *Settimana Bergamasca*.<sup>33</sup> This earned Armstrong a spot on the 1992 Olympic Team in Barcelona, where he finished a disappointing fourteenth place.<sup>34</sup> Although Armstrong was disappointed, his performance was strong enough that the Motorola Professional Cycling team immediately signed him to a professional contract.<sup>35</sup> However, Armstrong's first professional race was more of a baptism by fire—he finished dead last, and thought about quitting, but he remembered his mom telling him, "Son, you never quit," and at the next race Armstrong finished in second place.<sup>36</sup>

It was not long before Armstrong was winning on the professional scene. In the summer of 1993 Armstrong won a one million dollar bonus for winning the Triple Crown of Cycling in the United States, and in July followed that with his first of many Tour de France stage wins.<sup>37</sup> However, the soon to be seven-time Tour de France winner had to quit that Tour on the twelfth stage because his body was just not ready for the rigors of such a difficult race.<sup>38</sup>

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30. This was in large part due to his mother. *See id.* at 27. Armstrong watched his mother struggle with a divorce and as a single mom. His mother also struggled with her job, but when Armstrong asked her about quitting she said, "Son, you never quit." *Id.*

31. This is more impressive because Armstrong was only fifteen years old and he had to doctor his birthday because the minimum age to race with the professionals was sixteen. *Id.* at 28–29.

32. *Id.* at 36–37.

33. ARMSTRONG & JENKINS, *supra* note 28, at 47–48, 50.

34. *Lance Armstrong Fast Facts*, CNN.COM (Apr. 26, 2013, 6:55 PM), <http://www.cnn.com/2013/01/17/us/lance-armstrong-fast-facts> [hereinafter *Lance Facts*].

35. In 1992 Olympic bike racing was still only for amateurs so Lance decided to wait until after the Olympic Games to turn professional. ARMSTRONG & JENKINS, *supra* note 28, at 50.

36. *Id.* at 27, 52–53.

37. *Id.* at 60–61. The Triple Crown was a series of three races that included a one-day race in Pittsburgh, a six-day race in West Virginia, and culminated with the United States Professional National Championships in Philadelphia. The one million dollar bonus was for a rider who could "sweep" all three races. *Id.* at 60.

38. *Id.* at 61. Additionally, upon his withdrawal from the race Armstrong told reporters that the Alps were "too long and too cold." *Id.*

Undeterred, Armstrong won the Professional World Championship only a few months later.<sup>39</sup> From that point forward Armstrong's career was on an upward trajectory—he had several podiums in 1994, and in 1995 he returned to win the Clásica San Sebastián and another stage of the Tour de France.<sup>40</sup> Armstrong was on the precipice of becoming a great champion, and then the devastating news came.

## 2. Cancer

A cancer diagnosis is devastating for anyone. The diagnosis raises a myriad of questions in the mind of the patient and those who love him. These questions take on a very different tone when one of the best athletes in the world, entering the prime of his career, is diagnosed. This was the case on October 2, 1996 when Lance Armstrong, only twenty-five years old, was diagnosed with testicular cancer with less than a forty-percent chance of survival.<sup>41</sup> By the time Armstrong went to the doctor his testicle was three times the normal size and hard to touch.<sup>42</sup> At this point the cancer was not only in Armstrong's testicle, it had also spread to his lungs and his brain.<sup>43</sup> Armstrong was convinced he was done racing, but was determined to fight the disease and win.<sup>44</sup> Fortunately, Armstrong's career was not over because his oncologist tailored his treatment to allow a return to the bike.<sup>45</sup> However, a return to racing was the last thing on Armstrong's mind, as his chemotherapy felt like a "living death."<sup>46</sup> But the pain paid off, and three months after his diagnosis Armstrong's cancer markers were back to normal.<sup>47</sup> Armstrong was healthy.

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39. *Id.* at 62–64.

40. ARMSTRONG & JENKINS, *supra* note 28, at 67. Armstrong also finished his first Tour de France under sad circumstances. His teammate and friend, Fabio Casartelli, crashed and died on a descent two days before his stage win, making the win even more special. *Id.*

41. *Id.* at 2; *Lance Facts*, *supra* note 34.

42. It seems odd that someone dependent on their body to make a living would allow an ailment to get so bad. However, cyclists are in the "business of denial" and deny all aches and pains since the sport is based on self-abuse. ARMSTRONG & JENKINS, *supra* note 28, at 5, 10.

43. *Id.* at 98, 107 (Armstrong had twelve tumors in his chest ranging from "speck" to "2.7 centimeters" in size. There were also two tumors on his brain. Armstrong's oncologist stated his cancer was in the worst three percent of cases the doctor had ever seen, and additionally, a doctor told one of Armstrong's friends, "[Y]our friend is dead," after hearing the diagnosis.). *See also Lance Facts*, *supra* note 34.

44. ARMSTRONG & JENKINS, *supra* note 28, at 76, 85. During chemotherapy Armstrong would go for walks and bike rides because he thought, "[I]f I could continue to pedal a bike, somehow I wouldn't be so sick." *Id.* at 87–89.

45. *Id.* at 108. Although his highest priority was to live, Armstrong was stunned to learn of the possibility of a return to the bike. *Id.*

46. *Id.* at 135.

47. *Id.* at 160.

### 3. LIVESTRONG

During his treatment Armstrong recognized the lack of resources for people affected by cancer, and decided to start a foundation.<sup>48</sup> Armstrong felt that he had a mission and purpose to help those who were fighting the same disease, and asking the same question: “Am I going to die?”<sup>49</sup> Armstrong contacted his agent to start researching how to start a foundation, but he knew his case was a *cause célèbre*, and he did not want the foundation to be his pulpit, but wanted to use the foundation to tell people, “Fight like hell, just like I did.”<sup>50</sup> That is what the LIVESTRONG foundation (formerly the Lance Armstrong Foundation) has done.<sup>51</sup> Armstrong’s foundation has raised nearly five hundred million dollars and given money to over five hundred cancer survivorship groups.<sup>52</sup> In addition to the money raised, this work, for a cause that affects so many people,<sup>53</sup> has gained Armstrong an untold amount of goodwill with the public.

### 4. Post-Cancer

Once Armstrong fully recovered from the effects of the chemotherapy, he was ready to return to professional racing. However, Armstrong did not have a team.<sup>54</sup> It is generally easy for a world champion and a winner of multiple stages of the Tour de France to find a new team, but no big European teams wanted him.<sup>55</sup> Luckily for Armstrong, the United States Postal Service (USPS), an American funded organization, stepped in and offered Armstrong an incentive-laden contract.<sup>56</sup> In his first race with USPS, his first professional race in eighteen months, Armstrong finished a surprising fourteenth place and caused a stir in the cycling world.<sup>57</sup> However, two weeks later, in a cold race

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48. *Our Founder*, LIVESTRONG FOUNDATION, <http://www.livestrong.org/Our-Founder> (last visited Aug. 21, 2013).

49. ARMSTRONG & JENKINS, *supra* note 28, at 156.

50. *Id.* at 156–57.

51. *Our Founder*, *supra* note 48.

52. *Financial Information*, LIVESTRONG FOUNDATION, <http://www.livestrong.org/Who-We-Are/Our-Strength/Financial-Information> (last visited Aug. 21, 2013).

53. *See Cancer Prevalence: How Many People Have Cancer?*, AMERICAN CANCER SOCIETY, [www.cancer.org/cancer/cancerbasics/cancer-prevalence](http://www.cancer.org/cancer/cancerbasics/cancer-prevalence) (last visited Aug. 21, 2013).

54. *See* ARMSTRONG & JENKINS, *supra* note 28, at 141–42, 144 (Prior to his diagnosis Armstrong had signed a multi-year, multi-million dollar contract with the French team Cofidis, but during Armstrong’s chemotherapy Cofidis forced him to renegotiate his contract or risk having it cancelled. In the end, Cofidis only ended up paying Armstrong one-third of this contract value.).

55. *Id.* at 181 (Armstrong’s agent was asking teams for \$500,000 a year and was told that is a champions wage.).

56. *See id.* at 183–84 (USPS offered Armstrong \$215,000 per year and incentives for how many points he earned from races on the international calendar.).

57. *Id.* at 189.

with the rain “spit[ting] sideways,” Armstrong’s comeback nearly came to an end on the roads of France.<sup>58</sup> He quit the race, and returned to America ready to live a normal life—a different life from than that of a cyclist.<sup>59</sup>

This quasi-retirement was short-lived for Armstrong, and by the summer he was ready to race again. Although Armstrong skipped the Tour de France, not feeling quite prepared, he won a major race in Luxembourg.<sup>60</sup> That success was followed by placing fourth overall at the Vuelta a España, nearly two years to the day of his diagnosis.<sup>61</sup> Armstrong was back, and he had his sights set firmly on the 1999 Tour de France.<sup>62</sup>

Armstrong approached his first attempt at winning the Tour de France in a way no other rider had before.<sup>63</sup> This approach drew questions when Armstrong did not race the major spring races, the monuments of the sport, but instead spent time training for the Tour in the Pyrenees.<sup>64</sup> Not only was Armstrong committed to the Tour de France, but all of his teammates, which included Frankie Andreu, Tyler Hamilton, George Hincapie, Christian Vande Velde, and Jonathan Vaughters, were committed to the goal of winning the Tour.<sup>65</sup> All of the preparation paid off, and on the first day in the mountains, the Alpine climb to Sestrière, Italy, Armstrong won in dominant fashion.<sup>66</sup> Unlike early in his career where the climbs in the Alps were too long, now Armstrong felt as though he could climb them on a “damn tricycle.”<sup>67</sup> After his dominant display on the climb to Sestrière, Armstrong went on to win the 1999 Tour de France and became only the second American to ever win the race.<sup>68</sup> This victory was the first in an unprecedented run of seven consecutive Tour

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58. *Id.* at 189–90.

59. ARMSTRONG & JENKINS, *supra* note 28, at 190, 192. Armstrong thought, “This is not how I want to spend my life, freezing and soaked and in the gutter.” *Id.* at 190 (emphasis omitted).

60. *Id.* at 205.

61. *Id.* at 206. The Vuelta was a 2348-mile race over twenty-three days, raced in Spain (Spain’s version of the Tour de France). *Id.*

62. *Id.* at 207.

