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Erin Abbey-Pinegar

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# The Need for a Global Amateurism Standard: International Student-Athlete Issues and Controversies

ERIN ABBEY-PINEGAR\*

## ABSTRACT

*Due to the immense pressure to recruit highly talented prospects and an overwhelming desire to have winning college athletics programs, the recruitment of international prospective student-athletes at NCAA Division I institutions has drastically increased in recent years. NCAA rules founded on localized amateurism ideals are now being applied on a global scale, in countries where there is no similar concept of amateur athletes. This Note argues that the current NCAA amateurism rules inadequately address the potential amateur issues related to prospective student-athletes from various countries. Examples and evidence of the difficulties of apply localized amateur rules to international recruits are examined and discussed. The background of the amateurism idea and according interpretations by U.S. courts of NCAA rules are explained. This Note argues that because amateurism standards differ by country, there is no longer competitive equity between domestic and international college athletes. Although possible solutions have been presented to deal with this disparity, such proposed solutions do not sufficiently resolve the problem. Rather, as this Note suggests, a global standard of amateurism that would be applied fairly to all prospective student-athletes regards of country of origin is needed. Until such a standard is implemented, problems will continue to arise with the amateur standard of international student-athletes.*

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\* Senior Managing Editor, *Indiana Journal of Global Legal Studies*; J.D. Candidate, 2010, Indiana University Maurer School of Law; M.A., 2007, Ball State University; B.A., 2003, Huntington University. I would like to thank my husband, Noah, for his support; Professor Julia Lamber for her helpful comments; and the staff and executive board of the *Journal* for their assistance.

## INTRODUCTION

From everywhere around the world, they are coming to America,<sup>1</sup> hoping to compete in intercollegiate athletics. Prospective student-athletes from the world over flock to the United States not only to obtain a college diploma but to take advantage of the opportunities for athletic competition and scholarships. There are more than 380,000 student-athletes currently competing in a variety of sports at the collegiate level in the United States.<sup>2</sup> Each year, approximately 3,000 international student-athletes<sup>3</sup> (ISAs) join the National Collegiate Athletic Association<sup>4</sup> (NCAA) Division I (DI) member institution teams.<sup>5</sup>

The increased pressure placed upon coaches to produce winning programs, coupled with the desire to field the best athletes in a particular sport, has led to recruiting athletes outside U.S. borders. Current DI men's basketball coach Scott Drew says that "[i]f you do not recruit overseas, you are taking yourself out of a major market."<sup>6</sup> Not surprisingly, more than 16,000 ISAs appeared on NCAA rosters in the 2006-07 season, accounting for more than six percent of all DI athletes, markedly up from a mere two percent eight years earlier.<sup>7</sup> For example, the Winthrop College men's tennis program is comprised entirely of

1. NEIL DIAMOND, *America, on THE JAZZ SINGER* (Capitol Records 1980).

2. NAT'L COLLEGIATE ATHLETIC ASS'N, 2008-09 NCAA DIVISION I MANUAL (2008) [hereinafter NCAA MANUAL].

3. The NCAA defines international student-athletes as "students who have completed any portion of their secondary education in a non-United States educational system." NAT'L COLLEGIATE ATHLETIC ASS'N, GUIDE TO INT'L ACAD. STANDARDS FOR ATHLETICS ELIGIBILITY FOR STUDENTS ENTERING FALL 2008, at 4 (2008), available at <http://www.ncaa.org/wps/ncaa?ContentID=266> (then follow "International Guide for Student-Athletes" hyperlink).

4. The NCAA is a "voluntary organization through which the nation's colleges and universities govern their athletics programs." NCAA.org, About the NCAA, <http://www.ncaa.org/wps/ncaa?ContentID=2> (last visited Feb. 4, 2010). It comprises more than 1,250 "institutions, conferences, organizations and individuals committed to the best interests, education, and athletics participation of student athletes." *Id.*

5. Anastasios Kaburakis, NCAA DI Amateurism and International Prospective Student Athletes: The Professionalization Threshold 2 (Dec. 2005) (unpublished Ph.D. dissertation, Indiana University), *microformed on Kinesiology Publ'n. UO 05—276—UO 005 277* (Univ. Microforms Int'l).

