

# **“Doping on a Hanger”: Regulatory Lessons from the FINA Elimination of the Polyurethane Swimsuit Applied to the International Anti-Doping Paradigm**

RACHEL MACDONALD\*

*In 2008, swimwear manufacturer Speedo released the world’s first polyurethane competition body suit, the LZR Racer. Compared to “doping on a hanger,” the suit was an unprecedented leap in swimsuit technology, and more than 130 world records were broken in only the first seventeen months after the LZR became available to competitive swimmers. Upon realizing the polyurethane swimsuits stood to radically change swimming, the Fédération Internationale de Natation (FINA) implemented regulation that swiftly and successfully eradicated the problem.*

*In contrast, the World Anti-Doping Agency (WADA) has yet to effectively control athletic doping. Focus on the international anti-doping regime intensified in 2014 upon the exposure of widespread, permissive doping among internationally competitive Russian athletes. Further, WADA statistics reveal doping remains a serious and growing problem.*

*Despite the different scopes and missions of FINA and WADA, there are several regulatory lessons that can be extracted from FINA’s successful polyurethane swimsuit ban and applied to WADA’s struggle to eliminate doping in sports. The goal of this Note is to compare the international doping problem and the polyurethane swimsuit ban and then to ascertain how the successful FINA regulatory paradigm might be applied to the international anti-doping regime. Ultimately, FINA’s example suggests that WADA might benefit from making changes including: creating more specific regulations that can be articulated and then applied in a*

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\* Articles Editor, Colum. J.L. & Soc. Probs., 2017–2018. J.D. Candidate 2018, Columbia Law School. The author would like to thank Professor Petros Mavroidis and Jennifer Rodgers for their insight and encouragement, the staff members of the *Columbia Journal of Law and Social Problems*, and her parents Barb and Gregg MacDonald. The author dedicates this Note to her swim coach, Tony Ackerson.

*predictable and consistent manner, implementing a hierarchical bureaucratic scheme, effecting multi-tier monitoring and enforcement measures, enabling the establishment of independent oversight bodies, and a variety of other measures.*

## I. INTRODUCTION

In early 2008, swimwear manufacturer Speedo introduced the world's first polyurethane competition body suit, the LZR Racer.<sup>1</sup> The Speedo suit, which was imitated by nearly two-dozen companies immediately after its debut, represented an unprecedented leap in swimsuit technology by increasing swimmers' buoyancy up to 8% while significantly reducing drag.<sup>2</sup> As outcomes in swimming are determined by margins of only hundredths of seconds, it was unsurprising when more than 130 world records were broken in only the first seventeen months after the LZR became available to competitive swimmers.<sup>3</sup>

The suits did not make it far past those initial months. In July 2009, the Fédération Internationale de Natation (FINA), the international governing body of swimming, voted on an American proposal to ban polyurethane competition suits beginning on January 1, 2010. The proposal passed easily, with 180 nations voting in favor of the proposal and only seven voting against it.<sup>4</sup> Despite some experts' calls to distinguish those records set by swimmers wearing polyurethane suits, FINA ultimately did not choose to differentiate or nullify the records.<sup>5</sup>

After they emerged, and during the debates surrounding their regulation, polyurethane suits were frequently disparaged by

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1. Karen Crause, *Swimming Bans High Tech Suits, Ending an Era*, N.Y. TIMES (Jul. 24, 2009), <http://www.nytimes.com/2009/07/25/sports/25swim.html> [https://perma.cc/P645-LLU2].

2. See John D. Barrow, *Mathletics: A Scientist Explains 100 Amazing Things About The World Of Sports*, THE DAILY BEAST (Jul. 25, 2012), <https://www.thedailybeast.com/why-ban-full-body-olympics-swimsuits-a-scientist-explains-polyurethane> [https://perma.cc/7LNA-JC2U].

3. Crause, *supra* note 1.

4. See Barrow, *supra* note 2.

5. See *id.* See also *Hi-tech Suits Banned from January*, BBC SPORTS (Jul. 31, 2009), [http://news.bbc.co.uk/sport2/hi/other\\_sports/swimming/8161867.stm](http://news.bbc.co.uk/sport2/hi/other_sports/swimming/8161867.stm) [https://perma.cc/XB3K-HQMG] ("Scott also backed the idea of putting an asterisk by world records that were achieved in polyurethane suits to distinguish them from records before and after their introduction.").

swimmers and FINA regulators as akin to “doping on a hanger.”<sup>6</sup> Olympic gold-medalist swimmer Rebecca Adlington commented of the suits, “I would never in a million years take a drug to help me, so why would I wear a suit just to improve my performance? It’s just not who I am.” However, Adlington continued to wear the suits until the ban took effect in order to remain competitive among her peers.<sup>7</sup>

Improved technology has produced mixed consequences when applied to swimming and other sports. On one end of the spectrum, technology can be used in any sport to enforce rules with a previously impossible degree of precision. Sideline replays and other new technologies aimed at improving accuracy<sup>8</sup> can reduce referee discretion, decreasing the risk of match-fixing and generally improving fairness in competition. However, as the swimming community observed after the introduction of polyurethane suits, modern technology that provides athletes with too great an advantage can ultimately threaten the nature of competition.

The respective battles to limit doping in sport and polyurethane in swimming have been characterized as battles of ideals. In order for the nature of sport to be preserved, some argue, outcomes must be determined by perseverance and training combined with a “certain levels of biological luck.”<sup>9</sup> The importance of training and skill is threatened by the presence of mechanisms to create artificial improvement. In this sense, both extreme swimsuit technology improvements and doping can give advantages to athletes with less talent and experience. The prevalence of artificial improvements has compelled elite and recreational athletes to see the technologies as a “necessary part of the route to achieve success.”<sup>10</sup>

In this struggle to preserve the nature of sport, the similarities between the harms created through doping in sports and the use of polyurethane swimsuits in competition are readily appar-

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6. Sandee Lamonte, *High-tech Olympic ‘doping’?*, CNN (Aug. 10, 2016), <http://www.cnn.com/2016/08/10/health/gallery/high-tech-olympic-doping/index.html> [<https://perma.cc/VHC4-CKBH>].

7. Crause, *supra* note 1.

8. For an illustrative example of emerging accuracy technologies in baseball, see Jonny Glazier et al., *Baseball Sensors*, NORTHWESTERN UNIVERSITY (May 2016), <http://ideas.northwestern.edu/projects/baseball-sensors.html> [<https://perma.cc/NJE6-WS78>].

9. Johann Olav Koss, *Preface to the Second Edition* of BARRIE HOULIHAN, *DYING TO WIN: DOPING IN SPORT AND THE DEVELOPMENT OF ANTI-DOPING POLICY* 7 (2d ed. 2002).

10. Guiseppe Lippi et al., *Doping in competition or doping in sport?*, 86 *BRITISH MED. BULL.* 95, 105 (Mar. 2008).

ent. Accordingly, both have been monitored and regulated by international organizations due to their respective impacts on the integrity of sports. However, there is one major difference between doping and the polyurethane swimsuit: the former is still a headline in international sports news while the latter has been completely out of use for years.

The goal of this Note is to compare the international doping problem and the polyurethane swimsuit ban and then to ascertain how the successful FINA regulatory paradigm might be applied to the international anti-doping regime. Upon realizing polyurethane swimsuits stood to radically change swimming, FINA implemented regulation that swiftly and successfully eradicated the problem. In contrast, the World Anti-Doping Agency (WADA), the international organization charged with eradicating doping in sport, has yet to effectively control athletic doping. Despite the different scopes and missions of FINA and WADA, there are several regulatory lessons that can be extracted from FINA's successful polyurethane swimsuit ban and applied to WADA's struggle to eliminate doping in sports.

These regulatory lessons will develop in four parts. Part II will explain the FINA regulatory structure and the process by which FINA passed the polyurethane swimsuit ban in 2009. Part III will discuss the problems met by the World Anti-Doping Agency. Part IV will follow with an analysis of lessons from the FINA regime that might be applied to the international anti-doping paradigm as effected by WADA. The Note will conclude that, based on a comparison with FINA, WADA could benefit from executing changes including: articulating more specific and predictable regulations, implementing a hierarchical bureaucratic scheme, effecting multi-tier monitoring and enforcement measures, and making several other adjustments.

## II. FINA

FINA was founded in 1908 by eight national federations: Belgium, Denmark, Finland, France, Germany, Great Britain, Hungary, and Sweden.<sup>11</sup> Currently, FINA is comprised of national member federations from every continent and is charged with

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11. *Overview*, FEDERATION INTERNATIONALE DE NATATION, <http://fina.org/content/overview> [<https://perma.cc/3WRC-TJVB>] [hereinafter *Overview*, FINA].

achieving a robust list of objectives, including ensuring that swimming remains drug-free and encouraging people to participate in swimming and other FINA-regulated sports.<sup>12</sup> The International Olympic Committee (IOC) identifies FINA as the official International Sports Federation responsible for administering international competition in water sports.<sup>13</sup>

FINA’s governance structure and the process by which it has successfully regulated against the use of polyurethane swimsuits is further explained in Part II. Part II consists of three sections: the first Section details the regulatory and organizational structure of FINA, the next discusses the process of passing the swimsuit ban through FINA’s regulatory structure, and the final Section explains the content of the swimsuit ban. The goal of Part II is primarily to explicate FINA’s effective regulatory structure for comparison against, and ultimately application to, WADA’s regulatory regime in Part IV.

#### A. THE STRUCTURE OF FINA

FINA is comprised of 207 Member Federations.<sup>14</sup> Each Member Federation is the national governing body of FINA sports in its respective country. The constitution of FINA specifies that Member Federations must comply with FINA rules and, where rules conflict, FINA rules supersede national rules.<sup>15</sup> Member Federations — and the members thereof — are subject to sanctions for violating FINA rules or failing to comply with FINA regulations including fines, suspension, expulsion and cancellation of results.<sup>16</sup>

FINA has developed several instruments of regulation. FINA’s Constitution regulates the governance structure of the organization, and is the instrument from which each governing

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12. Incorporated in Switzerland, FINA is also the international governing body of diving and water polo. FINA is incorporated in Switzerland. *Id.*; see also FINA CONST. C1 (amended 2015), <http://www.fina.org/content/constitution> [<https://perma.cc/9UHW-W4Y4>].

13. *International Sports Federations*, OLYMPIC GAMES, <https://www.olympic.org/ioc-governance-international-sports-federations> [<https://perma.cc/72K9-U84R>] (last visited Jan. 21, 2018).

14. *Overview*, FINA, *supra* note 11.

15. Failure by a member or Member Federation to pay fines or honor FINA sanctions may result in expulsion. An expelled athlete or Member Federation may not participate in FINA world championships or competitions. FINA CONST., *supra* note 12, at C 7.1–7.3, 8.1.2, and C 12.2(d).

16. See *supra* note 15.

body within FINA derives its power.<sup>17</sup> The FINA General Rules are “basic regulations for FINA competitions in all kinds of Swimming, Open Water Swimming, Diving . . . as well as for uniform regulations for the development of competition facilities.”<sup>18</sup> These rules may be adjusted according to the limitations of each competition.<sup>19</sup> The General Congress, FINA’s legislative body and highest administrative authority, has the exclusive power to pass General Rules.<sup>20</sup> The FINA Bureau has direct power to control a robust series of codified By-Laws, which includes the FINA Code of Conduct, the FINA Rules of Conduct Applicable to Bidders, and the FINA Rules on the Prevention of Manipulation of Competition.<sup>21</sup> The Bureau and Committees produce other regulations including the FINA Swimming Rules and the FINA Requirements for Swimwear Approval.<sup>22</sup> The FINA Constitution and the FINA By-Laws both assign rule-making responsibilities and power to committees in respective circumstances.<sup>23</sup>

FINA’s organization is multi-layered and hierarchical. The General Congress of FINA is the highest authority of FINA and “shall have the power to decide upon any matters arising in FINA.”<sup>24</sup> The General Congress consists of two delegates from each Member Federation, each with a single vote.<sup>25</sup> The General Congress meets once every four years for many administrative purposes including voting on “proposals for changes and amendments of the FINA Constitution, General Rules, Facilities Rules, Medical Rules and Doping Control Rules.”<sup>26</sup> The Technical Congress, directly below the General Congress in FINA’s hierarchy,<sup>27</sup>

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17. FINA CONST., *supra* note 12, at C 1–2.