63. REASONED DECISION, *supra* note 8, at 21 (Armstrong planned to avoid most of the races before the Tour).

64. ARMSTRONG & JENKINS, *supra* note 28, at 222.

65. All these riders testified against Armstrong during USADA’s investigation. *See supra* text accompanying note 10. *See also* ARMSTRONG & JENKINS, *supra* note 28, at 220, 222 (Additionally, Armstrong’s doctors, the men who stole him from the grave, not only thought he could win, but expected him to win.).

66. REASONED DECISION, *supra* note 8, at 34.

67. ARMSTRONG & JENKINS, *supra* note 28, at 245; *supra* note 38 and accompanying text.

68. ARMSTRONG & JENKINS, *supra* note 28, at 258; Samuel Abt, *CYCLING; Armstrong Wins Tour and Journey*, N.Y. TIMES, July 26, 1999, <http://www.nytimes.com/1999/07/26/sports/cycling-armstrong-wins-tour-and-journey.html?pagewanted=all&src=pm>.

de France victories.<sup>69</sup> However, this dominant performance stirred accusations that would follow Armstrong the rest of his career.<sup>70</sup>

The accusations against Armstrong started after his win in Sestrière.<sup>71</sup> However, Armstrong could not understand the suspicion, because he claimed he had nothing to hide and the drug tests proved it.<sup>72</sup> Furthermore, less than three years prior, Armstrong had been on his deathbed, and stated it would be stupid to use drugs because of the damage they could cause.<sup>73</sup> At the time, Armstrong lived in France, and under the law the police could have raided his house at any time with no warrant or notice to search for drugs, which made doping an unreasonable risk for him.<sup>74</sup> To answer the accusations, Armstrong attributed the performance to his fitness, the conditions, and “sheer exultation in being alive.”<sup>75</sup> Also, in response to the critics he defiantly stated:

I can emphatically say I am not on drugs, . . . I thought a rider with my history and my health situation wouldn't be such a surprise. I'm not a new rider. I know there's been looking, and prying, and digging, but you're not going to find anything. There's nothing to find . . . and once everyone has done their due diligence and realizes they need to be professional and can't print a lot of crap, they'll realize they're dealing with a clean guy.<sup>76</sup>

But the accusations did not subside. Instead, they got stronger and started to come from unexpected people and places. The most influential voice of accusation came from American Greg LeMond, himself a three-time Tour de France champion.<sup>77</sup> LeMond was suspicious of the sport in general after he noticed a drastic increase in speed in 1991, following his third Tour victory.<sup>78</sup> LeMond was skeptical that Armstrong's improvements were from an increase in his VO<sub>2</sub> Max, because it had not changed that much.<sup>79</sup> Moreover, LeMond did not believe the theory of Professor Ed Coyle of the University of Texas at Austin, which hypothesized that muscle adaptation and weight loss led to an eighteen percent improvement for Armstrong.<sup>80</sup> LeMond found himself fully

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69. *Armstrong's Statement*, *supra* note 3.

70. ARMSTRONG & JENKINS, *supra* note 28, at 247.

71. It is almost a tradition in the sport of cycling that a rider with a dominant performance is under suspicion. The French press even postulated that a chemical from Armstrong's chemotherapy benefitted him on the bike. *Id.*

72. *Id.* See also REASONED DECISION, *supra* note 8, at 37.

73. ARMSTRONG & JENKINS, *supra* note 28, at 251.

74. *Id.* at 253.

75. *Id.* at 248.

76. *Id.* at 251.

77. Maureen A. Weston, *Doping Control, Mandatory Arbitration, and Process Dangers for Accused Athletes in International Sports*, 10 PEPP. DISP. RESOL. L.J. 5, 35 (2009).

78. DAVID WALSH, FROM LANCE TO LANDIS 179–80 (2007).

79. *Id.* at 183. VO<sub>2</sub> Max is a measure of the maximal rate of oxygen consumption by the body.

80. *Id.* at 183, 285.

amongst the Armstrong doubters when he learned of Armstrong's relationship with the notorious Dr. Ferrari.<sup>81</sup> LeMond expressed disappointment in the Armstrong-Ferrari relationship and stated, "[I]t was because of doctors like Ferrari that cycling's image was so bad."<sup>82</sup> When he was pushed further, LeMond stated, "If [Armstrong's story] is true . . . it is the greatest comeback in the history of sport. If it is not, it is the greatest fraud."<sup>83</sup>

Just like that Armstrong had been called out by the greatest American bike racer ever.<sup>84</sup> However, it did not last long because Armstrong went on the attack. LeMond claimed that Armstrong threatened to get ten people to say that LeMond doped during his Tour wins.<sup>85</sup> In response to LeMond's comments, it was made known to him by Trek Bicycles (Armstrong's sponsor) that without a retraction Trek would end its contract with LeMond's bicycle company.<sup>86</sup> Feeling threatened, LeMond quickly retracted his comments and issued an apology to Armstrong in *USA Today*.<sup>87</sup>

Another major accusation came from David Walsh in the form of the book *L.A. Confidential: les secrets de Lance Armstrong*, written in 2004, which raised issues about Armstrong doping.<sup>88</sup> Armstrong confronted the accusations saying he was tired of the allegations and that "we're going to do everything we can to fight them."<sup>89</sup> Armstrong's battle with Walsh's book carried over to the 2004 Tour de France, when he stated, "[E]xtraordinary accusations must be followed up with extraordinary proof," of which he stated there was none.<sup>90</sup>

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81. Teri Thompson et al., *Victims of Lance Armstrong's Strong-Arm Tactics Feel Relief and Vindication in the Wake of U.S. Anti-Doping Agency Report*, NYDAILYNEWS.COM (Oct. 20, 2012, 10:34 PM), <http://www.nydailynews.com/sports/more-sports/zone-lance-armstrong-bully-downfall-article-1.1188512>. This news came out in 2001 two months prior to Ferrari's trial for doping charges.

82. WALSH, *supra* note 78, at 185.

83. *Id.*

84. See Emily Hammond, *Government Liability When Cyclists Hit the Road: Same Roads, Same Rights, Different Rules*, 35 GA. L. REV. 1051, 1051 n.2 (2001).

85. WALSH, *supra* note 78, at 186. LeMond was incredulous at the threat because he had won the Tour de France in 1986—before r-EPO entered cycling and it was after the drug's arrival that LeMond had problems competing.

86. *Id.* at 190; see also REASONED DECISION, *supra* note 8, at 35 (showing that it was typical for Armstrong to go on the offensive and bully others when they questioned, just like he had done during the 1999 Tour de France when Frenchman Christophe Bassons spoke skeptically of Armstrong's performance.).

87. Thompson et al., *supra* note 81.

88. WALSH, *supra* note 78, at 210–11.

89. *Id.* at 211–12. Subsequently, Armstrong filed lawsuits against the *Sunday Times* (for printing an excerpt from the book) in London and against the book's authors, publisher, and *L'Express* magazine in Paris. The judge presiding over the case in France ruled against Armstrong and fined him 1800 euro for "an abuse of the legal process." *Id.* at 212–13.

90. *Id.* at 214.

The biggest test to Armstrong's story of cleanliness came in the form of a lawsuit with SCA Productions (SCA). The USPS team ownership bought an insurance policy to cover payments totaling \$9,500,000 to Armstrong if he won the Tour in 2001–2004.<sup>91</sup> SCA wanted time to research the accusations in Walsh's book before it paid Armstrong his \$5,000,000 bonus for winning his sixth consecutive Tour de France in 2004, and Armstrong filed a suit to compel payment.<sup>92</sup> Prior to the trial, SCA deposed Betsy Andreu, wife of Armstrong's former teammate Frankie Andreu, who said that Armstrong admitted to use of performance enhancing drugs (PEDs) to his cancer doctors in 1996.<sup>93</sup> Later, in his own sworn deposition, Armstrong "100 percent, absolutely" denied Andreu's statement and emphatically denied ever using PEDs.<sup>94</sup> Ironically, at the same time, LIVESTRONG, Armstrong's foundation, established an endowment in oncology at Indiana University, where he was treated, at a cost of \$1,500,000 and claimed it had nothing to do with the suit.<sup>95</sup> However, Andreu's claims could not be quashed by a donation and could be viewed as a distant proximate cause to what came eight years later when USADA brought its formal charges against Lance Armstrong.

## B. USOC/USADA

### 1. Authorization for USOC

The modern day United States Olympic Committee (USOC) was re-born in 1978.<sup>96</sup> This re-birth came in the form of the Ted Stevens Olympic and Amateur Sports Act (Sports Act).<sup>97</sup> It was more of a re-birth because the USOC was originally created in 1896.<sup>98</sup> At its inception the USOC was created to be the United States' representative to the International Olympic Committee.<sup>99</sup> Unfortunately, over time, factional disputes arose amongst the forty-one organizations that comprised the USOC.<sup>100</sup> Accordingly, in 1975, the President's Commission on Olympic Sports (the Commission) was established to determine the best means of correcting the disputes and disorganization that

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91. *Id.* at 250–51. SCA underwrites the risk taken by organizations for various one-off payments. *Id.* at 250–51.

92. *Id.* at 252.

93. REASONED DECISION, *supra* note 8, at add. pt. two 2–3.

94. WALSH, *supra* note 78, at 268. Armstrong, in typical fashion, blamed malice in the heart of Betsy Andreu for the comments and her testimony.

95. *Id.* at 271.

96. H.R. REP. NO. 95-1627, at \*8 (1978) [hereinafter REPORT].

97. 36 U.S.C § 220501(a) (2006).

98. REPORT, *supra* note 96, at \*8.

99. *Id.*

100. *Id.*

existed.<sup>101</sup> The Commission favored a vertical sports structure, where the USOC would serve as the coordinating body for the country's various amateur sports organizations.<sup>102</sup> Additionally, the Commission desired a means for "swift resolution of conflicts" between athletes, national governing bodies, and amateur sports organizations.<sup>103</sup> However, it was made clear by the Commission that the federal government was not to be the director of amateur sports in this country.<sup>104</sup> Therefore, the Commission asked Congress to legislate its recommendation by amending the USOC charter.<sup>105</sup>

The legislated recommendations of the Commission took the form of the Sports Act.<sup>106</sup> The Sports Act was to cover any "amateur athlete" who "[met] the eligibility standards established by the national governing body. . . ."<sup>107</sup> The Sports Act also covered "amateur athletic competition[s]" in which "amateur athletes compete."<sup>108</sup> Furthermore, and in direct response to the Commission, the Sports Act was enacted to allow the USOC to provide "swift resolution of conflicts and disputes" between athletes, governing bodies, and amateur sports organizations.<sup>109</sup> Moreover, the Sports Act sought to protect the opportunity of all athletes to participate in competition.<sup>110</sup> Accordingly, the USOC was granted the power to facilitate the resolution of conflicts that arise through "orderly and effective administrative procedures."<sup>111</sup> Thus, the ability of the USOC to resolve disputes was effectuated.