6. Maureen A. Weston, *Internationalization in College Sports: Issues in Recruiting, Amateurism, and Scope*, 42 WILLAMETTE L. REV. 830, 835 (2006); see also Robin Wilson & Brad Wolverton, *The New Face of College Sports*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 11, 2008, at 54 (stating that "coaches argue that they need to look abroad because there are not enough elite American players to go around").

7. Steve Wieberg, *Influx of Foreigners Presents New Challenges for NCAA*, USA TODAY, Oct. 1, 2008, available at [http://www.usatoday.com/sports/college/2008-1001-foreign-influx\\_N.htm](http://www.usatoday.com/sports/college/2008-1001-foreign-influx_N.htm).

international players.<sup>8</sup> Likewise, the Baylor University men's tennis team, which once struggled to achieve an above par record, won the 2004 NCAA Championship with a roster of nearly all ISAs.<sup>9</sup> Most recently, the University of Texas El Paso's 2008 cross-country team is comprised entirely of seven Kenyan runners, all of whom are on full scholarship.<sup>10</sup>

Avery Brundage, the former President of the International Olympic Committee, once said, "Sport must be amateur or else it is not sport. Sports played professionally are entertainment."<sup>11</sup> The NCAA has accordingly promulgated numerous rules that strive to retain amateurism in intercollegiate athletics. Many of these rules, if violated, could drastically affect the eligibility of college-bound athletes if they received money or benefits prior to enrollment at a college institution. Thus, intercollegiate student-athletes—an ever-growing segment of the sports population—are often relegated to defending their amateur status, regardless of national origins.<sup>12</sup> The structure of the laws and regulations of sports organizations overseas differ greatly from the collegiate structure of athletics we have become familiar with in the United States. Thus, a potentially serious issue arises when ISAs are recruited or attempt to participate in intercollegiate athletics in the United States and are therefore required to follow the NCAA amateurism bylaws.

Determining who qualifies as an amateur student-athlete is, at best, difficult. Discerning which benefits an amateur can receive while still retaining the coveted amateur status—a prerequisite to eligibility for intercollegiate athletics competition—is an equally challenging task. The differences in fundamental beliefs concerning amateur sports and the way in which sporting organizations are structured in different countries produce a blurred line, often making it difficult to ascertain whether an athlete should be classified as amateur or professional. If Ohio State University President Gordon Gee's comment that "the purpose of intercollegiate sports is not about professionalism, it is about amateurism"<sup>13</sup> is true, then who really qualifies as an amateur for NCAA purposes? If one of the main purposes of the NCAA is to uphold

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8. Weston, *supra* note 6, at 834.

9. *Id.* at 842. Furthermore, 14 of the 17 members of the Baylor Men's and Women's tennis roster for the 2005-06 season were international student-athletes.

10. Robin Wilson, *A Texas Team Loads Up on All-American Talent, With No Americans*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 11, 2008, at 54.

11. Thinkexist.com, Avery Brundage Quotes, [http://thinkexist.com/quotes/avery\\_brundage](http://thinkexist.com/quotes/avery_brundage) (last visited Feb. 2, 2010).

12. Cf. JAY COAKLEY, SPORTS IN SOCIETY: ISSUES & CONTROVERSIES 130 (8th ed. 2004) (noting the rising popularity and increased participation in organized youth sports).

13. Weston, *supra* note 6 at 835.

amateurism and to maintain a level playing field, how is this purpose maintained with the addition and the resulting influx of ISAs? Are the laws applied equally and fairly, resulting in a level amateur playing field? While some may argue that ISAs are unfairly burdened, there is evidence to show that perhaps ISAs are at a slight advantage and, consequently, push the limits of amateurism standards.