18. FEDERATION INTERNATIONALE DE NATATION, FINA GENERAL RULES 2 (2014), [http://www.fina.org/sites/default/files/fina\\_generalrules.pdf](http://www.fina.org/sites/default/files/fina_generalrules.pdf). [<https://perma.cc/3AMZ-ZYYJ>] [hereinafter FINA GENERAL RULES].

19. *Id.*

20. FINA CONST., *supra* note 12, at C 15.12.

21. *See generally* FINA Bureau, FEDERATION INTERNATIONALE DE NATATION, <http://www.fina.org/gms-function/fina-bureau> [<https://perma.cc/DW3M-JD4Z>] (last visited Nov. 21, 2017); *see also* FEDERATION INTERNATIONALE DE NATATION, FINA BYLAWS (approved on Dec. 2, 2014), [http://www.fina.org/sites/default/files/fina\\_by\\_laws\\_as\\_approved\\_by\\_the\\_fina\\_bureau\\_on\\_2\\_december\\_2016\\_clean.pdf](http://www.fina.org/sites/default/files/fina_by_laws_as_approved_by_the_fina_bureau_on_2_december_2016_clean.pdf) [<https://perma.cc/36Y9-EDX5>] [hereinafter FINA BYLAWS].

22. *Id.*

23. *See* FINA CONST., *supra* note 12, at C 20–21; *see also* FINA BYLAWS, *supra* note 21, at BL 9.47–9.9; BL 10.1; BL 10.3.5; BL 11.4.1.

24. *See* FINA CONST., *supra* note 12, at 15.1.

25. *Id.* at 15.2.1.

26. *Id.* at C 15.12.4.

27. *Id.* at C 13.

is responsible for deciding on all technical matters concerning each FINA sport, and has the power to determine the FINA Technical Rules.<sup>28</sup> The General Congress can overrule decisions made by the Technical Congress.<sup>29</sup>

The Bureau has separate but parallel responsibilities to, and acts to support, the General Congress. The Bureau consists of twenty-three voting Members appointed by the Congress.<sup>30</sup> The FINA Bureau is responsible for interpreting and enforcing FINA rules, determining the dates and sites of world championships, setting regulations for competition, appointing members of FINA Committees, and appointing delegates to international competitions including the Olympic Games.<sup>31</sup> However, the FINA Bureau has no power to make changes to the Constitution or Technical Rules.<sup>32</sup>

The final piece of the FINA regulatory hierarchy is its Committees. There are seven Technical Committees, one for each FINA-regulated sport, and thirteen Specialized Committees.<sup>33</sup> Additionally, the Constitution creates three Judicial Panels: the Doping Panel, the Disciplinary Panel, and the Ethics Panel.<sup>34</sup> Members of Committees are appointed by the Bureau and are not subject to term limits.<sup>35</sup> Committees have the power to propose amendments to regulations under their purview to the FINA Bureau.<sup>36</sup>

One of the thirteen Specialized Committees mentioned above is the Swimwear Approval Committee (SAC). Created by the FINA Constitution, the SAC consists of five appointed members, all representing different continents.<sup>37</sup> The Constitution specifies that each member have “knowledge about the sport equipment, of sport in general and the aquatics sport in particular” and that at least one of the members “shall also have knowledge in material science specifically in fabrics and/or polymers.”<sup>38</sup> Finally, the

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28. *Id.* at C 16.1.

29. *Id.* at C 15.1.

30. *Id.* at C 17.5.

31. *Id.* at C 17.14.

32. FINA Bureau, *supra* note 21.

33. *See* FINA CONST., *supra* note 12, at C 19.1.

34. *Id.*

35. *Id.* at C 19.4.

36. *Id.* at C 21.2.

37. There are only 5 continental organizations under FINA; North and South America comprise a single continental organization. FINA CONST., *supra* note 12, at C 14.1.

38. FINA CONST., *supra* note 12, at C 21.11.2.

Constitution requires at least one of the members of the SAC to have legal training and experience.<sup>39</sup> The Constitution requires the SAC to meet at least once per year.<sup>40</sup>

FINA's constitutional enforcement provisions are robust. As mentioned, should a Member Federation refuse to comply with a FINA regulation, that Federation can be expelled from FINA, preventing its athletes from competing in any FINA-sanctioned competition.<sup>41</sup> While there are few specific monitoring provisions in the FINA Constitution, the Constitution provides that a primary function of the Bureau is to enforce regulations.<sup>42</sup> The Bureau is required to appoint a delegate, who is then vetted by the Organizing Committee, to "attend the Olympic Games, World Championships, other FINA competitions, and other international competitions" in order to observe the competition for compliance and report back to the FINA Bureau.<sup>43</sup>

## B. THE IMPLEMENTATION OF THE SWIMSUIT BAN

The FINA Bureau first officially announced that it planned to permanently alter swimsuit standards in early March of 2009 with the approval of the Dubai Charter.<sup>44</sup> The Dubai Charter announced temporary amendments to regulate swimsuit standards that would be in effect until January 1, 2010, after which the transitory amendments were to be — and indeed were — replaced by the permanent approval procedure and swimsuit standards.<sup>45</sup> This announcement came after a Bureau meeting with the sport's major swimsuit manufacturers held in Switzerland in February 2009.<sup>46</sup>

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39. *Id.*

40. *Id.* at C 21.11.4.

41. *See supra* note 15.

42. *Id.* at C 17.14.2.

43. FINA CONST., *supra* note 12, at C 17.14.13.

44. The Dubai Charter was created, voted on, and ultimately issued by the FINA Bureau in order to announce its intentions to revise the methodology for the FINA swimwear approval process and to impose interim standards for swimwear in competition. Christopher Clarey, *All About the Suit: Rules Put Focus on the Athletes*, N.Y. TIMES (Mar. 21, 2009), <http://www.nytimes.com/2009/03/22/sports/othersports/22clarey.html> [https://perma.cc/DCZ9-2B2M].

45. DUBAI CHARTER ON FINA REQUIREMENTS FOR SWIMWEAR APPROVAL (2008), FEDERATION INTERNATIONALE DE NATATION, <http://archives.fina.org/H2O/docs/PR/the%20dubai%20charter> [https://perma.cc/K4XD-LR8R] [hereinafter DUBAI CHARTER].

46. *Id.* (FINA cited extensive support from the manufacturers, as well as FINA Athletes, Coaches and Legal Commissions when announcing their regulatory decision).



The FINA Requirements for Swimwear Approval were passed “by an overwhelming margin” of the General Congress on July 24, 2009.<sup>47</sup> A British motion moved oversight of the rule to the FINA Bureau, thus granting the Bureau the ability to alter the rule — it had originally been proposed as a general rule, which can only be amended by the FINA Congress.<sup>48</sup> Accordingly, the new swimsuit rules were codified as By-Law 8 (BL-8) in addition to being codified within the General Rules (GR 5).<sup>49</sup> On August 1, 2009, the Bureau announced the creation of the FINA Commission for Swimwear Approval. According to the Bureau, the Commission was created to “control the swimwear approval process” and to “monitor the development of the swimsuit industry based on the rules established by the FINA Bureau and the measurable scientific tests on buoyancy and permeability.”<sup>50</sup>

National Member Federations swiftly complied with FINA’s new swimsuit regulations after the General Congress’s decision was published. The United States’ Member Federation, USA Swimming, is representative of this trend of compliance. On September 19, 2009, months earlier than FINA’s deadline, the USA Swimming Rules and Regulations Committee announced that it had changed its rules to conform to those passed by FINA.<sup>51</sup> Additionally, the governing bodies of high school and college swimming in the United States — both non-FINA entities — passed rule changes that conformed with FINA’s standards in mid-2009.<sup>52</sup>

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47. *FINA Congress Severely Restricts Suit Coverage, Eliminates Non-textile Suits; FINA Releases Press Release*, SWIMMING WORLD MAG. (Jul. 24, 2009), <https://www.swimmingworldmagazine.com/news/fina-congress-severely-restricts-suit-coverage-eliminates-non-textile-suits-fina-releases-press-release/> [<https://perma.cc/84NL-VAYZ>]

48. *Id.* (“Previously, the rule was brought forward as a general rule, which can only be amended at the FINA Congress.”).

49. The subsequent General Congress, convening in 2013, removed any mention of swimwear compliance from the General Rules, leaving only BL-8 with any swimsuit regulation standards. *FINA Congress Severely Restricts Suit Coverage*, *supra* note 47; FINA BYLAWS, *supra* note 21, at BL-8.

50. *FINA Names Scientific Commission for Swimwear Approval*, SWIMMING WORLD MAG. (Aug. 1, 2009), <https://www.swimmingworldmagazine.com/news/fina-names-scientific-commission-for-swimwear-approval/> [<https://perma.cc/Z3EU-M7SX>].

51. Press Release, Bruce W. Stratton, Chair, USA Swimming Rules and Reg. Comm., Important new rules regarding swimsuits (Sep. 21, 2009), [http://www.pvswim.org/official/rules/Letter\\_to\\_Members\\_about\\_Swimsuits\\_2009-09-21.pdf](http://www.pvswim.org/official/rules/Letter_to_Members_about_Swimsuits_2009-09-21.pdf). [<https://perma.cc/9FS5-2YND>].

52. *USA Swimming Rule Changes on Swimsuits*, PVS NEWS (last updated Oct. 10, 2009), <http://pvswim.org/0809news/2009SwimSuitRules.html> [<https://perma.cc/BN8V-855F>].

### C. FINA REQUIREMENTS FOR SWIMWEAR APPROVAL

BL-8 codifies FINA's swimwear regulation. The By-Law specifies "all swimwear used at Olympic Games and FINA Events (pool and open water competitions) shall be swimwear approved by FINA in accordance with the rules and procedures set forth in the FINA Requirements for Swimwear Approval ('FRSA')." <sup>53</sup> Accordingly, the substance of the FINA swimsuit regulations is further detailed in the 26-page FRSA. The By-Law sets out the basic structure of monitoring fabric used by swimsuit manufacturers and ensuring compliance: any suit worn by an athlete during a FINA affiliated competition must be previously approved by FINA. By creating an official list of products for athletes to choose among, FINA establishes a closed universe of authorized swimsuits available to athletes in competition. <sup>54</sup>

The FRSA first explains the process that swimsuit manufacturers must follow in order to have new swimsuits approved by FINA. Only FINA-approved suits may be used in FINA competitions and the Olympic Games, and results achieved in non-approved suits, including time qualifications and world records, will not be recognized by FINA. <sup>55</sup> The Swimwear Approval Committee conducts the approval process through an independent testing program. The FRSA requires that SAC Members remain independent from swimwear manufacturers and cannot have "any relationship with a swimwear manufacturer (whether of contractual nature or as a shareholder direct or indirect) nor have had such during the five preceding years." <sup>56</sup> Swimsuit manufacturers, not subcontractors, must submit an application for approval that includes a sample of the swimsuit in question to FINA by the yearly submission date. <sup>57</sup> If the SAC rejects the product in question, the FRSA outlines a process for resubmission. <sup>58</sup> Those who submit applications for approval are responsible for paying a fee covering administrative and testing costs. <sup>59</sup>

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53. FINA BYLAWS, *supra* note 21, at BL-8.

54. *Id.*

55. FINA REQUIREMENTS FOR SWIMWEAR APPROVAL, FEDERATION INTERNATIONALE DE NATATION, Art. 3.2 (2016), <https://www.fina.org/sites/default/files/frsa.pdf> [<https://perma.cc/54T3-SAFE>] [hereinafter FRSA].

56. *Id.* at Art. 3.1.

57. *Id.* at Art. 3.2.

58. *Id.* at Art. 3.3.

59. *Id.* at Art. 5.