This left the problem of disorganization to be resolved by the Commission. The Commission suggested the statute allow the USOC to induce organizations to belong to the national governing bodies.<sup>112</sup> While the Sports

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101. *Id.*

102. *Id.* at \*9.

103. REPORT, *supra* note 96, at \*9.

104. *Id.*

105. *Id.*

106. 36 U.S.C. § 220501(a) (2006).

107. 36 U.S.C. § 220501(b)(1). Armstrong is considered amateur under the statute because cycling is regulated by USA Cycling, a national governing body under the USOC. *See Amended and Restated Bylaws of USA Cycling, Inc.*, USA CYCLING, <https://s3.amazonaws.com/USACWeb/forms/election/USACBylaws-2011.pdf> (last visited Aug. 23, 2013). The irony of the term "amateur" being used to describe Armstrong, who was set to earn fifteen to twenty million dollars a year the next ten years, is not lost on many. *See* Patrick Rishe, *Armstrong Will Lose \$150 Million in Future Earnings After Nike And Other Sponsors Dump Him*, FORBES (Oct. 18, 2012, 9:23 AM), <http://www.forbes.com/sites/prishe/2012/10/18/nike-proves-deadlier-than-cancer-as-armstrong-will-lose-150-million-in-future-earnings/>.

108. *See* 36 U.S.C. § 220501(b)(2) ("'[A]mateur athletic competition' means a contest, game, meet, match, tournament, regatta, or other event in which amateur athletes compete.").

109. 36 U.S.C. § 220503(8); REPORT, *supra* note 96, at \*9.

110. 36 U.S.C. § 220503(8).

111. 36 U.S.C. § 220505(c)(5). The Sports Act also states that the means of resolving these conflicts should be "swift and equitable." 36 U.S.C. § 220509(a).

112. REPORT, *supra* note 96, at \*9.

Act did not directly enable the USOC to induce organizations, it does give the USOC the ability to recognize amateur sports organizations as national governing bodies.<sup>113</sup> Additionally, the USOC was given the power to resolve disputes amongst athletic organizations.<sup>114</sup> The Sports Act uses the combination of centralized power and dispute resolution to solve the pre-existing problem of disorganization.

For an organization to be named the national governing body of a sport it must meet the statutory eligibility requirements.<sup>115</sup> Among the several requirements to be met, an organization must be autonomous in its governance of its sport, be a member of no more than one international sports federation for its sport, make its membership open to anyone, and provide procedures for the prompt and equitable resolution of grievances of its members.<sup>116</sup> Additionally, in keeping with the Commission's desire for the swift resolution of disputes, the statute requires that an organization agree to submit to binding arbitration in any controversy involving the opportunity of an athlete to compete.<sup>117</sup> This requirement is especially significant because the statute gives national governing bodies the authority to establish "procedures for determining eligibility standards for participation in competition."<sup>118</sup> Thus, the organization in charge of cycling has the ability to determine if an athlete can compete, but the organization must adhere to the binding arbitration clause of the Sports Act.

The International Olympic Committee has made cycling an Olympic sport for as long as the modern Olympic Games have existed.<sup>119</sup> The Sports Act gives the USOC the right to exercise exclusive jurisdiction over "all matters pertaining to United States participation in the Olympic Games."<sup>120</sup> Consequently, the USOC, by statute, can recognize a national governing body for the sport of cycling.<sup>121</sup> That national governing body is USA Cycling.<sup>122</sup> Thus, USA Cycling must comply with all the requirements that the Sports Act places on a national governing body.<sup>123</sup> These requirements are especially

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113. *Id.* at \*11.

114. 36 U.S.C. § 220505(c)(5).

115. 36 U.S.C. § 220522(a).

116. 36 U.S.C. §§ 220522(a)(5)–(7), (13).

117. 36 U.S.C. § 220522(a)(4)(B).

118. 36 U.S.C. § 220523(a)(5).

119. *Cycling Road Equipment and History*, OLYMPIC.ORG, <http://www.olympic.org/cycling-road-equipment-and-history?tab=history> (last visited Aug. 23, 2012) ("[C]ycling is among the rare sports that ha[s] always featured on the Olympic programme.") .

120. 36 U.S.C. § 220503(3)(A).

121. 36 U.S.C. § 220505(c)(4).

122. *Amended and Restated Bylaws of USA Cycling, Inc.*, *supra* note 107.

123. *Id.*

pertinent in determining the eligibility of athletes to compete in the sport of cycling.

USA Cycling's code of conduct states that the "privilege of membership" may be withdrawn at any time when a "member's conduct is inconsistent with the mission of the organization."<sup>124</sup> The key provision here is eligibility in light of a doping violation.<sup>125</sup> The rules essentially make the violation of anti-doping policies set forth by USADA or the World Anti-Doping Association (WADA) a *prima facie* case for a violation of the code of conduct.<sup>126</sup> This policy advances USA Cycling's "zero-tolerance" policy in regards to doping in cycling.<sup>127</sup> In furtherance of this policy USA Cycling adopted the USADA protocol for Olympic Movement testing.<sup>128</sup> In adopting this policy USA Cycling caused the medical control regulations of USADA to be applied to all of its members.<sup>129</sup> Additionally, USA Cycling has made its testing procedures, results and evidence, and dispositions of doping violations those of USADA.<sup>130</sup> Therefore, violations of USADA's policies will violate the rules of USA Cycling and affect a member's eligibility to compete.<sup>131</sup>

## 2. USADA

USADA is the National Anti-Doping Organization for the United States under WADA and is charged with implementing WADA's Code for anti-doping.<sup>132</sup> WADA came into being in 1999 after the "First World Conference on Doping in Sport."<sup>133</sup> The catalyst for the creation of WADA was the doping scandal at the 1998 Tour de France, which demonstrated the need for an

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124. See USA CYCLING, 2013 USA CYCLING RULE BOOK 232 (2013) [hereinafter RULE BOOK] ("The mission of USA Cycling is to encourage participation and the pursuit of excellence in all aspects of bicycling.").

125. *Id.*

126. *Id.*

127. *Id.* at 237 ("Fair play is paramount in maintaining the integrity of bicycle racing and the athletes who participate in it at any level and discipline. USA Cycling is committed to working with the United States Olympic Committee, the UCI, the U.S. Anti-Doping Agency, and the World Anti-Doping Agency to ensure a level playing field for all of our athletes.").

128. *Id.*

129. RULE BOOK, *supra* note 124, at 237.

130. *Id.* at 238.

131. *Id.* ("Any investigation, prosecution, and hearings shall be the responsibility of the United States Anti-Doping Agency (USADA). USA Cycling shall impose any sanction from the adjudication process when permitted under the USADA protocol and in accordance with the UCI approved sanctions.").

132. *United States Anti-Doping Agency Protocol For Olympic And Paralympic Movement Testing*, USADA 2 (Jan. 1, 2009), <http://www.usada.org/files/pdfs/usada-protocol.pdf> [hereinafter *Protocol*].

133. *A Brief History of Anti-Doping*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/About-WADA/History/A-Brief-History-of-Anti-Doping/> (last visited Aug. 25, 2013).

independent international agency to “set unified standards for anti-doping work and coordinate the efforts of sports organizations and public authorities.”<sup>134</sup> USADA comes under WADA’s code as a national anti-doping organization, and is given testing jurisdiction over athletes in its respective country.<sup>135</sup> Thus, according to WADA’s code, USADA’s role, in part, is to protect athletes’ “fundamental right to participate in doping-free sport.”<sup>136</sup>

USADA does not come under the auspices of any organization other than being the national anti-doping organization for WADA.<sup>137</sup> USADA is an “independent legal entity not subject to the control of the United States Olympic Committee.”<sup>138</sup> USADA contracted with the USOC to administer testing, manage the results of testing, and investigate “potential violations of anti-doping rules” for participants in the Olympic movement.<sup>139</sup> Additionally, USADA is charged with adjudicating disputes that involve anti-doping violations.<sup>140</sup> The participants, or athletes, that are subject to testing by USADA have been authorized by the USOC, national governing bodies, and the WADA Code.<sup>141</sup> The athletes that have been authorized to be tested, amongst others, are athletes licensed under a national governing body, or any athlete competing in an event sanctioned by a national governing body.<sup>142</sup> Thus, as the national governing body for cycling, USA Cycling is authorized to test licensed cyclists pursuant to the WADA Code under the Sports Act.

When an athlete is tested the sample is divided into two samples labeled “A” and “B.”<sup>143</sup> After testing the “A-sample” of an athlete, USADA will send a report of a negative finding to all parties concerned.<sup>144</sup> However, if the report comes back with an “Adverse Analytical Finding” USADA will promptly

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134. *Id.* The 1998 Tour de France scandal surrounded the Festina Pro Cycling team and its “‘concerted’ practice of providing drugs to Festina cyclists that ran the chain of command within the team, from director to cyclists.” *Out of the Race: Festina Team Expelled from Tour in Drug Scandal*, CNN SPORTS ILLUSTRATED (July 17, 1998, 6:30 PM), [http://sportsillustrated.cnn.com/cycling/1998/tourdefrance/news/1998/07/17/festina\\_expelled/](http://sportsillustrated.cnn.com/cycling/1998/tourdefrance/news/1998/07/17/festina_expelled/).

135. *World Anti-Doping Code*, WORLD ANTI-DOPING AGENCY 37, <http://www.wada-ama.org/en/world-anti-doping-program/sports-and-anti-doping-organizations/the-code/> (last visited Aug. 25, 2013).

136. *Id.* at 11.

137. *Protocol*, *supra* note 132, at 2.