With the advent of the globalization of other laws concerning diverse concepts throughout the world, the NCAA, in conjunction with other sports organizations around the globe, ought to develop a global amateurism standard for the purposes of intercollegiate athletic competition. Such globalization of intercollegiate athletics law, however, has yet to materialize.<sup>14</sup> Thus, student-athletes, administrators, coaches, and parents are left to decipher whether amateurism is applied equally and fairly to all individuals aspiring to compete at the NCAA DI level.

This Note will address the current problem with applying the NCAA amateurism bylaws to international student-athletes. The differences between the concepts of amateurism in the United States and those of European sports organizations' models are discussed in Part II. Relevant case law regarding antitrust principles as applied to the NCAA and several cases analyzing student-athlete rights are discussed in Part III. The hurdles an ISA must surpass if he or she desires to compete in the United States at NCAA DI institutions is addressed in Part IV.<sup>15</sup> Part V then considers how ISAs are able to compete at the NCAA level, even when their amateurism status is imperiled. The NCAA's Student-Athlete Reinstatement (SAR) process for ISAs is also noted. Part VI compares the outcomes of three different international student-athletes as they attempt to cross the amateurism hurdle to participate in DI athletics. Part VII not only discusses a proposal for an international amateurism standard that furthers the goal of a level playing field but also mentions additional solutions to this emerging problem in intercollegiate athletics.

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14. If the International Olympic Committee and the World Anti-Doping Agency are necessary international sport organizations, then it seems only logical to analogize the necessity and implement an international amateurism standard for the purposes of intercollegiate athletics.

15. For purposes of this paper, only NCAA DI ISA rules and bylaws are discussed. The majority of research is done on DI institutions and student-athletes. The three NCAA divisions have separate rules pertaining to amateurism for each division. The NCAA DI Manual is over 400 pages long; amateurism bylaws encompass only fifteen pages.

## I. EVOLUTION OF AMATEUR ATHLETICS

It is important to define exactly what activities qualify as sports. Sports are institutionalized competitive activities that involve rigorous physical exertion or the use of relatively complex physical skills by participants motivated by internal and external rewards.<sup>16</sup> The motivation by internal and external rewards, and specifically the external rewards for excellent competition, seems to differentiate amateur participants from participants who are considered professional. The idea of amateurism emerged in England; the amateur concept was used as a way to establish participation in a sport predicated on social class.<sup>17</sup> From these roots, the term amateur has evolved to signify a variety of things. A modern definition of an amateur is “one who engages in a pursuit, study, science or sport as a pastime rather than as a profession.”<sup>18</sup> The concept of amateurism in America is directly linked with money. If you are paid to participate in athletics, you are considered a professional; only those who participate for “free” maintain their amateur status.<sup>19</sup> Ultimately, control has rested in the hands of amateur sports organizations, each establishing rules that specify the conditions under which training and competition can occur.<sup>20</sup> The two major amateurism sports organizations in the United States, the U.S. Olympic Committee (USOC) and the NCAA, rely on separate amateurism rules to determine athlete eligibility. Moreover, other countries have their own standards for competition, many of which do not distinguish between the categories of amateur and professional.

## II. AMATEUR ATHLETICS ORGANIZATIONS

The most well known amateur sporting event in the world is the Olympic Games. The Olympic Games are governed by the International Olympic Committee (IOC), which is responsible for the organization and administration of the procedural rules governing the Olympics. According to Rule 26 of the original Olympic Charter, for an athlete “to be eligible for the Olympic Games, a competitor must always have participated in sports as an avocation without material gain of any

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16. COAKLEY, *supra* note 11, at 21.

17. Benjamin A. Menzel, *Heading Down the Wrong Road? Why Deregulating Amateurism May Cause Future Legal Problems for the NCAA*, 12 MARQ. SPORTS L. REV. 857, 858 (2002).

18. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 42 (3rd ed. 1997).