The list of approved swimwear is published each year prior to December 31.<sup>60</sup>

By-Law 8 and the FRSA incentivize athlete and manufacturer compliance with their robust, specific approval and monitoring procedures. FINA refuses to recognize any result achieved in a non-approved suit, and requires any athlete participating in a FINA competition or the Olympic Games to wear an approved suit.<sup>61</sup> The guidelines with which manufacturers must comply are specifically outlined within the FRSA and supported with photographic exhibits.<sup>62</sup> After a product has been approved, FINA reserves the right to conduct a further compliance check and summarily withdraw approval upon evidence of inconsistency or other issues.<sup>63</sup>

FINA is also able to closely monitor athletes for compliance during competition. Athletes are permitted to compete only in a specific number of controlled swimsuit options. The FRSA further simplifies the monitoring process to allow referees to easily judge whether an athlete is wearing a FINA-approved swimsuit. The FRSA mandates that each FINA-approved product bear a “FINA Approved’ identification label.”<sup>64</sup> Each label carries with it a “unique identification number which includes a reference to the year from which the approval will be valid.”<sup>65</sup> The labels must be affixed to each swimsuit in a way that prevents their removal or transfer and the manufacturer must warrant that the unique label is only affixed to a swimsuit that is “identical to, and fully consistent with, the actual Samples submitted to obtain the approval.”<sup>66</sup>

### III. THE INTERNATIONAL ANTI-DOPING REGIME

The United Nations Educational, Scientific, and Cultural Organization (UNESCO) defines doping as “an athlete’s use of prohibited drugs or methods to improve training and sporting results.” Doping includes the use of drugs such as steroids, hormones, and diuretics, but also other forbidden methods for gain-

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60. *Id.* at Art. 7.

61. *Id.* at Art. 2, Art. 8.

62. *Id.* at Art. 17.

63. *Id.* at Art. 12.

64. *Id.* at Art 6.

65. *Id.* at Art. 6.

66. *Id.*

ing a competitive advantage, such as blood transfusions.<sup>67</sup> The presence of doping in sports poses two major hazards to society: a public health threat and an ethical threat.<sup>68</sup> Performance enhancing drugs such as peptide hormones and anabolic steroids cause side effects in their users, including hostile behavior, mood swings, depression, infertility, liver damage, high blood pressure, death, and heart and circulation damage.<sup>69</sup> Health risks posed by numerous doping methods have the potential to cause lifelong damage to athletes.<sup>70</sup> Doping also carries with it ethical implications, as athletes who dope undermine the value of their competitors' hard work.<sup>71</sup> Sports provide emotional, physical, and psychological benefits to athletes, including instilling a sense of personal accomplishment, and the importance of teamwork and commitment. A culture that allows for doping undermines these values and benefits of sport by instead encouraging athletes to prioritize winning at all costs.<sup>72</sup>

Left unmanaged, permissive doping in sports poses unique risks to professional athletes and young athletes alike. These risks result from the collective action dilemma associated with doping: when an athlete isn't doping, but believes her competitor is, the athlete will believe that she must also dope in order to remain competitive. Thus, if doping is permissive in a sport, any rational actor attempting to participate meaningfully in that sport will choose to dope or risk becoming uncompetitive.<sup>73</sup>

Despite the substantial health and ethical risks posed by permissive athletic doping, performance-enhancing drugs were not

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67. *What is doping?*, UNESCO, <http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/youth-space/what-is-doping/> [https://perma.cc/92KF-NPME] (last visited Jan. 21, 2018).

68. *The Who, Why, and How of USADA Testing?*, USADA, <https://www.usada.org/who-why-how-usada-testing/#1505327608782-9276e046-8756> [perma.cc/7Q2F-CNZN] [hereinafter *USADA Testing*].

69. *Steroid Abuse in Today's Society*, DIVERSION CONTROL DIV., U.S. DEPT OF JUST., <https://www.deadiversion.usdoj.gov/pubs/brochures/steroids/professionals/index.html> [https://perma.cc/2Q6E-EEK3]

70. *Id.*

71. *USADA Testing*, *supra* note 68.

72. USADA, *TRUE SPORT: WHAT WE STAND TO LOSE IN OUR OBSESSION TO WIN* 7 (2012) <http://truesport.org/wp-content/uploads/TsReport.pdf> [https://perma.cc/YW6V-XXTZ] [hereinafter *USADA Report*].

73. For an analysis of collective action and athletic doping, in which Tyler Hamilton discusses the omertà of the cycling world, see generally *Planet Money: Lance Armstrong and the Business of Doping*, NAT'L PUB. RADIO (Apr. 27, 2016), <https://www.npr.org/sections/money/2016/04/27/475929464/episode-417-lance-armstrong-and-the-business-of-doping> [https://perma.cc/8A4D-ZWGD].

banned in athletic competition until 1964, when the International Olympic Committee (IOC) introduced its first doping ban and implemented drug testing of Olympic athletes as a means of enforcement.<sup>74</sup> Since 1964, scientists have continued to discover different ways to expose athletes using performance-enhancing drugs, while athletes have continued to discover different methods to evade doping enforcement.<sup>75</sup>

Accordingly, the World Anti-Doping Agency (WADA) was formed in 1999 to lead a “collaborative, worldwide movement for doping-free sport.”<sup>76</sup> However, WADA has received substantial criticism regarding its effectiveness.<sup>77</sup> This criticism came to a head in late 2014, when a German documentarian thrust the widespread prevalence of doping into international headlines by exposing the role of athletic doping in track and field. Throughout the documentary, Russian athletes detail government-mandated doping that affected all but a few internationally competitive Russian athletes.<sup>78</sup> Permissive doping in sports is not restricted to Russian athletes. There is evidence that more Americans are doping than ever: the Substance Abuse and Mental Health Services Administration’s National Household Survey on Drug Abuse determined that an all-time high of 1,084,000 Americans, or about 0.5% of the adult population, reported using anabolic steroids.<sup>79</sup>

The primary goal of Part III will be to lay out WADA’s unwieldy regulatory structure, and to describe particular difficulties the organization has encountered, in order to enable further com-

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74. Anita L. DeFrantz, *Which Rules? International Sport and Doping In the 21<sup>st</sup> Century*, 31 Hous. J. Int’l L. 1, 10 (2008).

75. See generally *Performance Enhancing Drugs in Sports Fast Facts*, CNN (May 28, 2017), <http://www.cnn.com/2013/06/06/us/performance-enhancing-drugs-in-sports-fast-facts/index.html> [https://perma.cc/F4R9-KMZW].

76. *Who We Are*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/who-we-are> [https://perma.cc/HZA4-UVT2] [hereinafter WADA, *Who We Are*] (last visited Jan. 21, 2018).

77. This claim will be further expanded in Part III.B. For one example of media coverage that has tarnished WADA’s reputation, see, e.g., Rebecca R. Ruiz et al., *Even With Confession of Cheating, World’s Doping Watchdog Did Nothing*, N.Y. TIMES (June 15, 2016), <https://www.nytimes.com/2016/06/16/sports/olympics/world-anti-doping-agency-russia-cheating.html> [https://perma.cc/LBC2-LCL8].

78. See generally Hajo Seppelt, *The Secrets of Doping: How Russia Makes its Winners*, HAJOSEPPELT.DE (Dec. 3, 2014), <http://hajoseppelt.de/2014/12/the-secrets-of-doping-how-russia-makes-its-winners/> [https://perma.cc/SKB4-Q6B3].

79. *Steroid Abuse in Today’s Society*, DIVERSION CONTROL DIV., U.S. DEP’T OF JUST. (Mar. 2004) <https://www.deadiversion.usdoj.gov/pubs/brochures/steroids/professionals/> [https://perma.cc/8JPN-P3GZ].

parison with the FINA regulatory regime. Accordingly, Part IV will then seek to apply FINA's regulatory lessons to aid weaknesses in WADA's regulatory regime.

This Part explains the WADA governance structure and regulatory regime in three sections. The first Section will discuss the ongoing international struggle to combat doping and the structural development of the WADA; the next Section will discuss the process of passing regulations through WADA, including a case study of the 2015 Russia doping investigation; and the concluding Section will explore the content of the current WADA Code.

#### A. THE STRUGGLE TO COMBAT ATHLETIC DOPING AND THE DEVELOPMENT OF THE WORLD ANTI-DOPING AGENCY

Global attention turned to athletic doping following the 1998 Festina Affair, a doping scandal in which many of the top cyclists competing in the Tour de France cycling race faced public exposure.<sup>80</sup> Amid pressure to reform and coordinate international anti-doping mechanisms, the IOC held the First World Conference on Doping in Switzerland in February 1990. At the World Conference, the IOC adopted the Lusanne Declaration on Doping in Sport (Lusanne Declaration), which called for the establishment of an "International Anti-Doping Agency . . . so as to be fully operational for the Games of the XXVII Olympiad in Sydney in 2000."<sup>81</sup>

Thus, the World Anti-Doping Agency was formed in 1999 to fulfill the mandate of the Lusanne Declaration. The Declaration listed the preliminary goals of the new international anti-doping organization to include "expanding out-of-competition testing, coordinating research, promoting preventive and educational actions and harmonizing scientific and technical standards and procedures for analyses and equipment."<sup>82</sup> Today, WADA exists as an independent agency and has retained many of its original mandates; WADA seeks to educate athletes, conduct research, and develop new anti-doping capacities in order to foster doping-

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80. *Drug scandal team thrown off Tour*, BBC NEWS (July 18, 1998), [http://news.bbc.co.uk/2/hi/special\\_report/1998/07/98/tour\\_de\\_france/134842.stm](http://news.bbc.co.uk/2/hi/special_report/1998/07/98/tour_de_france/134842.stm) [https://perma.cc/M5XX-UHJF].

81. World Conference on Doping and Sport, Lusanne Declaration on Doping and Sport (as adopted February 4, 1999), [http://www.sportunterricht.de/lksport/Declaration\\_e.html](http://www.sportunterricht.de/lksport/Declaration_e.html) [https://perma.cc/6BLJ-Y84P].

82. *Id.*

free environments across all sports.<sup>83</sup> Thus, from its inception, WADA has had very close connections with the IOC.<sup>84</sup> This includes WADA’s relationship with the Olympic Movement,<sup>85</sup> which is perpetuated through the Olympic Movements’ representation in WADA’s governing bodies and by virtue of WADAs’ hundreds of signatories who are also governed under the authority of the Olympic Charter.<sup>86</sup>

However, WADA’s mission statement has evolved beyond the provisions of the Lusanne Declaration. Today, WADA’s primary responsibility is to maintain and enforce the World Anti-Doping Code (the “Code”), the main legal document of the World Anti-Doping Program. The primary activities of WADA stem from its responsibilities under the Code.<sup>87</sup> The Code was first adopted in 2003 to harmonize anti-doping regulation across every country and every sport.<sup>88</sup> A document known as the Five International Standards contains additional technical details and operates in conjunction with the Code to serve as WADA’s primary instruments.<sup>89</sup>

WADA’s governance is affected by the Olympic Movement at multiple points. The organization’s governance structure consists of a thirty-eight member Foundation Board, a twelve member

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83. See WADA, *Who We Are*, *supra* note 76.

84. Jenny Gesley, *Global Anti-Doping Rules — an Overview*, LIB. OF CONG.: IN CUSTODIA LEGIS: LAW LIBRARIANS OF CONG. (August 12, 2016), <https://blogs.loc.gov/law/2016/08/global-anti-doping-rules-an-overview/> [<https://perma.cc/9XWP-JUZG>].

85. The Olympic Movement was established through the Olympic Charter in 1894 and “encompasses organisations [sic.], athletes and other persons who agree to be guided by the Olympic Charter. The goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport practiced [sic.] in accordance with Olympism and its values.” The Olympic Charters states that the constituents of the Olympic Movement are governed under the supreme authority of the International Olympic Committee. See INT’L OLYMPIC COMM., OLYMPIC CHARTER 1.1, [https://still.med.olympic.org/Documents/olympic\\_charter\\_en.pdf](https://still.med.olympic.org/Documents/olympic_charter_en.pdf) [<https://perma.cc/9VQX-8ZYF>] (last visited Jan. 21, 2018).

86. For a list of signatories, see *Code Signatories*, WORLD ANTI-DOPING AGENCY (last visited November 21, 2017), <https://www.wada-ama.org/en/code-signatories#OlympicMovement> [<https://perma.cc/K43Y-23NY>].