138. *Id.*

139. *Id.*

140. *Id.* This process of adjudication meets the provision of the USOC—to maintain provisions for swift and equitable resolution of disputes. 36 U.S.C. § 220509(a) (2006).

141. *Protocol*, *supra* note 132, at 2.

142. *Id.*

143. *Sample Collection Process for Urine Testing*, USADA, <http://www.usada.org/urine/> (last visited Aug. 25, 2013).

144. *Protocol*, *supra* note 132, at 6.

notify the athlete, USOC, and the national governing body.<sup>145</sup> At this point the athlete will be notified of the date on which his “B-sample” will be tested.<sup>146</sup> When the “B-sample” is tested the athlete has the option to attend with a representative or have a representative attend on his behalf.<sup>147</sup> Alternatively, if USADA determines that an athlete may have committed an anti-doping violation other than a positive test it may take action against the athlete.<sup>148</sup> Upon receipt of a “B-sample” that confirms the adverse finding of the “A-sample,” or a determination of a non-positive test anti-doping violation (non-analytical adverse finding), USADA shall convene a review board where the board will only use written submissions when deciding if USADA has established a violation to its “comfortable satisfaction.”<sup>149</sup> The board will then make a recommendation to either close the case or bring charges against the athlete.<sup>150</sup> Finally, if charges are brought, the athlete will have a hearing before the American Arbitration Association (AAA), which is binding per the Sports Act.<sup>151</sup>

### C. Arbitration of Doping Claims

In 1998 the Sports Act reiterated the use of arbitration in the resolution of disputes relating to Olympic and amateur sports.<sup>152</sup> With the passage of the Sports Act the USOC called for arbitration in disputes centered on an athlete’s eligibility.<sup>153</sup> The USOC provided that the AAA would administer this process following the Commercial Arbitration Rules.<sup>154</sup> The process is specifically administered through the Supplementary Procedures for the Arbitration of

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145. *Id.*

146. *Id.* The “B-sample” is tested to confirm the results of the adverse analytical finding of the “A-sample.” *Id.*

147. *Id.*

148. *Id.* at 7. USADA defines doping as the occurrence of one or more of the following: (1) presence of a prohibited substance or its metabolites or markers in an athlete’s sample; (2) use or attempted use of a prohibited substance or method; (3) refusing or failing to submit a sample after notification; (4) violating requirements regarding availability for out-of-competition testing; (5) tampering or attempted tampering with doping control; (6) possession of prohibited substance or methods; (7) trafficking or attempted trafficking of prohibited substances or methods; and, (8) any type of complicity involving an anti-doping rule violation or attempted violation. *Id.* at 17–21.

149. *Protocol, supra* note 132, at 9–10, 21. However, “[n]otwithstanding the forgoing, the process before the Review Board shall not be considered a ‘hearing.’” *Id.* at 10.

150. *Id.* at 10.

151. *Id.*; 36 U.S.C. § 220522(a)(4)(B) (2006).

152. *Sports Arbitration including Olympic Athlete Disputes*, AMERICAN ARBITRATION ASSOCIATION 1, [http://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_004199](http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004199) (last visited Aug. 25, 2013).

153. *Id.*

154. *Id.*

Olympic Sport Doping Disputes (Supplementary Procedures).<sup>155</sup> The Supplementary Procedures apply to arbitrations which arise from USADA Protocol, and where the Commercial Arbitration Rules conflict with the Supplementary Procedures the latter “shall control.”<sup>156</sup> However, the Supplementary Procedures do not introduce a burden of proof, but AAA Dispute Resolution Board Hearing Rules and Procedures do.<sup>157</sup> These procedures do not bind the arbitration to the judicial burden of proof, and thus, the Supplementary Procedures do not follow it either.<sup>158</sup>

The proceedings under the Supplementary Procedures are initiated by USADA.<sup>159</sup> USADA initiates the proceedings by sending notice, which must set forth the offense and the sanction, to the athlete charged with an anti-doping violation.<sup>160</sup> Once initiated, the proceedings shall be heard by one arbitrator, unless one party elects to have a panel of three arbitrators within five days of the initiation.<sup>161</sup> If one party elects to have a panel of three arbitrators USADA will delegate one arbitrator, the athlete will delegate another arbitrator, and the two chosen arbitrators will select the third arbitrator.<sup>162</sup> A party may object to the jurisdiction of an arbitrator; however, the arbitrator “shall have the power to rule on his or her own jurisdiction” to hear the case.<sup>163</sup> Moreover, the arbitration is permitted to proceed in the absence of any party, but the party who is present still must present such evidence as is required by the arbitrator to make a ruling.<sup>164</sup>

Once the number of arbitrators is set and the actual arbitrator(s) determined, the parties *may* exchange information.<sup>165</sup> “At the request of any party or the discretion of the arbitrator . . . the arbitrator may direct (i) the production of documents and other information, and (ii) the identification of

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155. *Id.* at 4.

156. *American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes*, AMERICAN ARBITRATION ASSOCIATION R-1 (May 1, 2009), [http://www.adr.org/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg\\_004136-1.pdf](http://www.adr.org/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004136-1.pdf) [hereinafter *Arbitration*].

157. *AAA Dispute Resolution Board Hearing Rules and Procedures*, AMERICAN ARBITRATION ASSOCIATION 9.0 (Dec. 1, 2000), [http://www.adr.org/cs/groups/construction/documents/document/dgdf/mda0/~edisp/adrstg\\_004229.pdf](http://www.adr.org/cs/groups/construction/documents/document/dgdf/mda0/~edisp/adrstg_004229.pdf).

158. *Id.*

159. *Arbitration*, *supra* note 156, at R-4.

160. *Id.*

161. *Id.* at R-11(b). “AAA shall send simultaneously to each party to the dispute an identical list of all names of persons in the Arbitrator Pool.” *Id.* at R-11(a).

162. *Id.* at R-11(d)(i)–(ii).

163. *Id.* at R-7(a). “A party must object to the jurisdiction of the arbitrator . . . no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection.” *Id.* at R-7(c).

164. *Arbitration*, *supra* note 156, at R-26.

165. *Id.* at R-18.

any witnesses to be called.”<sup>166</sup> Otherwise, parties need only exchange documents they plan to submit as exhibits more than five days before the hearing.<sup>167</sup> The conduct of the proceeding begins, generally, with USADA presenting the evidence supporting its claim followed by the accused presenting evidence supporting its defense.<sup>168</sup> As evidence supporting a party’s claim, the arbitrator “may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to . . . .”<sup>169</sup> Furthermore, “[c]onformity to legal rules of evidence shall not be necessary,” and parties may offer any evidence that is “relevant and material to the dispute.”<sup>170</sup> Under these proceedings, the arbitrator makes all determinations as to admissibility, relevance, and materiality of evidence offered by the parties.<sup>171</sup> Finally, at the end of the arbitration, the arbitrator may “grant any remedy or relief that the arbitrator deems just and equitable” within the scope of the USADA protocol.<sup>172</sup>

Since the AAA is a not-for-profit, it will prescribe the filing and other administrative fees to compensate it for the services provided.<sup>173</sup> These fees charged by the AAA are paid by the USOC.<sup>174</sup> Most of the expenses of arbitration, including travel and reasonable customary expenses of the arbitrator, will be also be paid by the USOC.<sup>175</sup> However, one exception is the expense of witnesses, which is borne by the party producing such witness.<sup>176</sup> Additionally, if a party desires to have an interpreter, that party must make all the arrangements for the interpreter and assume the cost of the interpreter’s services.<sup>177</sup>

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166. *Id.* at R-18(a).

167. *Id.* at R-18(b).

168. *Id.* at R-27(a). Although, “[t]he arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.” *Id.*

169. *Arbitration*, *supra* note 156, at R-29(a). Additionally, if a party requests and the arbitrator agrees, other evidence may be submitted within thirty days after the hearing. *Id.* at R-29(b). All parties will be given the opportunity to examine and respond to the new evidence. *Id.*

170. *Id.* at R-28(a).

171. *Id.* at R-28(c). The arbitrator also has the power to exclude evidenced she deems to be irrelevant or cumulative. *Id.*

172. *Id.* at R-40(a).

173. *Id.* at R-47.

174. *Arbitration*, *supra* note 156, at R-47.

175. *Id.* at R-48.

176. *Id.*

177. *Id.* at R-24.

## II. THE PROBLEM IS IN THE PROCESS

### A. *USADA Arbitration: Where Adversarialism Dies*

#### 1. One-sided Process?

When Armstrong decided not to fight, he claimed part of his reason for laying down his shield is that the USADA arbitration process is “one-sided.”<sup>178</sup> He went further and remarked that if he thought he had any chance of clearing his name he would not have stopped his fight.<sup>179</sup> In considering this comment, it is important to question whether this was the last fleeting appeal to the court of public opinion of a guilty man, or whether the allegation has merit.<sup>180</sup> Clearly Lance was guilty of doping, as he admitted on Oprah,<sup>181</sup> but his allegations also have merit. One fact to support Armstrong’s claim is that USADA has only lost two cases since its inception in October of 2000.<sup>182</sup> Second, the limits on discovery prevent defendants from gaining valuable evidence.<sup>183</sup> Third, there are no evidentiary rules to admit or restrict certain types of evidence.<sup>184</sup> Therefore, the adversarial nature for which proceedings in the United States are known does not exist in USADA proceedings.<sup>185</sup> Accordingly, Armstrong’s one-sided argument has merit and the process should be more adversarial.

#### 2. Is USADA “Unbeatable”?

USADA has assembled a record against athletes that would make even the greatest dynasties in sports history blush. In its twelve years in existence USADA has only lost two times.<sup>186</sup> To put that number in perspective, over the

178. *See supra* text accompanying note 22.

179. *See supra* text accompanying note 22.

180. *See supra* note 26 and accompanying text.

181. Jennifer Waite, *Lance Armstrong Oprah Interview: Confession Floods Out After Years of Denial*, THE EXAMINER (Jan. 17, 2013), <http://www.examiner.com/article/lance-armstrong-oprah-interview-confession-floods-out-after-years-of-denial>.

182. *See infra* note 186 and accompanying text.

183. Michael S. Straubel, *Lessons from USADA v. Jenkins: You Can’t Win When You Beat a Monopoly*, 10 PEPP. DISP. RESOL. L.J. 119, 136 (2009).