19. Menzel, *supra* note 17, at 859.

20. COAKLEY, *supra* note 11, at 398.

kind.”<sup>21</sup> This rule, however, was subsequently repealed in 1971. Several years later, the IOC took action and allowed the governing body for each Olympic sport to determine its own criteria for eligibility.<sup>22</sup> According to the newly formed bylaws of the IOC, each International Federation (IF) establishes its own eligibility criteria in accordance with the Olympic Charter and must be submitted to the IOC Executive Board for approval.<sup>23</sup> The IFs have the responsibility and the duty to manage and monitor the quotidian operation of the world’s various sport disciplines and the supervision of the development of athletes practicing the sports at every level.<sup>24</sup> The ability of each IF to maintain control over the sport on an international level is critical to the success of the Olympic Games and international sports competition as a whole. While the Olympic Games were once considered the pinnacle of amateur sporting events, professionals are now permitted<sup>25</sup> and, furthermore, are even encouraged by the USOC to participate in the Games. The USOC is succinct in its rationale for abandoning a narrow line view regarding the principles of amateurism: they simply wanted to rid themselves of the hypocrisy.<sup>26</sup>

Although amateur status is essentially gone from the Olympic context, it is alive in the NCAA.<sup>27</sup> The United States is the only country in the world with such an extensive system of competitive sports teams connected to colleges and universities.<sup>28</sup> The principles of amateurism and academic integrity underlie regulations governing intercollegiate athletics at the NCAA.<sup>29</sup> The leniency afforded Olympic athletes in pursuing other professional interests, however, is unparalleled in the

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21. JAMES A. R. NAFZIGER, INTERNATIONAL SPORTS LAW 143 (1988) (quoting INT’L OLYMPIC COMMITTEE, OLYMPIC CHARTER, Rule 26 (1970)). See also *id.* at 139-51 (evaluating the history of the amateur/professional distinction in the Olympics and the movement to eliminate amateurism as a requirement).

22. David B. Mack, Reynolds v. International Amateur Athletic Federation: *The Need for an Independent Tribunal in International Athletic Disputes*, 10 CONN. J. INT’L L. 653, 662 (1995).

23. *Id.*

24. *Id.* at 661.

25. The 1992 Dream Team and the 2008 Redeem Team, both of which were comprised of current professional NBA basketball players, participated in the Olympic Games.

26. David Warta, *Personal Foul: Unnecessary Restriction of Endorsement and Employment Opportunities for NCAA Student-Athletes*, 39 TULSA L. REV. 419, 455 (2003) (noting that while “[t]he USOC allows athletes to engage in radio, television, and print media work for compensation between Olympiads,” the NCAA does not permit these activities).

27. Stanton Wheeler, *Rethinking Amateurism and the NCAA*, 15 STAN. L. & POL’Y REV. 213, 220 (2004).

28. Rachel Bachman, *Tennis’ Tricky Melting Pot*, THE OREGONIAN, Apr. 27, 2006, at C1.

29. Weston, *supra* note 6, at 845.

NCAA.<sup>30</sup> The eligibility standard in NCAA-sponsored intercollegiate athletics rests on two bedrock characteristics: athletes must be amateurs, and they must be students.<sup>31</sup>

The NCAA displays its commitment to the student-athletes in two statements found in the opening pages of the DI Manual. The first is the principal of amateurism, which states that student-athletes shall be amateurs in an intercollegiate sport and that their participation should be motivated primarily by education and by the physical, mental, and social benefits that can be derived.<sup>32</sup> In addition, student participation in intercollegiate athletics is an avocation and student-athletes should be protected from exploitation by professional and commercial enterprises.<sup>33</sup> While the growth of the organization has evolved and amateur athletics is becoming more commercialized, the basic NCAA premise of amateurism has remained virtually unchanged.<sup>34</sup>

The NCAA was formed in 1905, primarily as a response to the increase in serious injuries and deaths occurring in intercollegiate football. President Theodore Roosevelt pled for reform, the result of which was the creation of the Intercollegiate Athletic Association of the United States, which later became the NCAA. The NCAA gradually expanded the scope of its power: what began as an institution designed to apply rules and procedures of play on the field has grown to include the externalities associated with a functioning intercollegiate athletics system. The origins of the NCAA were local in nature; the organization was formed to address and to rectify the local issues and problems in American universities and sporting events. Due to the increase in globalization of intercollegiate athletics, the NCAA, and bylaws, which were formed with local athletes from American schools and American-formed athletic teams, are now being ineptly applied overseas on a global level.<sup>35</sup>

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30. Warta, *supra* note 26.