87. See WADA, *Who We Are*, *supra* note 76.

88. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE: 2015 4 (2015), <https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf> [<https://perma.cc/8BV6-WMLU>] [hereinafter WORLD ANTI-DOPING CODE]. For a more detailed discussion of the Code, see *infra* Part III.C.

89. *International Standards*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/international-standards> [<https://perma.cc/NX9Y-CPWQ>] (last visited Nov. 21, 2017).

Executive Committee, and several expert committees.<sup>90</sup> The Foundation Board is the supreme decision-making body of WADA, and its members consist equally of representatives from the Olympic Movement and governments.<sup>91</sup> The Code mandates that Code amendments be made only through two-thirds approval by the Foundation Board, with at least majority approval coming from both private and public representatives.<sup>92</sup> The President of WADA, currently Sir Craig Reedie of the IOC, is a member of the Foundation Board.<sup>93</sup> The position of President alternates between an Olympic Movement representative and a government representative.<sup>94</sup>

The Foundation board delegates WADA's primary management responsibilities, including the administration of assets and the performance of activities, to the Executive Committee. The Executive Committee is comprised of twelve members and also includes equal representation of members from the Olympic Movement and governments.<sup>95</sup> The Committee is considered WADA's primary policymaking body.<sup>96</sup> As such, the Code mandates that the Executive Committee be granted the power to make timely adjustments to the International Standards without requiring any amendment to the Code.<sup>97</sup>

Several specialized committees also govern WADA. The specialized committees — which include groups such as the Compliance Review Committee and the Education Committee — are responsible for providing more specific operational and technical guidelines in support of WADA programs.<sup>98</sup> Certain committees oversee other concentrated groups, called Expert Groups, which monitor the specialized areas under a committees' purview. For

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90. *Governance*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/governance> [https://perma.cc/W4G5-MCYE] (last visited Nov. 21, 2017).

91. *Id.*

92. WORLD ANTI-DOPING CODE, *supra* note 88, at 125 (Art. 23.7.3).

93. *Foundation Board*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/foundation-board> [https://perma.cc/3GA7-965U] (last visited Feb. 9, 2018).

94. *Governance*, WORLD ANTI-DOPING AGENCY, *supra* note 90.

95. *See WADA, Who We Are*, *supra* note 76.

96. *Executive Committee*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/executive-committee> [https://perma.cc/9375-VKF5] (last visited Feb. 9, 2018).

97. WORLD ANTI-DOPING CODE, *supra* note 88, at 12.

98. *See Governance*, WORLD ANTI-DOPING AGENCY, *supra* note 90. *See also Compliance Review Committee*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/who-we-are/governance/compliance-review-committee> [https://perma.cc/Q52R-F5CM]; *Education Committee*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/education-committee> [https://perma.cc/2XJC-RH8R].



example, the Health, Medical and Research Committee oversees four different expert groups, including the Prohibited List Expert Group and the Laboratory Accreditation Expert Group.<sup>99</sup> The Health, Medical and Research Committee is responsible for monitoring scientific developments in doping, while the Prohibited List Expert Group is specifically responsible for providing recommendations and guidance to the Health Committee, “on the overall publication, management and maintenance of its annual List of Prohibited Substances and Methods.”<sup>100</sup>

However, this basic framework of WADA is not exhaustive. The WADA Ethics Panel provides expert ethical opinions and policy suggestions to WADA’s management regarding particularly contentious ethical issues.<sup>101</sup> WADA works with the Court of Arbitration of Sports (CAS) to coordinate rules, and allows athletes accused of a violation to be heard by CAS and to appeal to CAS for doping cases.<sup>102</sup> WADA also relies heavily on National Anti-Doping Organizations (NADOs), individual governments, and the International Olympic Committee for implementing testing procedures in their respective spheres of authority.<sup>103</sup> Part Three of the Code, entitled “Roles and Responsibilities,” outlines WADA’s expectations of Code signatories including the IOC, International Sports Federations, and athletes themselves.<sup>104</sup> Although the FINA Constitution mandates a particular structure for FINA’s internal governance and regulatory regime, WADA’s structure is not mandated by the Code.

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99. *Health, Medical, and Research Committee*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/health-medical-research-committee> [<https://perma.cc/B3MW-LGGT>] (last visited Nov. 21, 2017).

100. *Prohibited List Expert Group*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/prohibited-list-expert-group> [<https://perma.cc/P7P7-U2NP>] (last visited Nov. 21, 2017).

101. *WADA Ethics Panel*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/ethical-issues-expert-group> [<https://perma.cc/PF5L-FNYS>] (last visited Nov. 21, 2017).

102. See WORLD ANTI-DOPING CODE, *supra* note 88, at 17, 59 (Art. 8.5); see also *Global Anti-Doping Organization Chart*, WORLD ANTI-DOPING AGENCY (Jan. 2009), [https://www.wada-ama.org/sites/default/files/resources/files/WADA\\_PK\\_Global\\_ADO\\_Chart\\_200901\\_EN.pdf](https://www.wada-ama.org/sites/default/files/resources/files/WADA_PK_Global_ADO_Chart_200901_EN.pdf) [<https://perma.cc/X54E-FTLK>].

103. *Anti-Doping Community*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/anti-doping-community> [<https://perma.cc/HK6S-GUKU>] (last visited Feb. 9, 2018).

104. See WORLD ANTI-DOPING AGENCY, *supra* note 88, at 102–19.

## B. THE WADA REGULATORY PROCESS: THE RUSSIAN CASE STUDY

In order to explore WADA's current regulatory response mechanisms, this Section details WADA's response to, and influence upon, the recent Russian doping scandal. However, it should not be understood as an analogy to the polyurethane swimsuit problem, but rather is intended to illustrate WADA's situational problem-solving capacity.

On May 8, 2016, 60 Minutes reported allegations of systematic government-sponsored doping among Russian athletes during the 2014 Sochi Olympics.<sup>105</sup> Four days later, the *New York Times* published an article with similar allegations, sourced primarily from whistleblowers Dr. Grigory Rodchenkov and Mr. Vitaly Stepanov.<sup>106</sup> Dr. Rodchenkov was the director of the Sochi anti-doping laboratory, and detailed the lab's facilitation of the elaborate doping ploys that involved hundreds of Russian athletes during the 2014 Olympics.<sup>107</sup> WADA responded promptly to the reports, and on May 16, 2016, WADA President Sir Reedie appointed Professor Richard H. McLaren to lead an investigation into the allegations. The Russian informants insisted upon an independently-led investigation, given that the allegations related to the Sochi Olympics and in light of the connections between the IOC and WADA.<sup>108</sup>

Professor McLaren was granted the resources of a WADA investigation team, and was asked to first gather and review all evidence to determine whether there had been anti-doping violations, and then to publish a full report detailing his discoveries.<sup>109</sup> WADA published formal terms of reference governing Professor McLaren's investigation and WADA's expectations of McLaren. The terms of reference include provisions detailing: the dates of

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105. Rebecca R. Ruiz & Michael Schwartz, *Russian Insider Says State-Run Doping Fueled Olympic Gold*, N.Y. TIMES (May 12, 2016), <https://www.nytimes.com/2016/05/13/sports/russia-doping-sochi-olympics-2014.html> [https://perma.cc/6SC2-4PZF].

106. *Id.*

107. *Id.*

108. Press Release, World Anti-Doping Agency, WADA Names Richard McLaren to Sochi Investigation Team (May 19, 2016), <https://www.wada-ama.org/en/media/news/2016-05/wada-names-richard-mclaren-to-sochi-investigation-team> [https://perma.cc/WHW4-3DL5].

109. WORLD ANTI-DOPING AGENCY, INDEPENDENT INVESTIGATION INTO THE SOCHI ALLEGATIONS MADE BY GRIGORY RODCHENKOV: TERMS OF REFERENCE (2016), [https://perma.cc/AH3X-FRND].

the investigation, the investigation’s organizational structure, its working norms, and the source of the investigation’s funding.<sup>110</sup>

Professor McLaren released the 103–page McLaren Investigation Report on July 18, 2016, revealing what would later be called “one of the greatest conspiracies in sports history.”<sup>111</sup> The McLaren Report uncovered Russian state-sponsored manipulation of the doping-control process not only at the 2014 Sochi Olympics, but also at the 2013 IAAF World Championships, the 2013 World University Games, and the 2012 London Olympic Games.<sup>112</sup> Sir Reddie released a public statement acknowledging that the Report “corroborates the allegations, exposing a modus operandi of serious manipulation of the doping control process in the satellite laboratory set up in Sochi for the 2014 Games; and, the Moscow laboratory since 2011 and after the Sochi Games.”<sup>113</sup> The second part of the McLaren Report — an expansion on the original report produced without the time constraint of the impending Olympics — was released in December 2016 and identified more than 1,000 Russian athletes that had benefitted from doping.<sup>114</sup>

Following the issuance of the McLaren Report, WADA recommended that the IOC decline entry to all athletes submitted by the Russian Olympic Committee at the Rio 2016 Olympic Games.<sup>115</sup> Additionally, WADA recommended that all Russian officials be removed from international competitions, and that International Sports Federations take similar actions against Russian National Federations as called for in the Code.<sup>116</sup>

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110. *Id.*

111. Rebecca R. Ruiz, *Russians No Longer Dispute Olympic Doping Operation*, N.Y. TIMES (Dec. 27, 2016), <https://www.nytimes.com/2016/12/27/sports/olympics/russia-doping.html> [<https://perma.cc/UE5H-HFG2>].

112. See RICHARD H. McLAREN, WORLD ANTI-DOPING AGENCY, THE INDEPENDENT PERSON REPORT 61 (2016), [https://www.wada-ama.org/sites/default/files/resources/files/20160718\\_ip\\_report\\_newfinal.pdf](https://www.wada-ama.org/sites/default/files/resources/files/20160718_ip_report_newfinal.pdf) [<https://perma.cc/3RXT-K2G4>]. The Report also explains the Russian sample swapping methodology in great detail. *Id.*

113. Press Release, World Anti-Doping Agency, WADA Statement: Independent Investigation confirms Russian State manipulation of the doping control process (July 18, 2016), <https://www.wada-ama.org/en/media/news/2016-07/wada-statement-independent-investigation-confirms-russian-state-manipulation-of> [<https://perma.cc/6WQR-LHTW>] [hereinafter WADA Independent Investigation Press Release].

114. Press Release, World Anti-Doping Agency, WADA Statement regarding conclusion of McLaren Investigation (December 9, 2016), <https://www.wada-ama.org/en/media/news/2016-12/wada-statement-regarding-conclusion-of-mclaren-investigation> [<https://perma.cc/7VV7-5RGD>].

115. WADA Independent Investigation Press Release, *supra* note 113.

116. *Id.*

WADA's calls for extreme recourse against Russia were not exclusively based on the severity of the actions detailed in the report. The McLaren Report found that the Russian Government had continued its systematic doping regime during and after the 2015 WADA Independent Committee Investigation into Russian doping.<sup>117</sup> The Executive Committee found that this conduct "show[ed] a total disregard for the international community; and, reinforce[d] the urgent need for true and demonstrable commitment by the Russian authorities for a change of culture."<sup>118</sup> WADA's Executive Committee issued the sanction recommendations, with support from other WADA officials.<sup>119</sup>

The International Olympic Committee did not follow WADA's sanction recommendations. The IOC instead asked individual sports federations to scrutinize Russian athletes individually and decide who was eligible to compete in the Rio Games.<sup>120</sup> Ultimately, more than 110 Russian athletes were banned from competing, while 272 Russian athletes were cleared.<sup>121</sup> In light of the extremely limited timeframe the IOC had before the start of the Rio Olympics, the IOC referred to a blanket ban as a "nuclear option" that would come at the expense of "innocent athletes."<sup>122</sup> The Olympic Committee representative from Barbados characterized the decision as passing the buck.<sup>123</sup> The Russian Olympic Committee and the IOC both condemned WADA as an ineffective regulator, suggesting that the WADA system of accountability was a broken one that allowed for the doping conspiracy to take root.<sup>124</sup> WADA itself did possess the power to halt the re-accreditation of the Moscow Laboratory, which had been suspended following the 2015 Independent Commission investigation.<sup>125</sup>

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117. *Id.*

118. *Id.*

119. *Id.*

120. Rebecca R. Ruiz, *I.O.C. Members Berate WADA Over Russia Scandal*, N.Y. TIMES (Aug. 2, 2016), <https://www.nytimes.com/2016/08/03/sports/olympics/international-olympic-committee-world-anti-doping-agency.html?rref=collection%2Fbyline%2Frebecca-r.-ruiz> [https://perma.cc/WK6M-UBC7].