184. *See supra* text accompanying note 170.

185. *See* ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 4 (2001).

186. *See* U.S. Anti-Doping Agency v. Jenkins, AAA No. 30 190 00199 07, at 43–44 (2008) (Fortier & Shycoff, Arbs.) (LaTasha Jenkins had an adverse analytical finding of norandrosterone set aside by an arbitration panel that found the testing laboratories violated testing procedures.); *see also* U.S. Anti-Doping Agency v. Page, AAA No. 77 190 16 09 JENF, at 24 (2009) (Georgo, Benz & Lindberg, Arbs.) (The panel held that Page had not committed an anti-doping violation after submitting evidence justifying his failure to submit a sample after an event.).

course of twelve years USADA has sanctioned athletes more than 300 times.<sup>187</sup> When the decision in the case of LaTasha Jenkins was issued in January of 2008, it was analogous to when the United States Olympic Hockey team toppled the mighty Soviets in the 1980 Olympic Games.<sup>188</sup> The unbeatable had been beaten. LaTasha Jenkins was the first athlete in the then seven-year history of USADA to clear her name of a doping infraction.<sup>189</sup> Unfortunately for Jenkins, the process of clearing her name, which took nearly eighteen months, beat her down and effectively ended her career.<sup>190</sup> Thus, even in victory, Jenkins lost to USADA. Jonathan Page had better luck getting back into the sport after his clash with USADA.<sup>191</sup> The primary difference seems to be that Page's case only lasted two months<sup>192</sup> and Jenkins's case took significantly longer.<sup>193</sup> This extraordinarily low success rate for athletes tends to support Armstrong's one-sided argument.

### 3. Limits on Discovery

The limitations on discovery in the USADA arbitration process tilts the scales to the advantage of USADA.<sup>194</sup> The USADA protocol limits the laboratory documents that must be given to athletes for their defense.<sup>195</sup> Additionally, USADA has maintained its stance that it has no obligation to provide any documents, and if an athlete requests further documents the athlete would be required to pay for them.<sup>196</sup> In cases, such as Armstrong's, where there was not an adverse-analytical finding, USADA only has to produce the documents that the arbitrator may, at his or her discretion, require.<sup>197</sup> The true

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187. See *Sanctions*, USADA, <http://www.usada.org/sanctions/> (last visited Aug. 26, 2013).

188. See Jenkins, AAA No. 30 190 00199 07 at 44; John Soares, *The Cold War on Ice*, 14 BROWN J. OF WORLD AFF. 77, 77 (2008).

189. Straubel, *supra* note 183, at 119. Ironically, USADA was beaten by a group of third-year law students and their professor at the Valparaiso University Sports Law Clinic, truly a David versus Goliath story. *Id.* at 119 n.\*.

190. *Id.* at 133, 135.

191. Page was able to return to professional cycling, including winning the 2013 USA Cycling Cyclocross National Championships. *Results: 2013 USA Cycling Cyclocross National Championships, day 5*, VELONEWS (Jan. 13, 2013, 8:23 PM), [http://velonews.competitor.com/2013/01/news/2013-usa-cycling-cyclocross-national-championships-day-5\\_271287/2](http://velonews.competitor.com/2013/01/news/2013-usa-cycling-cyclocross-national-championships-day-5_271287/2).

192. See U.S. Anti-Doping Agency v. Page, AAA No. 77 190 16 09 JENF, at 1 (2009) (Georgo, Benz & Lindberg, Arbs.)

193. See *supra* note 190 and accompanying text.

194. See *supra* notes 183–84 and accompanying text.

195. Straubel, *supra* note 183, at 136.

196. *Id.*

197. See *supra* notes 165–66 and accompanying text; see also Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration For Sport Can Do Its Job Better*, 36 LOY. U. CHI. L.J. 1203, 1229 (2005) (arguing that doubts about AAA's independence have challenged its effectiveness).

nature of this standard, or lack thereof, was revealed when USADA prosecuted Floyd Landis for failing a doping test in the 2006 Tour de France.<sup>198</sup> In Landis's case, USADA continually resisted discovery requests, which ultimately lead to several retaliatory motions.<sup>199</sup> Because "[d]iscovery in doping arbitration is intended to be limited," Landis's attorney, Howard Jacobs, stated, "This is completely unfair."<sup>200</sup> Moreover, USADA has no obligation to turn over exculpatory evidence or even let the athlete know that it exists.<sup>201</sup> Thus, the one-sided nature of USADA's proceedings is only accentuated by its ability to refuse disclosure of evidence.

#### 4. No Evidentiary Restraints or Safeguards

The USADA arbitration process has no specified rules of evidence, and the arbitrators, unilaterally, can decide what evidence to admit and how much weight the evidence is entitled.<sup>202</sup> Under the USADA doping rules, the arbitrators are permitted to draw a negative inference against an athlete who invokes his or her Fifth Amendment right against self-incrimination.<sup>203</sup> In a non-analytical adverse finding this inference can be damaging corroborating evidence against the athlete because the arbitrators must rely on circumstantial evidence.<sup>204</sup> The lack of rules also prevents athletes from deposing witnesses and allows witnesses to refuse to answer questions on cross-examination.<sup>205</sup> Additionally, the arbitrators can use affidavits as evidence and are free to give them the weight they feel appropriate.<sup>206</sup> The inability to cross-examine during the quasi-criminal proceeding combined with the free use of hearsay contained in the affidavits, creates a Sixth Amendment issue.<sup>207</sup> Affidavits are in the core class of testimonial evidence and, as such, the athlete is unable to face his or her accuser.<sup>208</sup> This lack of evidentiary rules and protections makes it significantly harder for the athlete to prove his innocence while making a conviction more likely.

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198. U.S. Anti-Doping Agency v. Landis, AAA No. 30 190 00847 06, at 19 (2007) (Brunet, McLaren & Campbell, Arbs.).

199. Weston, *supra* note 77, at 35.

200. *Id.* at 35–36.

201. Straubel, *supra* note 183, at 141.

202. *See supra* note 171 and accompanying text.

203. Paul Greene, Note, *USADA v. Montgomery: Paving A New Path To Conviction In Olympic Doping Cases*, 59 ME. L. REV. 149, 158 (2007).

204. *Id.*

205. Weston, *supra* note 77, at 35.

206. *See supra* text accompanying note 169.

207. *See infra* text accompanying note 251 (arguing the process is quasi-criminal).

208. *See Crawford v. Washington*, 541 U.S. 36, 51 (2004).

## 5. Adversarial Legalism

The nature of proceedings in the courts of the several states is very adversarial. In fact, part of the significance of the United States' "fight-oriented" adversarial system is that no other country relies as extensively on this type of system.<sup>209</sup> The adversarial nature of the system really took shape in the 1960's when Americans began to demand "total justice."<sup>210</sup> The key to "total justice" is that the adversary system creates a "checking" system.<sup>211</sup> The system of "checking" is necessary because the adversary system "does not expect people to tell the truth on the witness stand or to reveal things that hurt their positions."<sup>212</sup> Moreover, the system rests on the presumption that human beings are "self-interested and competitive."<sup>213</sup> Due to this, lawyers expect "surprises, tricks, and concealments," but there is an ultimate belief that adversarial proceedings will resolve these issues.<sup>214</sup> However, this type of adversarial legalism comes with problems of high expenses, unpredictability, defensiveness, and contentiousness, but it is the American way.<sup>215</sup> Despite its problems, this type of legalism puts the parties involved in control of the contest and, in essence, their own fate.<sup>216</sup>

The ideal for adversarialism is that "when diametrically opposed arguments are aired . . . the better argument will win, and therefore the 'right' side will be victorious."<sup>217</sup> Two elements to procure a victory by the "right" side are (1) "party control and presentation" and (2) "a formalized system of rules and procedures."<sup>218</sup> One of the key components of giving parties control in adversarial legalism is placing the "powerful tool[]" of discovery into the hands of entrepreneurial attorneys.<sup>219</sup> Primarily, discovery seeks to make parties and lawyers act against their nature by acting against their own self-interest.<sup>220</sup> Thus, putting this tool in the hands of litigators allows for a more probing form of fact-finding and more "potent remedies."<sup>221</sup> Additionally, pre-

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209. Michael Dominic Meuti, *Legalistic Individualism: An Alternative Analysis of Kagan's Adversarial Legalism*, 27 HASTINGS INT'L & COMP. L. REV. 319, 323 (2004).

210. *Id.* at 325.

211. Paul T. Wangerin, *The Political and Economic Roots of the "Adversary System" of Justice and "Alternative Dispute Resolution"*, 9 OHIO ST. J. ON DISP. RESOL. 203, 224 (1994).

212. *Id.*

213. *Id.* at 231.

214. *Id.* at 227.

215. KAGAN, *supra* note 185, at 4.

216. *See id.* at 9 (Calling the American way litigant activism, in which "the assertion of claims, the search for controlling legal arguments, and the gathering and submission of evidence are dominated not by judges or government officials but by disputing parties or interests . . .").

217. Meuti, *supra* note 209, at 340.

218. *Id.* at 337.

219. KAGAN, *supra* note 185, at 100.

220. Wangerin, *supra* note 211, at 228.

221. KAGAN, *supra* note 185, at 100.

trial discovery, which is a pillar of adversarialism, is a powerful tool for uncovering phony claims and defenses.<sup>222</sup> Accordingly, discovery is the key to the adversarial nature of the legal system in our county, but it is completely lacking in the USADA process.

Moreover, adversarialism allows litigants to make their own strategic decisions about their cases.<sup>223</sup> This inevitably creates a “sharp clash of proofs” that is presented by the parties, but it also “exalts the value of personal autonomy” for the parties.<sup>224</sup> This “clash” reflects the adversarial system’s origin in “primitive systems of trial by battle.”<sup>225</sup> In fact, a conference of “elite” lawyers and judges referred to the system as “thoroughly savaged.”<sup>226</sup> This nature helps yield the true benefit of adversarialism, which is preventing the innocent from having to defend themselves.<sup>227</sup> This protection, which adversarialism offers, furthers fundamental ideals of due process and democracy.<sup>228</sup> Adversarialism does this by creating autonomy for the parties and, in addition to discovery, gives parties the right to call and confront witnesses.<sup>229</sup> Furthermore, “it embodies the fundamental right to be heard.”<sup>230</sup> This system has been the only effective means of fighting the natural tendency of humans to judge too quickly that which is not known.<sup>231</sup> Thus, USADA’s lack of an adversary system only furthers the one-sided nature of its arbitration process.