31. Alfred Dennis Mathewson, *The Eligibility Paradox*, 7 VILL. SPORTS & ENT. L.J. 83, 98 (2000) (summarizing Justice Steven's discussion in *NCAA v. Board of Regents of Oklahoma*).

32. NCAA MANUAL, *supra* note 2, art. 2.9.

33. *Id.*

34. See Wheeler, *supra* note 27, at 216 (noting that the principle of amateurism "has been moved about in the manual and some revisions made, but the basic premise has been a guiding principal since day one" (quoting e-mail from Ellen E. Summers, NCAA Archivist, to Stanton Wheeler, Professor Emeritus of Law, Yale Law School (Aug. 14, 2003) (on file with author))).

35. Recently, NCAA DII membership has been extended to Simon Fraser University, located in Burnaby, British Columbia, making it the first foreign institution to join any NCAA Division. Simon Fraser Athletics Director David Murphy stated, "No one would dispute that the highest level of intercollegiate sport in North America is played at the NCAA, and that's where we want to be." Gary Brown, *Simon Fraser Application Accepted*,



Under NCAA bylaws,<sup>36</sup> only amateur student-athletes<sup>37</sup> are eligible to participate in intercollegiate athletics.<sup>38</sup> Additionally, an individual who pursues sport as a vocation, even if the individual fails at that pursuit, shall not be permitted to compete in intercollegiate athletics.<sup>39</sup> The NCAA defines this approach as a “clear line of demarcation.” This ostensibly maintains a clear boundary between college athletics and professional sports.<sup>40</sup>

In contrast, the European Model<sup>41</sup> of sport is sponsored through a club-based system, with a national sport federation as its governing body.<sup>42</sup> The NCAA notion of amateurism is not a concept that is involved in the rules, regulations, or procedural aspects of these non-U.S. athletic federations.<sup>43</sup> In fact, several ISAs from the University of Oregon tennis team were not aware of the concept of amateurism until they began to talk to U.S. college coaches.<sup>44</sup>

According to research done by the NCAA, these club systems are “financed through membership fees, corporate sponsors, and local government funding.” Unlike the NCAA, these clubs are not structured by a stark demarcation between amateur and professional players.<sup>45</sup> Organized participation in sports through these clubs can begin as early as three years old, with the first competitions occurring in the ten-and-

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THE NCAA NEWS, Jul. 10, 2009, <http://ncaa.org> (rollover “Library” on left; then follow “NCAA News Archive” hyperlink; then follow “2009” hyperlink; then follow “Division II” hyperlink).

36. Interestingly enough, the NCAA as an organization does not promulgate rules or legislation. Instead, coaches and committee members propose new rules and bylaws. The NCAA and university officials only interpret and enforce the bylaws.

37. The phrase “student-athlete” was coined by the NCAA to escape liability. See WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 67-76 (1995) (relating the history of the term “student-athlete” and explaining that the term was created in response to the “dreaded notion” that NCAA athletes could be identified as employees by state industrial commissions and the courts, which would require the schools to provide workmen’s compensation for their injured players).

38. NCAA MANUAL, *supra* note 2, art. 12.0.2.

39. See *id.* art. 12.1.2 (providing a variety of ways a student-athlete can jeopardize his or her amateurism status).

40. *Id.* art. 12.01.2.

41. The European Model is addressed because it is more susceptible to comparison with the U.S. system than are the organizations of sports in some other countries.