121. Greg Myre & Tom Goldman, *Dubious Olympic Record: More Than 110 Russian Athletes Barred From Rio*, NAT'L PUB. RADIO (Aug. 2, 2016), <http://www.npr.org/sections/thetorch/2016/08/02/487642811/the-russian-tally-more-than-110-athletes-barred-from-the-olympics> [https://perma.cc/FMQ6-FKT9].

122. Ruiz, *I.O.C. Members Berate WADA Over Russia Scandal*, *supra* note 120.

123. *Id.*

124. *Id.*

125. WADA Independent Investigation Press Release, *supra* note 113.

However, since addressing the fallout from the McLaren Report, the IOC has expressed renewed faith in working with WADA. In October 2016, following the conclusion of a four-hour closed-door meeting with twenty sporting officials, Thomas Bach, IOC President, announced the creation of a new drug-testing authority that will operate under WADA.<sup>126</sup> Bach also advocated for the importance of independent adjudication, and suggested that the CAS impose all penalties for doping violations as an alternative to the current system that leaves sanctioning to International Sporting Federations.<sup>127</sup> Further, WADA met in May 2017 to discuss agency reform and to begin to develop concrete plans for implementation.<sup>128</sup>

### C. THE WORLD ANTI-DOPING CODE

The World Anti-Doping Code was adopted in 2003, went into effect in 2004, and was amended once in 2009.<sup>129</sup> The current version of the Code went into effect in 2015 and reflects revisions passed by a meeting of the Foundation Board in November 2013.<sup>130</sup> The document provides a “fundamental and universal” framework in order to help coordinate effective anti-doping programs with respect to deterrence, detection, and prevention of doping.<sup>131</sup> The Code was written with the goal of providing specificity where required, but remaining general enough to allow for flexibility in implementation.<sup>132</sup>

WADA acts as a custodian to monitor implementation of the Code, but does not actually implement the vast majority of its provisions itself. Instead, the Code delegates the implementation of Code provisions “according to their authority within their relevant spheres of responsibility.”<sup>133</sup> Signatories are mandated to implement policies, statutes, rules, and regulations that are not

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126. Rebecca R. Ruiz, *I.O.C. Expands WADA's Authority to Lead Anti-Doping Efforts*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/09/sports/olympics/international-olympic-committee-antidoping-wada.html>.

127. *Id.*

128. See Andy Brown, *Reforms take centre stage at WADA Symposium*, THE SPORTS INTEGRITY INITIATIVE (Mar. 13, 2017), <http://www.sportsintegrityinitiative.com/reforms-take-centre-stage-wada-symposium/> [<https://perma.cc/TBD7-X7HW>].

129. WORLD ANTI-DOPING CODE, *supra* note 88, at 4.

130. *Id.*

131. *Id.* at 11.

132. *Id.* at 16.

133. *Id.* at 121.

substantively different from those set forth in the Code. Signatories are also required to agree to “devote sufficient resources in order to implement anti-doping programs in all areas that are compliant with the Code and the International Standards.”<sup>134</sup>

Accordingly, the Code does not allow for WADA to carry out sanctions itself, and leaves the enforcement responsibility to the Anti-Doping Organizations. The goal of the Code is to provide a framework for the “fair and transparent” application of sanctions,<sup>135</sup> but WADA may only make recommendations regarding the suggested imposition of particular sanctions. Specified Persons and organizations,<sup>136</sup> including WADA, are then “given the opportunity to appeal” any decision regarding a doping violation in the CAS.<sup>137</sup>

Despite its fragmented enforcement procedure, the Code emphasizes the importance of achieving consistency in the assignment of doping sanctions across all countries and sports. A comment to the Code identifies the “harmonization” of doping sanctions as one of the most contentious but vital elements of anti-doping enforcement.<sup>138</sup> In the comment, the Code states that “flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting organizations to be more lenient with dopers.”<sup>139</sup> Additionally, the Code takes the stance that it would be inappropriate for athletes from the same country that are caught doping in similar manners to receive different sanctions simply because they participate in different sports.<sup>140</sup>

The Code recommends doping sanctions of varying severity based on the severity of the violation in question. An athlete who tests positive for a prohibited substance at an event is, at a minimum, disqualified from that event and stripped of his results from that event.<sup>141</sup> Athletes might be subject to fines, particularly the loss of prize money, in order to compensate for the cost of arbitrating a doping violation.<sup>142</sup> Additionally, athletes can be

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134. *Id.* at 122.

135. *See id.* at 86.

136. *Id.* “Specified Persons” is a defined term as referenced in Code comment to Art. 13. *Id.* at 86.

137. WORLD ANTI-DOPING CODE, *supra* note 88, at 86.

138. *Id.* at 78.

139. *Id.*

140. *Id.*

141. *Id.* at 59–60.

142. *See id.* at 72.

subject to a provisional suspension or a period of ineligibility.<sup>143</sup> During a period of ineligibility, the violator may not train with a club or team and is not eligible to receive any financial gain from his sport.<sup>144</sup> The period of ineligibility is usually either two or four years, but can extend to a lifetime ban for the violation of more serious provisions of the Code, such as a violation involving a minor.<sup>145</sup> Teams with multiple players found doping in the same time period are subject to an undefined “appropriate sanction.”<sup>146</sup> Those accused of doping violations have the chance to be heard within a reasonable period of time by a fair and impartial hearing panel.<sup>147</sup> This hearing is to be conducted by the National Anti-Doping Organization of the jurisdiction in question, or, with approval of WADA and other bodies, may be handled directly by the CAS.<sup>148</sup> While enforcement is only mentioned briefly in the Code, International Federations and National Anti-Doping Organizations are required “to ensure proper enforcement of consequences” of violations.<sup>149</sup>

Despite its goal of regulatory unification, the Code is not an independently comprehensive regulative tool. Instead, the Code functions in conjunction with another regulatory protocol, the five International Standards, which “contain much of the technical detail necessary for implementing the Code.”<sup>150</sup> Compliance with the International Standards is necessary in order to achieve complete compliance with the Code. As previously mentioned, the WADA Executive Committee has the power to review and edit

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143. *See id.* at 60.

144. *See id.* at 75–78.

145. *See id.* at 62.

146. *Id.* at 79.

147. *Id.* at 57.

148. *See id.* at 57, 59.

149. This requirement is understated in the Code, and the two enforcement provisions are found subtly toward the end of the document: International Federations agree “To vigorously pursue all potential anti-doping rule violations within its jurisdiction including investigation into whether Athlete Support Personnel or other Persons may have been involved in each case of doping, to ensure proper enforcement of Consequences, and to conduct an automatic investigation of Athlete Support Personnel in the case of any anti-doping rule violation involving a Minor or Athlete Support Person who has provided support to more than one Athlete found to have committed an antidoping rule violation.” WORLD ANTI-DOPING CODE, *supra* note 88, at 106 (Art. 20.3.10); National Anti-Doping Agencies agree “[t]o vigorously pursue all potential anti-doping rule violations within its jurisdiction including investigation into whether Athlete Support Personnel or other Persons may have been involved in each case of doping and to ensure proper enforcement of Consequences.” *Id.* at 109 (Art. 20.5.3).

150. WORLD ANTI-DOPING CODE, *supra* note 88, at 12.

the International Standards after “reasonable consultation” with signatories and relevant stakeholders.<sup>151</sup> Regulatory models and best practices suggested by the Code and the International Standards are not mandatory.<sup>152</sup>

Although enforceable against non-governmental actors, the Code cannot legally bind most governments. Notwithstanding government involvement in its funding and management, the Code is a non-governmental document that functions under private, contractual law and was established by a private foundation;<sup>153</sup> many governments cannot be legally bound by this kind of non-governmental document.<sup>154</sup> Accordingly, the UNESCO General Congress decided in 2003 to develop an international convention calling for the removal of doping in sport. UNESCO ultimately adopted the International Convention Against Doping in Sport (Convention) in October of 2005 with the stated objective of providing an internationally enforceable legal framework to “ensure that governments take actions against doping in sport that are complementary to those already being taken by the sporting movement” and “provide support for the Code and for other international standards developed by WADA.”<sup>155</sup> The Convention includes provisions that allow it to be altered easily to reflect WADA-originated changes to the Code or to the International Standards.<sup>156</sup> Governments are currently ratifying the Convention individually.<sup>157</sup>

#### IV. LESSONS FROM FINA TO WADA

Due in part to the different scopes of the respective organizations, FINA’s procedure for overseeing its ban on certain swimsuits cannot, and should not, be precisely replicated within

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151. *Id.*

152. *Id.* at 13.

153. PAUL MARRIOT-LLOYD, UNESCO, *International Convention against Doping in Sport* 3 (2010), <http://unesdoc.unesco.org/images/0018/001884/188405e.pdf> [https://perma.cc/3XQR-NTGH] (last visited Nov. 21, 2017).

154. See *Global Anti-Doping Organization Chart*, *supra* note 102.

155. MARRIOT-LLOYD, *supra* note 153, at 3.

156. *Id.*

157. As of February 12, 2017, all but a few of the Code government signatories had ratified the Convention. For a complete list of countries that have ratified the convention and those who have yet to ratify, see *UNESCO Convention Ratifications*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/unesco-convention-ratifications> [https://perma.cc/YSP9-AZLK] (last visited Nov. 21, 2017).



WADA nor applied to the international anti-doping regime. However, with consideration given to the similarities and differences between doping and polyurethane suits, certain effective practices from FINA’s regulatory regime could be successfully utilized by WADA. This Part highlights certain aspects of FINA’s successful swimsuit ban procedures and discusses potential applications within WADA’s international anti-doping regime.

#### A. SPECIFICITY AND PREDICTABILITY IN REGULATION

*WADA could align itself with the FINA bureaucratic model by: 1) creating concise and specific regulations that could be applied predictably and are not subject to the discretion of any governing body, and 2) creating hierarchical bureaucracies specific to individual sports to monitor and enforce such regulations.*

FINA’s FRSA and WADA’s Code are both intended to provide comprehensive approaches to regulating swimsuit technology and anti-doping measures respectively.<sup>158</sup> The FRSA achieves its goal in a manner that is manageable and understandable to manufacturers, referees, federations, and athletes. Dr. David Pendergast, a member of the Swimwear Approval Committee at FINA, attributes the swimsuit regulation’s success to its specificity and predictability.<sup>159</sup> In contrast, WADA’s Code falls short of being entirely comprehensive. The Code is long, vague, and unwieldy; WADA’s anti-doping regulations span hundreds of pages and several different documents, including the Prohibited List and International Standards in addition to the cornerstone Code.<sup>160</sup> The length and structure of WADA’s regulations reflect WADA’s momentous charge to eliminate doping from every sport in every country around the world. As the Code is intended to be broadly applied, many of its provisions lack the specificity necessary to be functional.<sup>161</sup>

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158. Telephone Interview with David Pendergast, Member, FINA Swimwear Approval Committee (Nov. 2, 2016).

159. *Id.*

160. *See, e.g.*, WORLD ANTI-DOPING CODE, *supra* note 88.

161. For example, *see* WORLD ANTI-DOPING CODE Article 23.3 for the implementation of anti-doping programs that instructs, “[s]ignatories shall devote sufficient resources in order to implement anti-doping programs in all areas that are compliant with the Code and the International Standards.” *Id.* at 122 (Art. 23.3).

Following the FINA model, WADA might benefit from creating shorter, more specific, and more predictable regulations that apply to only smaller subsets of athletes while existing within WADA's overarching framework. WADA might use FINA's model of specificity to produce comprehensive regulations that can more effectively communicate to athletes and clubs exactly which substances are banned, how the ban will be enforced, and how they can expect to be punished should they violate the regulation. FINA's detailed compliance procedures are more effective because manufacturers and athletes are able to predict the outcome of designing a suit or wearing a noncompliant suit in competition. The World Anti-Doping Code was created with the goal of providing increased standardization, but the provision of more specific regulation will not necessarily frustrate this goal.