## B. *USADA the State Actor*

### 1. *Armstrong v. Tygart*

Armstrong made one last ditch effort to avoid USADA sanctions and a lifetime ban; he filed a federal lawsuit.<sup>232</sup> One of Armstrong’s major claims in his case was that his due process rights were violated.<sup>233</sup> The court found that AAA arbitration rules satisfy the due process requirements and dismissed the

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222. *Id.* at 108.

223. Michael Asimow, *Popular Culture and the Adversary System*, 40 LOY. L.A. L. REV. 653, 658 (2007).

224. *Id.* at 653, 658.

225. *Id.* at 667. In these systems, “litigants” would battle to determine the outcome. One-on-one combat is quite autonomous indeed.

226. Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 58 (1998).

227. *Id.* at 61.

228. *See id.* at 63.

229. *Id.* at 57.

230. *Id.* at 73.

231. Freedman, *supra* note 226, at 76.

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

233. *Id.* at 574.

claim.<sup>234</sup> The court noted that the key requirement for due process is that “an individual be given an opportunity for a hearing before he is deprived of any significant property interest.”<sup>235</sup> Armstrong did have a significant private interest in the results of the arbitration because it could affect the past and future of his career and cost him financially.<sup>236</sup> However, Armstrong had not exhausted his internal remedies under the USADA Protocol, which precluded his civil claim.<sup>237</sup> The judge stated that although there were troubling aspects to the case, federal courts should stay out of sports to avoid turning federal judges into “referees for a game in which they have no place, and about which they know little.”<sup>238</sup>

The court’s refusal to act followed the precedent of non-involvement from the courts in the arena of sport. Federal courts have long held that they “should rightly hesitate before intervening in disciplinary hearings held by private associations,” such as national governing bodies of sport.<sup>239</sup> In fact the courts have held that “[i]ntervention 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.”<sup>240</sup> However, even if the courts were to get involved, it would not be to intervene on the merits of the dispute.<sup>241</sup> As the Seventh Circuit said, “[T]here can be few less suitable bodies than the federal courts for determining the eligibility, or procedures for determining the eligibility, of athletes to participate in [sport].”<sup>242</sup> Thus, the merits of arbitration of sport are not the province of the court, but by the time

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234. *Id.* at 584.

235. *Id.* at 581 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)).

236. *Id.*

237. *Armstrong*, 886 F. Supp. 2d at 587. The court went on to state, “If the panel’s resolution of those issues is manifestly unjust and devoid of any reasonable legal basis, Armstrong may have a judicial remedy . . .” *Id.* Thus, direct challenges will likely be ineffective on issues where the athlete does not think the process is “fair.” See also Andrew Hood, *Vuelta a España Awaits Formal Word Before Returning 2005 Title to Roberto Heras*, VELONEWS (Dec. 22, 2012, 4:07 PM), [velonews.competitor.com/2012/12/news/vuelta-a-espana-awaits-formal-word-before-returning-2005-title-to-roberto-heras\\_269657](http://velonews.competitor.com/2012/12/news/vuelta-a-espana-awaits-formal-word-before-returning-2005-title-to-roberto-heras_269657). The Spanish courts do not feel the same way. Roberto Heras was stripped of his 2005 victory after testing positive for EPO. Instead of going through arbitration he sued through the Spanish courts. This non-standard method of appealing an adverse analytical finding paid off when the Spanish Supreme Court “awarded” him his title back.

238. *Armstrong*, 886 F. Supp. 2d at 586, 590. The judge was troubled by USADA’s “apparent single-minded determination to force Armstrong to arbitrate the charges against him, in direct conflict with UCI’s equally evident desire not to proceed against him.” *Id.* at 590.

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

240. *Id.*

241. *Id.*

242. *Slaney v. The Int’l Amateur Athletic Fed’n*, 244 F.3d 580, 594 (7th Cir. 2001).

an athlete has exhausted internal remedies it can be too late to salvage his or her career and reputation.

## 2. Is USADA a State Actor?

USADA's classification as a being a state actor or a private entity is very important. If USADA is considered a state actor, athletes charged with anti-doping violations would have the due process protections of the Constitution.<sup>243</sup> The argument of whether USADA is a private entity or state actor is strong on both sides. USADA is a corporation under the laws of Colorado and was not created by the government.<sup>244</sup> However, USADA was congressionally designated as the "official anti-doping agency for the United States."<sup>245</sup> Moreover, USADA is an instrumentality of the government for the purposes of anti-doping.<sup>246</sup> Yet the government does not retain permanent, controlling authority over USADA and its directors.<sup>247</sup> These conflicting facts can lead to confusion in defining USADA's actor type. Ultimately, despite the potential for USADA to become a state actor, it is treated as a private entity.<sup>248</sup> Even after Presidential calls for anti-doping, USADA is still treated as a private entity and not a state actor.<sup>249</sup>

## 3. How To Characterize USADA Action

Although it seems clear that doping is outside the province of the courts, that does not mean that USADA's actions are not "state-type" actions. The anti-doping actions of USADA are generally treated similarly to those of a voluntary association between the athlete and the governing body.<sup>250</sup> However, due to the disciplinary action of anti-doping proceedings, it is more likely that the actions are quasi-criminal.<sup>251</sup> This is mainly because the consequences USADA seeks are punitive, which makes a disciplinary action quasi-criminal.<sup>252</sup> The punitive nature of the punishment is no more apparent than

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243. Dionne L. Koller, *Does the Constitution Apply to the Actions of the United States Anti-Doping Agency?*, 50 ST. LOUIS U. L.J. 91,109 (2005).

244. *Id.* at 113–14.

245. *Id.* at 112.

246. *Id.*

247. *Id.* at 114–15.

248. The state has a relationship with USADA "such that the state actually *could* coerce, encourage . . . or otherwise control the private actor to achieve the challenged action." Koller, *supra* note 243, at 127. *See also U.S. Anti-Doping Agency 2011 Annual Report*, USADA 45, <http://usada.org/uploads/2011annualreport.pdf> (last visited Aug. 28, 2013). It is likely that the government could coerce USADA because \$12,432,000 of its \$13,722,470 yearly revenue came from the USOC or grants in 2011.

249. Koller, *supra* note 243, at 132.

250. Straubel, *supra* note 183, at 146.

251. *Id.* at 148.

252. *Id.* at 149.

when an athlete's ability to earn a livelihood in his or her respective sport is taken away.<sup>253</sup> This affects the athlete's economic and liberty rights by restricting his or her right to work in his or her desired profession, which implicates fundamental rights.<sup>254</sup> Accordingly, based on the consequences, the USADA proceedings are quasi-criminal.

#### 4. USADA's Burden of Proof

USADA places a very harsh burden on athletes while its own burdens are malleable and ever-changing. In the modern anti-doping fight athletes are held to a strict liability standard when their sample gives an adverse analytical finding.<sup>255</sup> Under this standard an athlete may not avoid sanction, even if they show an absence of fault.<sup>256</sup> Furthermore, if an athlete can show how the substance got in his or her system and that it was not intended to enhance performance, then he or she is only eligible for a reduction in punishment.<sup>257</sup> An unfortunate example of this is Scott Moninger, a professional cyclist, who was sanctioned for steroid use in competition.<sup>258</sup> Moninger was sanctioned despite lab results showing that a supplement he had taken was tainted with steroids.<sup>259</sup> The saving grace for athletes is that, as stated in Latasha Jenkins's case, the laboratories that test the samples are held to a similar standard.<sup>260</sup> Despite this, USADA still need only show the substance is in the athlete's sample to prove the offense.<sup>261</sup>

This standard is pretty straightforward, but when there is no positive drug test, as with a non-analytical adverse finding, it gets more contentious. USADA set the precedent for this type of conviction in 2005 when it found

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253. "The effect of these punishments for the athlete is that the athlete may not earn her livelihood in the profession for which she trained; she will lose any endorsement contract that she has; and, she will be suspended from her team and lose any salary associated with team membership. For all athletes, regardless of their level, punishment means permanent damage to their reputation and future earning ability." *Id.* at 150. *See also Protocol, supra* note 132, at 26–27. The athlete can have results disqualified, be suspended from competition, and have to forfeit prizes.

254. Weston, *supra* note 77, at 39.

255. Straubel, *supra* note 197, at 1262.

256. *Id.* It is argued that it is similar to product liability cases; however, in tort law a plaintiff must still show causation and damages. *Id.*

257. The period of ineligibility can still be a period of two years. *Protocol, supra* note 132, at 28–29.

258. U.S. Anti-Doping Agency v. Moninger, AAA No. 30 190 00930 02, at 2–3 (2003) (McLaren, Colbert & Gootnick, Arbs.).

259. *Id.* at 4–5.

260. U.S. Anti-Doping Agency v. Jenkins, AAA No. 30 190 00199 07, at 43 (2008) (Fortier & Shycoff, Arbs.).

261. Greene, *supra* note 203, at 157.

that Tim Montgomery used steroids without a positive test.<sup>262</sup> To date USADA has not clarified its “comfortable satisfaction” standard for convicting athletes of these offenses without real evidence.<sup>263</sup> In fact, it is left to each individual panel to determine “case by case whether the standard of proof . . . has been met and the burden of proof has been discharged, or not . . . .”<sup>264</sup> Thus, in a case like Armstrong’s, where there is no positive test,<sup>265</sup> the burden can vary and yield unpredictable outcomes for the parties.