42. Weston, *supra* note 6, at 848.

43. See Dana Mulhausser, *NCAA Cracks Down on Foreign Athletes, While Urging Members to Relax Rules*, 48 CHRON. HIGHER EDUC. (12, 13 (2001) Wash., D.C.) (noting that club teams in many countries pay certain members of the team, which can jeopardize an athlete’s future eligibility to compete at the NCAA level).

44. Bachman, *supra* note 28.

45. Weston, *supra* note 6, at 848.

under age group.<sup>46</sup> By the time a selected few reach the under-sixteen age group, they will most likely have been given the opportunity to join professional teams.<sup>47</sup> It is this participation with professional teams—and the accompanying receipt of compensation—that create problems when and if these athletes subsequently wish to pursue an athletics opportunity in the United States.<sup>48</sup>

Since the European club model of sport is structured in this way, the ISA is exposed to a greater risk of losing amateur status by virtue of having belonged to a team that combined amateur and professional players.<sup>49</sup> Additionally, some international student-athletes are given stipends, receive free gear, and obtain prize money for competition, all of which jeopardize a student-athlete's amateur status in the United States. The combination of professionalization circumstances in the international sports system and the gaps in knowledge regarding amateurism in the United States lead many to believe that international student-athletes are not able to pursue higher education and sports in NCAA DI institutions.<sup>50</sup> Yet, this proposition may be incorrect. There is evidence that these rules are not as hindering as one would imagine, and ISA's are competing in DI athletics despite conflicts with the amateurism bylaw. Even if an ISA or a domestic student-athlete wished to challenge the basic premise of the amateurism bylaws, relevant case law has shown that, when student-athletes challenge the rulemaking body of the NCAA, the student-athletes are often unsuccessful.

### III. JUDICIAL DECISIONS SUPPORTING NCAA REGULATIONS

The NCAA as an institution and the NCAA bylaws have both been subjected to scrutiny in various cases brought by student-athletes. Courts, however, are reluctant to invalidate the NCAA rules, especially those rules regarding amateurism. Accordingly, NCAA regulations fall into two general categories: (1) rules designed to promote and to preserve eligibility status and (2) rules created for economic purposes.<sup>51</sup> The only U. S. Supreme Court decision regarding antitrust principles in

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46. Kaburakis, *supra* note 5, at 83

47. *Id.*

48. *Id.*

49. See *infra* note 104 and accompanying text (regarding Ohio State University's men's basketball player who must sit out 12 games for playing with professionals while in Serbia).

50. Kaburakis, *supra* note 5, at 3.

51. David E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 338 (2007).

intercollegiate athletics is *NCAA v. Board of Regents of Oklahoma*, which set the foundation for the two-pronged antitrust approach to NCAA regulations.<sup>52</sup> In this case, the NCAA was found to have violated antitrust principles by limiting the ability of membership institutions to obtain contracts; this case, however, did not specifically deal with individual student-athletes. It appears that, while in a non-player context, traditional antitrust analysis applies; within the player context, however, the federal courts shy away from the antitrust doctrine altogether.<sup>53</sup>

Cases dealing with eligibility, amateurism, and other NCAA rules are almost always resolved in favor of the NCAA.<sup>54</sup> Several decisions by various federal courts have determined that a student-athlete is not a competitor within the contemplation of antitrust laws. Thus, antitrust law is not applicable to individual student-athletes.<sup>55</sup> Similarly, in *Gaines v. NCAA*,<sup>56</sup> a college football player's motion for a preliminary injunction was denied in an antitrust challenge to the NCAA's rule that declared ineligible players who participate in the National Football League draft. The court, relying on the holding in *Board of Regents*, concluded that, since the overriding purpose of the NCAA no-draft rule was to preserve the unique atmosphere of competition between "student-athletes," the NCAA regulations should not even be addressed under federal antitrust law.<sup>57</sup>

When considering legal actions taken by student-athletes, most courts will agree it is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition

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52. See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) (holding that a television viewing plan constituted a restraint on trade in the sense that it limited member institutions' freedom to enter into their own television contracts).