WADA can adjust and streamline its bureaucratic structure to more effectively achieve concise regulation. FINA's specialized committees are responsible for constructing, editing, and monitoring FINA's most technical regulations.<sup>162</sup> The FINA Bureau then has the power to incorporate these specialized regulations into the overall FINA structure. Thus, the system gives an amount of power to those with a specialized understanding of technical matters, but ensures that Committees are not given unilateral control.<sup>163</sup>

While WADA already employs specialized Committees and Expert Groups to answer technical questions, the organization might further utilize a FINA-type bureaucratic model by exerting increased control over each sport. Specialists exclusively charged with monitoring doping trends within each sport might implement and enforce sport-specific regulations while under the oversight umbrella of a larger and more representative voting body. The type of sport would provide natural points of division within WADA's authority and make anti-doping regulations more tailored for the athletes to whom the regulations are applicable. Furthermore, each sport already has an existing international federation tasked with coordinating the sport worldwide; the international federations might ease initial implementation of sport-specific monitoring.

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162. See *supra* Part I.A.

163. See *generally* the FINA CONST., *supra* note 12.

## B. MONITORING AND ENFORCEMENT

*The Russian doping scandal has thrust WADA’s monitoring and enforcement weaknesses into the limelight.<sup>164</sup> FINA has utilized and developed multiple successful monitoring and enforcement mechanisms that can be instructive to WADA’s regime.*

FINA has implemented reinforcing compliance strategies among different tiers of its jurisdiction. For example, FINA is able to adequately achieve swimsuit compliance by monitoring athletes in competition, but FINA also monitors the national swimming governing bodies of each of its member countries to ensure that each has implemented swimsuit regulation policies similar to its own.<sup>165</sup> WADA might seek to establish jurisdiction over local competitions — in addition to its existing authority over international competitions — to monitor doping testing from the ground level. Multi-tier monitoring<sup>166</sup> might be achieved through coordination with international sports federations that currently have control over national federations, and therefore local-level competition.

However, in the FINA model, increased multi-tier monitoring mechanisms couple with tangible, direct enforcement measures. If a Member Federation does not comply with the regulations passed by FINA, it can be subject to fines, suspensions or even expelled from FINA.<sup>167</sup> While WADA does ask that its signatories comply with the Code,<sup>168</sup> it has become apparent that threats of international and national sanctions by WADA are relatively toothless. Including the obvious weaknesses of sanctioning the Russian Sports Federation, at its most basic level, the non-compliance list published on WADA’s website has yet to produce serious consequences for the athletes in violation.<sup>169</sup>

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164. For an example of the media attention commanded by the scandal, see Rebecca R. Ruiz, N.Y. TIMES, <https://www.nytimes.com/by/rebecca-r-ruiz> [<https://perma.cc/H5W3-DLAU>] (last visited Jan. 27, 2018).

165. FINA GENERAL RULES, *supra* note 19, at 5.

166. In this context, I am using the term “multi-tier monitoring” to refer to monitoring for regulatory compliance at *all* levels of competition from local competitions to international competitions.

167. FINA GENERAL RULES, *supra* note 19, at 7.

168. *Compliance*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/what-we-do/the-code/code-compliance> [<https://perma.cc/XH9K-227B>] (last visited Nov. 21, 2017).

169. See generally, *supra* Part II.B. For further examples of international scrutiny compelled by a perceived inadequate response to the Russian Doping Scandal, see, e.g.,

Multi-tier enforcement mechanisms might ultimately eliminate WADA's need to have the power to impose sanctions at the Olympic-level. Instead, if WADA is able to sanction individual violators (athletes) at the local level, or national sports federations for noncompliance at their national competitions, the IOC might follow suit. Additionally, if WADA is able to directly disqualify an athlete's performance at a local qualification competition, the organization could also threaten the athlete's ability to compete in international competitions.<sup>170</sup>

In order to legitimize its sanctioning capacity, WADA should centralize a mandate for sanctions enforcement or provide oversight for enforcement management. The process for adjudicating and enforcing sanctions (in contexts beyond FINA's immediate control) is clear in the FINA Constitution.<sup>171</sup> Alternatively, the process for adjudication and enforcement is not emphasized in the WADA Code and is only mentioned in passing.<sup>172</sup> The Code details extensively the appropriate way to hear and assign sanctions, but stops short of describing the body that is later responsible for carrying out the sanctions that have been assigned to violators.<sup>173</sup>

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Rebecca R. Ruiz, *U.S. Athletes Weigh a Boycott Over Russian Doping*, N.Y. TIMES (Dec. 4, 2016), <https://www.nytimes.com/2016/12/04/sports/russian-doping-boycott-us-athletes.html> [https://perma.cc/E6H3-4SQC].

170. See Mat Luebbbers, *How to Become an Olympic Swimmer*, THOUGHTCO. (Jan. 8, 2018), <https://www.thoughtco.com/how-to-become-an-olympic-swimmer-3169871> [https://perma.cc/MDZ5-T3RD].

171. Article 12, entitled "Sanctions," concisely and definitively states possible sanctions and outlines the different enforcing bodies of such sanctions. FINA CONST., *supra* note 12, at C 12.

172. See WORLD ANTI-DOPING CODE, *supra* note 88, at 121.

173. Appendix Two of the Code, entitled "Examples of the Application of Article Ten" provides a very stark example of this enforcement void. The Appendix provides six example fact patterns, and then discusses the process of hearing and evaluating those facts in reference to the provisions of the Code. Each example ultimately concludes with explanations of the sanctions that should be assigned to the violation in question, but does not explain how the sanction is to be enforced. For example, the final note from Example 4 finds "[t]he Athlete is not allowed to participate in any capacity in a Competition or other sport-related activity under the authority of any Signatory or its affiliates during the Athlete's period of Ineligibility (Article 10.12.1). However, the Athlete may return to train with a team or to use the facilities of a club or other member organization of a Signatory or its affiliates during the shorter of: (a) the last two months of the Athlete's period of Ineligibility, or (b) the last one-quarter of the period of Ineligibility imposed (Article 10.12.2). Thus, the Athlete would be allowed to return to training two months before the end of the period of Ineligibility." The Code does not explain which party is responsible for ensuring that the Athlete in question is not training while suspended, or provide for WADA oversight of such enforcement. WORLD ANTI-DOPING CODE, *supra* note 88.

FINA’s effective model of assigning enforcement responsibility could be reflected in WADA’s Code through an equivalent oversight mechanism. FINA requires sanctions assigned by any one FINA Member or by FINA to be “recognized and *enforced* by all other Members.”<sup>174</sup> This grants FINA authority to penalize Member organizations that do not enforce its sanctions. Alternatively, WADA’s similar provision contains no language regarding enforcement, and only asks that the hearing results of Signatories “shall be applicable worldwide and shall be respected and recognized by all other Signatories.”<sup>175</sup> Additionally, FINA grants oversight to expert hearing panels and committees to FINA based on the nature of the violation in question and the panels’ respective expertise.<sup>176</sup> WADA might replicate FINA’s system of divisional oversight,<sup>177</sup> and could grant itself the power to sanction the international federations that have not adequately ensured the enforcement of sanctions imposed on athletes or clubs under the federations’ immediate jurisdiction. Considerations regarding the effectiveness of such oversight will be addressed in the following Section.

Maintaining independent oversight is a vital ingredient to successfully implementing objective standards.<sup>178</sup> WADA has no independent enforcement body to monitor athletes for doping. Dr. David Pendergast of FINA has determined that FINA found success enforcing its swimsuit regulation because the SAC is responsible for testing the textile samples he receives from FINA to ensure that the samples comply with a series of objective standards.<sup>179</sup> The FINA protocol is applied quickly and uniformly through the SAC. The criteria for legal swimsuit production, and a description of the scientific methods used to measure the crite-

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174. FINA CONST., *supra* note 12, at C 12.4 (emphasis added).

175. FINA CONST., *supra* note 12, at Art. 15.1.

176. *Id.* at Arts. 12.3–12.8.

177. WADA expresses that it does not care to require results management to be completely uniform, and advocates for systems that have been effective despite the flexibility. WORLD ANTI-DOPING AGENCY, *WADA’s Role in Results Management*, (last visited on Jan. 8, 2018), <https://www.wada-ama.org/en/questions-answers/wadas-role-in-results-management> [<https://perma.cc/R2UD-2FDF>]. Mandating oversight of violation enforcement does not likely conflict with this belief.

178. Alasdair Bell & Brent Nowicki, Litigating Corruption Lecture at the Fighting Corruption in Sports Seminar at Columbia Law School (Nov. 15, 2016); *see also* Interview with Pendergast, *supra* note 158 (Dr. David Pendergast of FINA speaks to the importance of maintaining an independent, scientific body that is able to test for objective, thorough standards).

179. Interview with Pendergast, *supra* note 158.

ria, can be found within the FRSA.<sup>180</sup> The Prohibited List and the International Standards used by WADA include similarly specific protocol for testing athletes, but lack methodology for implementing an independent oversight body.<sup>181</sup> The FRSA provides for such measures while WADA does not, leaving a glaring difference between WADA's and FINA's implementation procedures.

### C. AUTHORITY AND LEVERAGE

*The International Olympic Committee's inaction following the issuance of the McLaren Report highlights WADA's dependency on other organizations for effective enforcement. Despite its efforts to survey Russia for doping, WADA was initially unable to penetrate Russia's high-reaching doping system. Once doping was detected, WADA's recommendations were virtually ignored by the body ultimately holding sanctioning power, the IOC.<sup>182</sup> In order to implement monitoring and enforcement improvements, such as the imposition of more severe sanctions, WADA needs to compel leverage over its constituents.*

The preceding Sections of Part IV suggest greater direct control over WADA constituents. WADA's broad goals could be realized more easily through cooperation with international federations and national organizations because decentralization could help WADA more easily maintain a high level of influence over such a broad constituency. In order for WADA to rely on these other organizations, it must have the ability to compel compliance. Leverage is likely not grounded in the seriousness of sanctions, as FINA and WADA both call for similar sanctions for violations. FINA primarily compels compliance with its swimsuit ban by maintaining control over record books and the legitimacy of results.<sup>183</sup> Sanctions mandated by the Code are very similar

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180. FRSA, *supra* note 55, at Exhibit 5.

181. See WORLD ANTI-DOPING AGENCY, THE 2015 PROHIBITED LIST (2015), <https://wada-main-prod.s3.amazonaws.com/resources/files/wada-2015-prohibited-list-en.pdf> [<https://perma.cc/9WJM-SMUW>].

182. See *generally supra* Part III.B.

183. See *supra* Part I.A.

and in certain circumstances are even more serious.<sup>184</sup> However, WADA loses significant leverage to compel compliance when athletes and organizations believe that WADA will not detect violations and that, even if it did, it could not take meaningful action against violators.

There is evidence that WADA does not detect the vast majority of athletic doping, and may not even have the scientific capacity to do so.<sup>185</sup> Even after doping is detected, WADA has a difficult burden of proof to overcome in order for a violator to be sanctioned for the violation.<sup>186</sup> Alternatively, FINA developed a tagging and classification system that can immediately identify violators to any referee or competitor.<sup>187</sup> WADA’s system of detection could come closer to FINA’s system through increased testing and more rigorous testing standards but could never, in light of the limitations of modern technology,<sup>188</sup> achieve the near-ubiquity of FINA’s tag detection.<sup>189</sup>

However, WADA could obtain increased leverage and legitimacy if it were given more power over the Olympics. After WADA uncovered systemic doping in Russia, the IOC ultimately

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184. For example, athletes can be suspended from training or banned from competition for extensive periods of time. *See, e.g.*, WORLD ANTI-DOPING CODE, *supra* note 88, at Art. 10.

185. Olivier de Hon et al., *Prevalence of doping use in elite sports: a review of numbers and methods*, 45 SPORTS MED. 57 (2015), <https://www.ncbi.nlm.nih.gov/pubmed/25169441> [<https://perma.cc/AVW6-FAJC>] (“The above-mentioned figure of 14–39% is likely to be a more accurate reflection of the prevalence of intentional doping in elite sports than that provided by doping control test results (estimate of doping: 1–2% annually) or questionnaire-based research (estimations between 1 and 70% depending on sport, level and exact definitions of intent and doping).”).