### III. THE NEEDED CHANGE

#### A. *Making the USADA Arbitration More Adversarial to Change its One-Sided Nature*

Although the intent of the process is to be expedient—tell that to Latasha Jenkins, whose battle lasted for eighteen months—it needs to be made more adversarial due to what is at stake for the athlete.<sup>266</sup> For Armstrong, or any athlete that battles USADA, his career and reputation were on the line, which warranted a need for “total justice” similar to the courts. The only means to ensure “total justice” for the athlete and USADA are the “checks” that an adversarial system offers. The “checks” are the parties’ right to control proceedings and rules to protect them. Athletes have no ability to control the proceedings by finding evidence and choosing what to present, unlike judicial proceedings. This dual-control by the athlete and USADA, instead of just USADA, would create a system in which the proceedings will resolve the issues of truth. An athlete’s equal ability to control the proceedings and present the evidence he or she deems necessary, both staples of adversarialism, would give him or her a better chance to win, but also decrease the one-sided nature of the proceedings. Moreover, USADA, and its employees, are in the competitive endeavor of ferreting out doping, which only enhances the concern over their natural tendency for dishonesty. This lack of adversarialism inevitably leads to innocent athletes having to defend themselves, and it eliminates the autonomy that adversaries in the courts enjoy. Thus, a more adversarial process would help eliminate the one-sided nature of the process.

The simple act of allowing discovery in USADA arbitration would cut down on the one-sided nature of the process. Allowing full discovery would allow an athlete to uncover any concealed evidence, as well as evidence of malfeasance.<sup>267</sup> Thus, athletes would have an “extraordinary . . . weapon[.]”

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262. *Id.* at 151.

263. Straubel, *supra* note 197, at 1270; *see also supra* note 149 and accompanying text.

264. Greene, *supra* note 203, at 164.

265. *See* REASONED DECISION, *supra* note 8, at 129.

266. *See supra* text accompanying note 190.

267. KAGAN, *supra* note 185, at 101.

and the process would be more adversarial.<sup>268</sup> Pre-arbitration discovery might have enabled Armstrong to know exactly what he was up against and what information USADA would use against him. Knowing this information would have enabled Armstrong to build a case against USADA and might have altered his decision. Making the proceedings more adversarial with discovery could cause USADA to lose a few more cases. However, it would go a long way to purge the process of the taint of being one-sided.

Additionally, a comprehensive set of evidentiary rules needs to be developed and enforced. This would serve the purposes of making the process more adversarial and eliminating the ease with which USADA uses items that would never come into a proper legal proceeding to convict alleged dopers. Having rules would make the process more adversarial by permitting athletes to call and confront the witnesses needed to prove their case. However, the rules do not have to be the same as the Federal Rules of Evidence, but a set of rules similar to that would make the process less one-sided. In cases where there is an adverse analytical finding, this might require the lab technician who tested the sample to testify live since the affidavit is testimonial.<sup>269</sup> However, Armstrong's case was charged based on a non-analytical adverse finding.<sup>270</sup> The importance of rules is heightened when an athlete is charged with this type of offense. For the type of evidence used to prosecute this type of case there needs to be hearsay-type rules to protect the athletes. Moreover, USADA's witnesses should not be able to refuse cross-examination.<sup>271</sup>

The implementation of these rules would likely have played a major role in proceedings against Armstrong. First, there was not a positive test during a race that initiated the proceedings.<sup>272</sup> USADA collected evidence in the form of affidavit testimony and also used lab reports from re-tests of thirteen year-old samples.<sup>273</sup> If there were rules in place, USADA would have had a difficult time using the affidavits alone and would have been required to have the witnesses testify live. Also, there would be the problem of cross-examination. It is difficult to fully articulate the effect that cross-examining professional cyclists who lied for years about doping would have on the arbitration panel. But, it would definitely have enabled Armstrong to show that the witnesses lack a character for truthfulness and call their testimony into question. The two primary examples are Floyd Landis and Tyler Hamilton. Both men fought

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268. *Id.*

269. The USADA could use a standard similar to the plurality in *Williams v. Illinois*, which held that when a lab report is sought before a suspect is identified it is not testimonial. 132 S. Ct. 2221, 2228 (2012).

270. REASONED DECISION, *supra* note 8, at 15.

271. *Weston*, *supra* note 77, at 35.

272. REASONED DECISION, *supra* note 8, at 15.

273. *Id.* at 2.

viciously to have their names cleared after testing positive for drugs, including raising money from fans for their respective defenses, and ultimately admitted to doping throughout their whole careers.<sup>274</sup> The cross-examination of these two alone could be devastating because they lied about doping their entire careers. Therefore, the assurance of the ability to cross-examine witnesses would help create a less one-sided process.

Finally, to further eliminate the one-sided nature of the USADA process, USADA should follow its own rules. Primarily, USADA should follow its statute of limitations. The USADA protocol states, “No action may be commenced against an *Athlete* or other *Person* for an anti-doping rule violation contained in the *Code* unless such action is commenced within eight (8) years from the date the violation is asserted to have occurred.”<sup>275</sup> USADA’s choice to violate its own rule in charging Armstrong is another fact tending to show the one-sided nature. USADA charged Armstrong on June 12, 2012, which would only allow charges to go back to June of 2004.<sup>276</sup>

Unlike most statutes of limitations, which inform plaintiffs on how long they have to file a suit, the code’s statute of limitations tells USADA what action it *cannot* take. Generally, the statute of limitations is an “affirmative defense,” meaning that the party wishing to assert it against a charge or claim must raise it, or forever lose it under the doctrine of “waiver.” It might be argued that Armstrong waived the right to raise any affirmative defenses when he chose to not contest the charges brought by USADA. However, based on the language in USADA’s code, it seems that it was not solely Armstrong’s responsibility to raise the time limitation, but it was also Tygart’s responsibility to refrain from bringing time-barred charges.

In the *Reasoned Decision*, Tygart and USADA attempted to circumvent this textual technicality by saying that the statute of limitations was “tolled” by Armstrong’s actions.<sup>277</sup> However, the legal definition of “tolling” means that the proverbial clock stops ticking. Under Tygart’s unilaterally dictated definition, the clock was tossed out altogether. USADA’s main argument here

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274. See WALSH, *supra* note 78, at 205–06 (Hamilton defended himself saying, “I am 100 percent innocent. I will fight this until I don’t have one euro left in my pocket. I have always been an honest person.” Additionally, Hamilton set up [www.believetyler.org](http://www.believetyler.org) to raise money for his defense and Bell Helmets, his sponsor, created “I BELIEVE TYLER” buttons.). See also Landis to repay Fairness Fund donations to avoid jail time, CYCLINGNEWS (Aug. 24, 2012, 2:23 AM), <http://www.cyclingnews.com/news/landis-to-repay-fairness-fund-donations-to-avoid-jail-time> (Landis Raised nearly \$500,000 from fans to help pay for his legal defense before ultimately admitting guilt); Floyd Landis Aff. ¶¶ 11–14, Sept. 26, 2012; Tyler Hamilton Aff. ¶¶ 25–27, 33–36, Sept. 28, 2012.

275. *Protocol*, *supra* note 132, at 49. There is no comment to this section that would suggest the statute of limitations can be tolled.

276. REASONED DECISION, *supra* note 8, at 11.

277. *Id.* at 154.

is that because Armstrong perjured himself in 2004 during his lawsuit with SCA, the limitations period became irrelevant and could not be argued by Armstrong.<sup>278</sup> USADA's argument here is flawed and, quite frankly, wrong. If Armstrong had challenged USADA on the limitations period it is likely he would have won. Here is why.

USADA claimed that Armstrong could not raise USADA's eight-year statute of limitations as a defense because he has "unclean hands," in that he committed perjury and misconduct (i.e., the claim that he "bullied" riders and support staff into concealing his doping and public lies).<sup>279</sup> USADA supports this argument in two ways. First, USADA used the *Hellebuyck* case to support its use of the "unclean hands" doctrine.<sup>280</sup> Second, USADA relied on a CAS advisory opinion for the proposition that American law should be used.<sup>281</sup>

USADA does not explicitly invoke the unclean hands doctrine, but it relies on the "well-established principle" that a statute of limitations is tolled when the party seeking to use it subverts the legal process.<sup>282</sup> This is where USADA invoked the *Hellebuyck* case. In *Hellebuyck*, the athlete, who was a marathon runner, tested positive for a banned substance.<sup>283</sup> Hellebuyck perjured himself at his original arbitration by denying any prior drug use, and he was only punished for one offense by USADA, in large part based on his denial, and in other part based on a lack of other credible and readily available evidence.<sup>284</sup> Subsequently, Hellebuyck gave a public interview in which he then admitted to the doping offense that he previously denied under oath.<sup>285</sup> USADA re-opened its case against Hellebuyck, and when Hellebuyck attempted to use the statute of limitations the AAA arbitration panel presiding over the matter ruled he could not avail himself of that defense because he had subverted the legal process and had "unclean hands."<sup>286</sup>

In Armstrong's case, relying on *Hellebuyck*, USADA claimed that Armstrong acted subversively.<sup>287</sup> USADA claimed that Armstrong's actions towards those who accused him, and those with whom he rode, amounted to

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278. *Id.* at 155.

279. *Id.*

280. *Id.*

281. REASONED DECISION, *supra* note 8, at 154.

282. *Id.*

283. U.S. Anti-Doping Agency v. Hellebuyck, AAA No. 77 190 168 11, at 3, 6 (2012) (Benz & Campbell, Arbs.).

284. *Id.* at 6–8.

285. *Id.* at 8–9.

286. *Id.* at 27–28.

287. REASONED DECISION, *supra* note 8, at 154.

fraudulent concealment.<sup>288</sup> Thus, USADA claimed Armstrong should not be able to avail himself of the benefit of the eight-year limitations period (which would have resulted in Tygart and USADA only being able to strip Armstrong of his race results going back to 2004, thus leaving intact five of Armstrong's seven Tour de France General Classification wins, amongst other international race victories and placings).<sup>289</sup> USADA found support for using this doctrine in an advisory opinion issued by CAS, which stated, "[E]xtension of such [eight-year] time-bar . . . should be dealt with in the context of the principles of private law of the country where the interested sports authority is domiciled."<sup>290</sup> This seems like good support for USADA's argument, but it is likely that USADA's argument would still fail.