53. Lazaroff, *supra* note 51, at 348; see also *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998) (invalidating an NCAA rule limiting the annual compensation of certain entry-level coaches); *Worldwide Basketball and Sports Tours, Inc. v. NCAA*, 388 F.3d 955 (6th Cir. 2004) (invalidating the NCAA rule limiting member institutions' participation in outside men's basketball tournaments, under conventional antitrust analysis).

54. *But see* *Oliver v. NCAA*, No. 2008-CV-762, 2008 WL 6085011 (Ohio Com. Pl. Dec. 12, 2008).

55. See *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975) (holding that an American college athlete who had received compensation for playing hockey while he was not a student failed to demonstrate a likelihood of success on due process, equal protection, and antitrust claims). Specifically, the court said that Jones is currently a student, not a businessman in the traditional sense of antitrust principles. *Id.* at 303.

56. 746 F. Supp. 738 (M.D. Tenn. 1990).

57. *Id.* at 744. See also *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569 (E.D. Pa. 2004) (holding that federal antitrust rules did not apply to NCAA rules regarding certification of camps and NCAA coaching visits).

among amateur athletic teams.<sup>58</sup> Furthermore, the court reasoned that creating a line of demarcation between professional and amateur sports by restricting compensation to student-athletes was legally permissible.<sup>59</sup> Additionally, at least one court concluded that “student-athletes do not possess a constitutionally protected interest in their participation in extracurricular activities.”<sup>60</sup> Since the ability to engage in extracurricular activities is not a constitutionally protected right, student-athletes are left with relatively few viable options.

These courts, using *Board of Regents* as a starting point, read Supreme Court dicta as evidence that amateurism itself passed the reasonableness test.<sup>61</sup> These cases analyze whether the NCAA rules are reasonable and necessary for preserving amateurism, not if amateurism itself is reasonable and necessary.<sup>62</sup> The NCAA claim that amateurism is an essential component of its product offering rests on the assumption that there is a demand for amateur sports.<sup>63</sup> Regardless of whether this claim is accurate, since the NCAA promulgates these rules and institutions subject themselves to such standards, amateurism remains a vital component of collegiate athletics.

#### IV. PROBLEMS WITH DETERMINING INTERNATIONAL STUDENT-ATHLETE AMATEURISM STATUS

The main controversy over the inclusion of ISAs on NCAA DI rosters has less to do with their nationalities and more to do with the peculiarity of the American notion of amateurism.<sup>64</sup> The mere fact that ISAs come from a different philosophical, cultural, structural, educational, and athletic background does not mean that they should be rendered ineligible, provided they did not otherwise jeopardize their eligibility.<sup>65</sup> However, determining whether an ISA’s amateurism status has been violated is much more difficult than making the comparable determination with respect to the amateurism status of a domestic

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58. *McCormack v. NCAA*, 845 F.2d 1338, 1344 (5th Cir. 1988).

59. *Id.* at 1344-45.

60. *See NCAA v. Yeo*, 171 SW.3d 863 (Tex. 2005) (holding that student-athletes do not have a protected interest in speculative future financial opportunities); *see also Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983) (holding that sanctions banning football student-athletes from competition did not deprive players of any constitutionally protected rights).

61. *See Daniel A. Rascher & Andrew D. Schwartz, Neither Reasonable Nor Necessary: “Amateurism” in Big-Time College Sports*, 14 ANTITRUST 51, 53 (2000).

62. *Id.*

63. *Id.* at 54.

64. Bachman, *supra* note 28.

65. Kaburakis, *supra* note 5, at 12.

student-athlete.