186. David Epstein et al., *How Do Drug Cheats In Sports Get Away With It?*, NEWSWEEK (Aug. 20, 2015), <http://www.newsweek.com/how-do-drug-cheats-sports-get-away-it-364691> [<https://perma.cc/W449-RU6Y>] (“Anti-doping is like the criminal justice system in the sense that it is constructed to keep the number of false positives to a minimum at the cost of letting some false negatives slip through what are, in fact, pretty big cracks.”).

187. FRSA, *supra* note 55, at Art. 6 (“The FRSA mandates that each FINA-approved product bear a “FINA Approved identification label.” Each label carries with it a “unique identification number which includes a reference to the year from which the approval will be valid”).

188. This is particularly true in the context of comparing a swimsuit, which can be easily observable, with a nearly unlimited possible number of doping mechanisms, which may or may not be observable even through blood testing. Bonnie Berkowitz & Tim Meko, *Stronger. Faster. Longer. And Higher.*, WASH. POST (Jun. 28, 2016), <https://www.washingtonpost.com/graphics/sports/olympics/doping/> [<https://perma.cc/FUV4-TTNW>].

189. De Hon et al., *supra* note 185 (“In the future, analytical science may play a more important role in this topic if it may become feasible to detect very low concentrations of prohibited substances in sewage systems downstream of major sporting events.”).

undermined the organization's recommendations to ban the Federation from the Rio Olympics.<sup>190</sup> Alternatively, when an athlete or a Member Federation violates a FINA rule, FINA is able to respond by immediately and internally sanctioning the violator. WADA could gain greater leverage over organizations, and therefore improved participation in doping prevention, if it had a similar direct and immediate authority. In order to obtain this direct authority, WADA could become an independent gatekeeper for the Olympics. This would allow WADA to use the Olympics as a stick to threaten violators on an individual or national level. If WADA could incentivize larger organizations to comply with its provisions, anti-doping might become a norm and anti-doping measures might become more pervasive worldwide. In this context, top-down leverage could become more effective than bottom-up leverage for mobilizing anti-doping measures, making weaknesses in testing less important.

The Court of Arbitration of Sports also plays different roles in WADA and FINA enforcement. Both the Code and FINA allow decisions regarding the evaluation of violations to be reviewed by the CAS at the request of the party being evaluated.<sup>191</sup> However, the CAS plays a much more vital role in WADA's ability to enforce, as WADA itself frequently does not possess original jurisdiction to evaluate and sanction many doping allegations, but does have the jurisdiction to challenge hearing decisions made by National Anti-Doping Organizations to the CAS.<sup>192</sup> FINA's structure allows it to state exactly how it will try and sanction violators, while the Code only allows WADA to mandate that there should be a hearing by some party applying Code standards.<sup>193</sup> While implementing a similar system might prove to be an extensive and obtrusive remedy, WADA's effectiveness requires a greater level of influence over original hearings.

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190. See, e.g., *supra* Part II.B; Ruiz, *I.O.C. Members Berate WADA Over Russia Scandal*, *supra* note 120.

191. WORLD ANTI-DOPING CODE, *supra* note 88, at Art. 8; FINA CONST., *supra* note 12, at C 12.

192. WORLD ANTI-DOPING CODE, *supra* note 88, at Art. 13.

193. See generally WORLD ANTI-DOPING CODE, *supra* note 88; FINA CONST., *supra* note 12, at C 12.4.



## D. FUNDING

*The preceding regulatory analyses are dependent upon WADA’s ability to exert greater direct control over athletes and national federations.<sup>194</sup> Inevitably, increased control and more robust management over doping violations is contingent upon increased funding for WADA.*

WADA needs more money.<sup>195</sup> The agency might consider making structural adjustments in order to implement a funding structure more similar to that of FINA. In May 2016, the President of WADA, Sir Craig Reddie, addressed the serious need for increased funding to support the implementation of clean sport regulation.<sup>196</sup> Professor Petros Mavroidis has expressed concern about the impact of cost reduction of fighting corruption within the Court of Arbitration of Sports. Scientific tests performed by experts are expensive, and can take a long time, but are necessary to ensure consistency and fairness among arbiters.<sup>197</sup> WADA is funded equally by the Olympic Movement and governments around the world, as agreed upon in the International Convention Against Doping in Sport.<sup>198</sup> As mandated by FINA, the manufacturers submitting swimming textiles must fund the tests for compliance of their products in order to get approval. Thus, the entities deriving the financial benefit from approval are those that bear the cost of testing.<sup>199</sup>

Following this model, WADA might consider compelling international sports federations to pay a tax or fee to WADA as a condition of complying with its Code. In return, WADA would pledge to use the funds to maintain the integrity of the sport in question. Giving international sports federations a financial interest in WADA will simultaneously give the federations a greater stake in

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194. Improved multi-tier monitoring, specified regulations, etc., as discussed in *supra* Part IV.A–C.

195. See Craig Reddie, *Expanding Funding for Clean Sport*, WORLD ANTI-DOPING AGENCY: WADA PRESIDENT BLOG (May 9, 2016), <https://www.wada-ama.org/en/media/news/2016-05/wada-president-blog-expanding-funding-for-clean-sport> [https://perma.cc/5JSG-9AU7].

196. *Id.*

197. Petros Mavroidis, Law Professor, Class Lecture at the “Fighting Corruption in Sports” Seminar at Columbia Law School (Nov. 22, 2016).

198. *Funding*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/funding> (last visited Nov. 21, 2017), [https://perma.cc/38VA-QZQN].

199. FRSA, *supra* note 55.

monitoring the efficiency and effectiveness of WADA and provide external oversight. However, it is also important to make sure that international sports federations do not unduly influence regulators and testers. Thus, as swimsuit manufacturers exclusively pay for their own products' approvals, international federations might limit WADA sponsorship to paying for the costs of obtaining WADA approval.

#### E. THE POWER OF FEEDBACK AND COORDINATION

*Just as FINA coordinated with its major stakeholders while regulating swimsuits, WADA might coordinate with international sports federations to either 1) tailor anti-doping procedures for each sport or 2) improve existing procedures.*

USA Swimming's embrace of the FINA-produced swimsuit regulations illustrates the power of coordinating with stakeholders before attempting to regulate.<sup>200</sup> By accepting regular input from sport federations as FINA does with its stakeholders, WADA will be able to retain consistency in its policy, allow for flexibility in regulation among sports, and clarify its powers and expectations of international sports federations. By integrating sports federations into the routine regulatory process, WADA can more reasonably expect enforcement, cooperation, and entrenchment of its recommended models.<sup>201</sup> Additionally, as discussed above,<sup>202</sup> by coordinating more effectively with international sports federations and mandating compliance, WADA could outsource some of its costs and responsibility to these separate bodies.

FINA's swimsuit prohibitions have also remained entrenched in swimming because its regulations provide for transparency and flexibility that have allowed for coordination with businesses

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200. See *supra* Part I.A; DUBAI CHARTER, *supra* notes 45–46 (“FINA cited extensive support from the manufacturers, as well as FINA Athletes, Coaches and Legal Commissions when announcing their regulatory decision.”).

201. Stakeholders were invited to provide their opinions of and experiences with the Code at three different conferences in 2011 and 2012. See *What We Do*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/what-we-do/the-code> [https://perma.cc/8ST7-4WE6] (last visited Nov. 21, 2017) (“The revision process for the 2015 Code began at the end of 2011 and, following three phases of consultation over a two-year period, and with 2,000 changes submitted, the revised Code was unanimously approved on 15 November 2013 at the World Conference on Doping in Sport in Johannesburg, South Africa.”).

202. See *supra* Part IV.A.

that support the sport. Swimsuit manufacturers are major stakeholders in the sport of swimming, and have much to lose through competitive swimsuit prohibitions. The FRSA provides these swimsuit manufacturers with clear guidelines for producing new products, a process for appealing a rejection of a product, and the opportunity to provide feedback to the Bureau about FINA regulation.<sup>203</sup>

Following this example, WADA might try to coordinate with the media, governments, or athletic sponsors that profit from doped athletes by providing an outlet for feedback that is reflected in the regulatory regime. FINA has been able to exert immense control over the producers of the product it sought to regulate. However, as many substances that provide unfair advantages in sport are otherwise legal,<sup>204</sup> WADA will not be able to effectively limit doping by coordinating directly with manufacturers to restrict production. Instead, WADA can work with the organizations that profit from athletes' drug use<sup>205</sup> to foster an industry rejection of the practice. This is particularly important to consider in sports that have extensive for-profit professional organizations.<sup>206</sup>

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203. See generally *supra* Part II.A.

204. See *supra* Part II. However, WADA has been working with pharmaceutical companies to ensure that potential doping drugs are only being issued for legitimate medical purposes to the greatest extent possible. WORLD ANTI-DOPING AGENCY, *World Anti-Doping Agency and Astellas Announce Global Initiative to Prevent Misuse and Abuse of Medicines for Doping in Sports* (Oct. 14, 2016), <https://www.wada-ama.org/en/media/news/2016-10/world-anti-doping-agency-and-astellas-announce-global-initiative-to-prevent> [<https://perma.cc/2UWY-AXCQ>]; Owen Gibson, *Sir Craig Reedie wants drug-cheat sponsorship money for anti-doping fight*, THE GUARDIAN (May 8, 2016), <https://www.theguardian.com/sport/2016/may/08/craig-reedie-wada-drugs-in-sport> [<https://perma.cc/8UZM-VFZN>].

205. Newspapers, magazines, and news outlets all profit from broken records and superstar athletes. Sports organizations profit from selling broadcasting rights. *Revenue*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/about/resources/finances/revenue> (last visited Nov. 21, 2017) [<https://perma.cc/Z89V-AYDK>]. There is evidence that the symbiotic relationship between media outlets and private sports organizations fosters incentives to both allow for doping and to keep doping accusations out of the public eye. Bhaskar Sunkara, *Opinion: Blame capitalism for doping in sports*, ALJAZEERA AMERICA (Jan. 6, 2016), <http://america.aljazeera.com/opinions/2016/1/blame-capitalism-for-doping-in-sports.html> [<https://perma.cc/9G5B-SVAU>].

206. When athletes have the opportunity to earn or win substantial prize money or sponsorship funding through superior performance in sport, they are more likely to find doping to be the rational choice. Eugen Dimant & Christian Deutscher, *The Economics of Corruption in Sports: The Special Case of Doping*, HARV. U. EDMOND J. SAFRA CTR. FOR ETHICS (Mar. 18, 2015), <http://ethics.harvard.edu/blog/economics-corruption-sports-special-case-doping> [<https://perma.cc/Q2VS-QAAC>].

## F. IDEOLOGICAL ENTRENCHMENT AMONG STAKEHOLDERS

*In order for WADA to sustainably reduce and eradicate doping in sport, it is vital that athletes, national and international federations, and other important stakeholders come to agree that the practice should be eliminated.*<sup>207</sup>

Many prominent swimmers became outspoken against the use of polyurethane swimsuits in competition after their debut.<sup>208</sup> The swimming community was quick to accept the idea that wearing buoyant swimsuits in competition amounted to an unfair advantage that perceptibly changed the nature of the sport. However, while pressure to eliminate doping has manifested from athletes within certain sports,<sup>209</sup> in order for doping bans to be completely effective on an international level, federations across the world must fundamentally reject the presence of doping.<sup>210</sup> Establishing doping as more universally objectionable is vital to the success of the anti-doping movement, in part because “punitively driven deterrence [in anti-doping] does not work, especially when the motivation for substance use comes from the pursuit of

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207. See *Education and Prevention*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/education-prevention> (last visited Nov. 21, 2017) [<https://perma.cc/KU9L-Q8LY>] (“Effective anti-doping education is a crucial part of protecting clean sport.”).