The CAS advisory opinion says that private law should be used.<sup>291</sup> This would cause the litigants to look to the common law that, thanks to federalism, would lead to state law. The USADA code does not have a choice-of-law provision, so it is likely that by default, either Texas or Colorado law would apply.<sup>292</sup> In both states, it is unlikely USADA could meet the elements necessary to justify tolling the statute of limitations. In both states, the limitations period runs from the date that the fraud could have been discovered with reasonable diligence.<sup>293</sup> USADA relies on Armstrong's perjury, witness intimidation, and seeking to procure false affidavits to make its case for concealment. This argument is a stretch. Prior to Armstrong's perjury, USADA had the deposition transcripts of former Armstrong teammate Frankie Andreu, and his wife, Betsey, both of whom were referenced in the *Reasoned Decision*. USADA also could have, years prior to 2012—even as far back as 1999 when the first doping allegation against Armstrong arose during that season's Tour de France—subpoenaed any of Armstrong's former teammates whose statements ultimately appeared in USADA's report. USADA provides no credible explanation for why these co-dopers came forward in 2011 and 2012, as opposed to earlier. USADA's power over these athletes was just as extensive in, say 2002, as it was in 2012, or so Armstrong certainly could have credibly argued. It has been noted that the "omerta," cycling's code of silence

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288. *Id.* at 155 ("Mr. Armstrong fraudulently concealed his doping from USADA in many ways, including lying under oath in the SCA case; lying in the 2000 French judicial investigation; intimidating witnesses; and soliciting false affidavits.").

289. *Id.*

290. *Id.* at 154.

291. CAS Advisory Opinion for Comitato Olimpico Nazionale Italiano, CAS 2005/C/841 CONI, at 24 (2005) (Carrard, Coccia & Fumagalli) [hereinafter CAS Advisory Opinion].

292. Armstrong is from Texas and USADA is a Colorado-based corporation. *See supra* note 244 and accompanying text.

293. *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 67 (Tex. 2011); *BP Am. Prod. Co. v. Patterson*, 263 P.3d 103, 109 (Colo. 2011) (en banc).

amongst pro riders, is so strong that no one would talk willingly,<sup>294</sup> but under the penalty of perjury, these riders might have given testimony, regardless of the year.

Neither Tygart nor USADA have ever been able to explain and justify why 2012 was a watershed year as opposed to at least as far back as 2004 when Betsy and Frankie Andreu testified under oath in the SCA litigation. While Armstrong's reign over cycling is not to be condoned, neither should USADA's own inaction during that same time span. It is well documented that numerous riders accused Armstrong during the early years of his Tour de France reign and everyone knew that Armstrong was working with Dr. Ferrari. Also, by 2004, David Walsh's book, with damning allegations, had been published and USADA could have looked at that for a reason to investigate. USADA's argument that it could not prosecute Armstrong because of his misconduct is weak at best when it is considered that unlike Hellebuyck, Armstrong's own admissions were not necessary, per the *Reasoned Decision*, to convict him. Thus, Armstrong lying or bullying teammates and U.S. Postal team staff did not hinder USADA in its prosecution.

Furthermore, how common law doctrines would apply to Armstrong's case is likely irrelevant. The *Reasoned Decision* relies on the CAS advisory opinion to use American common law to thwart the application of a statute of limitations.<sup>295</sup> However, noticeably absent from the *Reasoned Decision* is the very next sentence after the one USADA cites. That part states, "[W]ith respect to the doping rules issued by international federations domiciled in Switzerland, the rules of Swiss civil law concerning statute of limitations . . . should be applied . . ."<sup>296</sup> The UCI, the international federation for cycling, is based in Switzerland, which means Swiss law should apply.<sup>297</sup> USADA's counter-argument would be that because it brought the anti-doping charges against Armstrong, United States law should be used. The problem with this argument is that the UCI code states that when there is no positive test the

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294. Julien Pretot, *Cycling's omerta has to be broken—Hamilton*, REUTERS (Oct. 17, 2012, 3:55 AM), <http://in.reuters.com/article/2012/10/16/cycling-armstrong-hamilton-idINDEE89F0IJ20121016>.

295. REASONED DECISION, *supra* note 8, at 154.

296. CAS Advisory Opinion, *supra* note 291, at 24. It should be noted that the CAS opinion does say, "[I]f in a given case there are legal doubts as to the interpretation of the statute of limitations . . . the concerned sports authority must start the prosecution of the presumed doping violation." *Id.* at 25. USADA could use this to justify beginning its prosecution of Armstrong. However, this does not justify going beyond the limitations period. In fact, there should have been no legal doubt at the time USADA initiated its proceedings against Armstrong. There should have been no legal doubt because USADA had no right to go beyond eight years. After reading *Hellebuyck*, USADA could have done a reasonable amount of research and come to the same conclusion as this Comment regarding the its inability to prosecute beyond eight years.

297. UCI CONST. art. 1.

UCI's anti-doping rules will apply if the person who discovers the violation is a license-holder.<sup>298</sup> The UCI defines discovery as, "[T]he finding of elements that turn out to be evidence for facts that apparently constitute an anti-doping rule violation, regardless of the *Anti-Doping Organization* who qualifies that evidence as such."<sup>299</sup> USADA used the testimony of no less than twelve current or former license-holders as evidence to "prove" that Armstrong doped.<sup>300</sup> Thus, the UCI rules should apply.

Accordingly, as the UCI rules state, when cases are appealed to CAS Swiss law will be used.<sup>301</sup> Unfortunately, for USADA and Tygart, Swiss civil law *does not recognize* the common law doctrine of unclean hands.<sup>302</sup> Therefore, in an appeal to CAS, Armstrong could have argued that any offenses prior to 2004 were time-barred and could not be brought.

Thus, Armstrong could have kept his first five Tour de France titles, and all other international victories and placings. While this may lead to an absurd result, knowing that these wins and placings were nevertheless tainted, the fact remains that in international professional cycling during the era between 1995, when Armstrong began using doping methods to enhance his riding, after the team got "crushed" at Milan San Remo—a major cycling event—all the way to arguably 2010, when Alberto Contador lost his Tour de France win for having tested positive for Clenbuterol, most wins and/or placings were obtained or influenced by doped participants.<sup>303</sup> Stated another way, procedure matters. Due process matters. Tygart, though on the side of right, as the prosecutor, must nevertheless follow the "laws" he claims the right to enforce. He is not above the law. Here, the law would have dictated a far shorter reach than Tygart extended. This reality taints what he has done against Armstrong.

Therefore, for the process to be less one-sided there would need to be accountability in USADA following its own processes regarding the statute of limitations. USOC, USA Cycling, or even Congress could do this, and the oversight would prevent USADA from ignoring its own rules.<sup>304</sup> Whoever

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298. *UCI Cycling Regulations: Part 14 Anti-Doping*, UCI 3, <http://www.uci.ch/Modules/BUILTIN/getObject.asp?MenuId=&ObjTypeCode=FILE&type=FILE&id=NDc3MDk&LangId=1> (last visited Jan. 26, 2014) [hereinafter *UCI Cycling Regulations*].

299. *Id.*

300. REASONED DECISION, *supra* note 8, at iii–iv.

301. *UCI Cycling Regulations*, *supra* note 298, at 67.

302. *See, e.g.*, Tribunal fédéral [TF] [Federal Supreme Court] May 2, 2003, 4C.375/2002/svc, ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE [ATF] C 2.2 (Switz.).

303. George Hincapie Aff. ¶ 27, Sept. 24, 2012; Jane Aubrey, *Cyclingnews' complete coverage of Alberto Contador's Clenbuterol case*, CYCLINGNEWS (Feb. 6, 2012, 10:17 AM), <http://www.cyclingnews.com/features/cyclingnews-complete-coverage-of-alberto-contadors-clenbuterol-case>.

304. *See supra* text accompanying note 122 (USA Cycling is the national governing body for cycling); *see supra* text accompanying note 121 (USOC authorizes national governing bodies).

oversees USADA needs to ensure the rules are followed to make the process less one-sided.

*B. USADA Needs To Be Treated As A State Actor*

Although USADA is a private entity, incorporated in Colorado, it needs to be treated as a state actor for purposes of its arbitrations. Under these circumstances, the action taken by USADA would be treated as though they were state actions and would entitle athletes to certain procedural safeguards. The primary advantage to athletes would be the right to confront and cross-examine accusers. This would not drastically change the outcome of proceedings, but the process would appear to be more just. On the other hand, cases such as Armstrong's might be a toss-up as to the outcome. It would give athletes accused via non-analytical adverse findings a better opportunity to attack the evidence and a better chance of success. These protections and opportunities are imperative considering athletes stand to lose so much. Armstrong lost his seven Tours de France and nearly \$100 million in endorsements because of the outcome.<sup>305</sup>

Furthermore, the arbitration process needs to have a defined standard and burden of proof. Whether that is a preponderance of the evidence, beyond a reasonable doubt, or somewhere in between, it needs to be a set standard. The "comfortable satisfaction" standard is vague and imprecise and does not allow the athletes to prepare for what they must do to succeed.<sup>306</sup> This is simply a minor change, but it would make outcomes more consistent because the standard to be met by the arbitrators in determining the merits would be less personally subjective.

Lastly, the one thing that should not change is the practice that arbitrations stay out of the courts. In enacting the Sports Act, Congress specifically stated that the Federal Government should not regulate eligibility in sport.<sup>307</sup> Moreover, the courts have consistently held that it is not their job to determine the disputes on the merits in these situations.<sup>308</sup> Thus, it is necessary to maintain a separate forum for determining doping disputes. This is just as important as the need for the process to be altered.

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305. *Lance Armstrong faces \$100 million loss*, CANADIAN CYCLING MAGAZINE (Jan. 21, 2013), <http://cyclingmagazine.ca/2013/01/sections/news/lance-armstrong-faces-100-million-loss/>.

306. See *supra* text accompanying notes 263–64.

307. REPORT, *supra* note 96, at \*9.

308. *Armstrong v. Tygart*, 886 F. Supp. 2d 572, 586 (W.D. Tex. 2012) (this is unlike Spain where Roberto Heras did not even attempt to exhaust internal means before using the national courts).

CONCLUSION

Although Armstrong was self-admittedly guilty of doping, at the time he chose not to fight USADA, he made statements that the USADA arbitration process was one-sided and unfair. Those statements were true. If Armstrong had mounted a defense, the legal strategies that he would have needed were unavailable to him and he would not have had a fair opportunity. Accordingly, the rules of USADA arbitration need to be changed to make the process less one-sided and to give athletes more procedural safeguards.

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\* Thanks to my wife, for making this journey better than I could ever imagine. Thanks also to my mother, my late father, my sisters, and little brother, all of whom cheered for me on the roadside, or from above, when I finally cracked into professional cycling. J.D. Candidate, 2014, Saint Louis University School of Law.