208. See, e.g., Crause, *supra* note 1, at D1.

209. For example, Michael Phelps has been a public advocate for global anti-doping reform and Tiger Woods has supported proactive drug testing in the PGA. See Luke Brown, *Michael Phelps takes centre stage in the push for global anti-doping reform*, INDEPENDENT (Mar. 1, 2017), <http://www.independent.co.uk/sport/olympics/michael-phelps-wada-ioc-usada-drugs-doping-in-sport-a7605886.html> [<https://perma.cc/FQF3-HQDS>] (“[T]he 31-year-old passionately urged lawmakers to push for sweeping anti-doping reforms in sport and told them that he had never been totally confident that he was competing only against clean athletes during his glittering career.”); ANTI-DOPING RESEARCH INSTITUTE, *Athletes Speak Out*, <http://www.antidopingresearch.org/athletes-on-record/> [<https://perma.cc/3XDL-95WT>]; Richard Pound & TJ Quinn, *Doping in Sports Lecture at the Fighting Corruption in Sports Seminar at Columbia Law School* (Sep. 13, 2016).

210. Peter Strelan & Robert J. Boeckmann, *Why Drug Testing in Elite Sport Does Not Work: Perceptual Deterrence Theory and the Role of Personal Moral Beliefs*, 36 J. OF APPLIED SOC. PSYCHOL. 2909, 2909 (2006) (“The strongest influence on athletes’ hypothetical decisions to use drugs was their personal moral beliefs and health concerns, each of which also mediated the relationship between drug testing and athletes’ decisions to use banned substances.”); see also Dimant & Deutscher, *supra* note 206 (“However, an individual’s reputation depends not only on one’s own behavior but also on the behavior of peers and the group dynamics. In this context, Tirole studies the impact of the joint dynamics of individual and collective reputations on the persistence of corruption. The assumption is that individual incentives are affected by the individual’s past behavior (which is commonly observed by outsiders in a noisy manner) and the group’s past behavior, thus introducing reputation effects.”).

superior performance.”<sup>211</sup> However, international entrenchment of an anti-doping norm in sports remains elusive.<sup>212</sup>

Despite regulating against the interests of swimsuit manufacturers, FINA was able to foster wide support for its swimsuit ban and continuing textile evaluation system. FINA moved its regulations forward using momentum from the Beijing Olympics and polyurethane’s outspoken opponents.<sup>213</sup> WADA might follow this example, capitalizing upon the continuing press stemming from the McLaren Report and Russian Doping Scandal to allocate itself more power with similar public acceptance. Further, FINA achieves unified support for its ban by providing channels to receive continuous input from its stakeholders and providing an

211. Aaron C. T. Smith & Bob Stewart, *Why the war on drugs in sport will never be won*, HARM REDUCTION J. (Nov. 10, 2015) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4641409/> [<https://perma.cc/A2R9-G5H4>]; see also Jaime Morente-Sánchez and Mikel Zabala, *Doping in Sport: A Review of Elite Athletes’ Attitudes, Beliefs, and Knowledge*, 43 SPORTS MED. 395, 395 (2013) (“Therefore, information and prevention are necessary, and should cater to the athletes and associated stakeholders. This will allow us to establish and maintain correct attitudes towards doping. Psychosocial programmes must be carefully planned and developed, and should include middle to long-term objectives (e.g. changing attitudes towards doping and the doping culture.”).

212. Andrea Petróczi, *Attitudes and Doping: A Structural Equation Analysis of the Relationship Between Athletes’ Attitudes, Sport Orientation and Doping Behaviour*, 2 SUBSTANCE ABUSE TREATMENT, PREVENTION, AND POL’Y 34, 44 (2007) (“Those athletes who use doping or wish to use such performance enhancements would prefer to do so without social stigmatization. Such a view is in keeping with previous research where athletes expressed their view of doping as a necessary means to a desired end and whilst they acknowledge rule breaking behaviour, they do not consider themselves cheaters or more cheating than any other athletes.”); V. Lentillon-Kaestner and C. Carstairs, *Doping Use Among Young Elite Cyclists: A Qualitative Psychosociological Approach*, 20 SCANDINAVIAN J. MED. & SCI. IN SPORTS 336, 336 (2010) (The study analyzes interviews with young cyclists and concludes that the “cyclists believed that doping at the professional level in cycling was acceptable but did not approve of it at the amateur level.”). Many op-ed writers and researchers still advocate for the legitimization of doping in sport, under various justifications. See, e.g., Yascha Mounk, Opinion, *Ban What Is Dangerous, Legalize What Is Not*, N.Y. TIMES: ROOM FOR DEBATE (Nov. 30, 2016), <https://www.nytimes.com/roomfordebate/2012/08/07/should-doping-be-allowed-in-sports/ban-what-is-dangerous-legalize-what-is-not> [<https://perma.cc/36W5-W8FK>]; Julian Savulescu, Opinion *Permit Doping So We Can Monitor It*, N.Y. TIMES: ROOM FOR DEBATE (Aug. 7, 2012), <https://www.nytimes.com/roomfordebate/2012/08/07/should-doping-be-allowed-in-sports/permit-doping-so-we-can-monitor-it> [<https://perma.cc/23YW-4J4A>]; Scott Michael Leddy, *Devil’s Advocate: The Case for Steroids*, BLEACHER REPORT (May 23, 2010), <http://bleacherreport.com/articles/395832-devils-advocate-the-case-for-steroids> [<https://perma.cc/B5JU-DZXC>]. Further, doping is still prevalent in several countries around the globe. See Jack de Menezes, *Russia doping crisis: Map reveals worst countries for doping in sport*, INDEPENDENT (Nov. 25, 2015), <http://www.independent.co.uk/sport/general/athletics/russia-doping-crisis-map-reveals-the-worst-nations-for-doping-in-sport-a6728916.html> [<https://perma.cc/TSG5-5TMZ>].

213. See, e.g., Crause, *supra* note 1 (“[P]olyurethane suits were frequently disparaged by swimmers and FINA regulators as akin to ‘doping on a hanger.’”).

internal appeals method for swimsuit producers.<sup>214</sup> WADA should also create a constant feedback system that allows it to gain buy-in from critical stakeholders for a more aggressive approach.

### G. REDUCING CORRUPTION IN SPORT

*The anti-doping movement might be futile due to the corruption otherwise inherent in sports institutions.<sup>215</sup> Accordingly, WADA's goals might be better achieved through the increased use of independent oversight bodies.*

WADA's efforts to reduce doping in sports worldwide are likely hindered by the corruption of sports institutions generally. When institutions fail to fulfill their duties of oversight and efficiency, there is the potential for corruption within them.<sup>216</sup> It has been suggested that it will be impossible to address broader systems of corruption in sport as long as underlying institutions remain corrupt,<sup>217</sup> WADA has inherited a challenging constituency.

However, there is evidence that swimming, and particularly FINA, might have greater *relative* institutional corruption than other sports agencies worldwide.<sup>218</sup> Thus, in spite of evidence of corrupted member organizations,<sup>219</sup> FINA's regulatory body has still been able to successfully unite its constituents under the FRSA. FINA's example suggests that WADA's mission is not necessarily frustrated by worldwide corruption in sport.<sup>220</sup>

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214. See, e.g., *supra* note 58 and accompanying text.

215. Dimant & Deutscher, *supra* note 206 ("However, the effectiveness of counter-measures to fight corruption in sports in general and rampant doping in particular is mediated by the corruption inherent in the institutions themselves.").

216. *Id.*

217. *Id.* ("Unsurprisingly, the fight against corruption of any kind in sports cannot be successful as long as the underlying institutions suffer from the same disease.").

218. In fact, of the international sports organizations FINA expressed some of the strongest public criticism of the McLaren Report. Andy Bull, *Poison in the pool: can scandal-hit swimming be trusted in Rio?*, THE GUARDIAN (Aug. 4, 2016), <https://www.theguardian.com/sport/2016/aug/04/poison-pool-swimming-scandal-trust-rio-2016-olympics-fina> [<https://perma.cc/AE5U-T6Y2>]; Press Release, Fédération Internationale de Natation, Press Release 61, FINA statement on calls for Russian ban ahead of McLaren Report publication (July 17, 2016), <http://www.fina.org/news/pr-61-fina-statement-calls-russian-ban-ahead-mclaren-report-publication> [<https://perma.cc/6R2Y-KH3U>].

219. For an example, see the Kenyan Olympic Team scandal. Bull, *supra* note 218.

220. For more information about corruption in sport see Transparency International's extensive research regarding the topic. TRANSPARENCY INT'L, *Corruption by Topic: Sport*,

Several sources suggest that FRSA’s success, and the way to successfully implement anti-corruption measures in a corrupt environment, can be traced to “truly independent government institutions.”<sup>221</sup> Thus, the SAC may remain trusted within a corrupted organization due to its independent oversight. The SAC is able to achieve its mission with oversight of a relatively controlled universe, while WADA’s mission and authority is anything but controlled. While WADA might seek to establish increased independent associations to help implement its regulations, entrenched corruption in the international organizations and national federations it oversees will make this task much more expansive (as well as expensive).

## V. CONCLUSION

There is evidence that improved technology, as opposed to improved physiological methods or increasing globalization, is responsible for the continuously improving record books across every sport.<sup>222</sup> While the development and ban of polyurethane swimsuits is unquestionably an argument about technology’s role in sport, scholars debate as to whether doping in sports can also be characterized as a problem of technology.<sup>223</sup> Other scholars also disagree over whether doping in sport is even an issue worth solving.<sup>224</sup> Two international organizations, WADA and FINA, have attempted to address these highly theoretical and interrelated problems with different regulatory paradigms.

The World Anti-Doping Agency is working with a long-term goal of eradicating doping from sports and has faced an uphill

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<https://www.transparency.org/topic/detail/sport/> [<https://perma.cc/K8ZX-Z945>] (last visited Nov. 21, 2017).

221. Dimant & Deutscher, *supra* note 206.

222. Lalith Munasinghe et. al., *Globalization and the Rate of Technological Progress: What Track and Field Records Show*, 109 J. POL. ECON. 1132 (2001).

223. See, e.g., Bernat Lopez, *Doping as technology: a re-reading of the history of performance-enhancing substance abuse in light of Brian Winston’s model of technological continuity and change*, 4 INT’L J. OF SPORTS POL’Y AND POL., 55 (2011), <http://www.tandfonline.com/doi/abs/10.1080/19406940.2011.627361> [<https://perma.cc/EA5F-7L8P>]; Andy Miah, *From anti-doping to ‘performance policy’ sport technology, being human, and doing ethics*, 5 INT’L J. OF SPORTS POL’Y AND POL. 51 (2006), <http://www.tandfonline.com/doi/full/10.1080/17461390500077285?src=recsys> [<https://perma.cc/GJG3-ZFDJ>].

224. Claudio Tamburrini, *Are doping sanctions justified? A Moral Relativistic View*, 2 INT’L J. OF SPORTS POL’Y AND POL. 199 (2007), <http://www.tandfonline.com/doi/abs/10.1080/17430430500491264> [<https://perma.cc/94V8-AYJL>].

battle in controlling doping around the world. In contrast, FINA was faced with a discrete problem that it was able to eradicate quickly and efficiently through successful regulation. Despite the differences implicit in the discussion of doping regulation and swimsuit regulation, there are lessons that can be extracted from FINA's regulatory regime and applied to WADA's. Ultimately, FINA's example suggests that WADA might benefit from:

1. Creating more specific regulations that can be articulated and then applied in a predictable and consistent manner
2. Implementing a hierarchical bureaucratic scheme
3. Effecting multi-tier monitoring and enforcement measures
4. Enabling the establishment of independent oversight bodies
5. Coordinating with primary stakeholders including the media, international sports federations, and athletes
6. Establishing leverage over international sports federations to better incentivize compliance, possibly through increased control of Olympic participation
7. Considering the impact of limitations on authority
8. Continuing efforts to encourage worldwide rejection of doping in sports
9. Implementing a funding regime in which the basic functions of WADA are supported by its constituents
10. Working to combat corruption in sport as a broad matter

While effecting all of these measures simultaneously would require a complete overhaul of its organizational structure, WADA still may stand to benefit by following FINA's example through the implementation of some combination of these changes. If WADA could achieve even a fraction of FINA's efficacy, it would mark a dramatic improvement in the international anti-doping regime.