The NCAA's "Principle of Rules Compliance" provides that each member institution is required to operate its intercollegiate athletics program in compliance with all the NCAA rules and regulations.<sup>66</sup> The effect of this principle is the amateurism command to member universities.<sup>67</sup> The athletics compliance department at these colleges and universities is initially responsible for upholding and enforcing the NCAA rules, including those rules regarding amateurism. Each member institution has the responsibility to research and to confirm the eligibility of each recruited ISA. First, a recruited ISA is distributed an ISA questionnaire.<sup>68</sup> Once the compliance staff receives the questionnaire, the institution reviews the information and searches for any vague areas of the application that could raise potential amateurism problems. The burden rests on the recruiting institutions to carefully investigate those governing structures of the country and/or sport club where the ISA originates in order to identify potential problems before the NCAA staff does.<sup>69</sup>

Chris Rogers, Associate Athletic Director at The Ohio State University, states, "Amateurism certification is very fact specific, so getting an ISA certified is completely dependent on the student-athlete's given situation."<sup>70</sup> Typically, the Westernized countries are easier to evaluate than some of the more closed, Eastern bloc nations.<sup>71</sup> Additionally, the sport itself may play a role in the evaluation as well, since the level of organization within governing bodies can vary greatly among sports and among countries.<sup>72</sup> According to legendary basketball coach Bobby Knight, "determining ISA eligibility proves difficult because '[f]our interns [might] have to sit and study some country they have no idea where the hell it is to begin with [sic] . . . and then determine whether this kid is or is not pro.'"<sup>73</sup> Compliance departments typically consist of only a handful of certified staff members and, given the vast amount of other compliance issues that need to be dealt with on

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66. NCAA MANUAL, *supra* note 2, art. 2.8.1.

67. Mathewson, *supra* note 31, at 100 (noting that member institutions may not directly pay, apart from permitted financial aid, for a student to participate in athletics).

68. See NCAA Eligibility Center, Amateurism Questionnaire, [http://www.ncaa.org/wps/wcm/connect/ncaa/NCAA/Legislation%20and%20Governance/Compliance/amateurism\\_questionnaire.doc](http://www.ncaa.org/wps/wcm/connect/ncaa/NCAA/Legislation%20and%20Governance/Compliance/amateurism_questionnaire.doc) (last visited Feb. 9, 2010).

69. Kaburakis, *supra* note 5, at 104.

70. E-mail from Chris Rogers, Assoc. Athletic Dir. for Compliance, The Ohio State Univ. (Nov. 5, 2008) (on file with author).

71. *Id.*

72. *Id.*

73. Jeff Miller, Foreign Amateur Status Can Be Tough for Colleges to Document, <http://athleticscholarships.net/amateurforeign.htm> (last visited March 29, 2010).

a daily basis,<sup>74</sup> searching the Internet for information regarding prospective ISAs may not be a top priority.<sup>75</sup> Therefore, possible loopholes may exist where ISAs can sneak through and only ISAs who are in high profile sports or attend large DI institutions will be given more scrutiny in the process.

Previously, the amateurism status of a student-athlete was to be certified by the NCAA national office, but, with the recent formation of a centralized amateurism certification process within the NCAA Eligibility Center,<sup>76</sup> all prospective student-athletes must now be approved through this office. The development of this process was designed to lift the burden placed on compliance departments. Yet, compliance officers must still go through the same process of reviewing questionnaires and seeking out additional information regarding the ISA.<sup>77</sup> Since coaches at member institutions are continuing to search out ISAs in an effort to win the “arms race” in college sports,<sup>78</sup> compliance officers are going to continually be swamped reviewing the amateurism status of these prospective ISAs, possibly shying away from reporting any potential implication of violations.

#### V. VIOLATIONS OF AMATEURISM STATUS AND REINSTATEMENT

The NCAA recognized that it needed to identify a mechanism that could equitably satisfy members’ demands for greater access to international athletes. Therefore, the NCAA structured student-athlete reinstatement in such a way that ISAs could redeem their amateur

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74. Other issues of concern include contact and evaluation logs, telephone logs, countable related activities, playing and practice season, and academic and financial aid.

75. See, e.g., ESPN.com, Staiger Plans to Return to Germany (Jan. 20, 2010), <http://sports.espn.go.com/nbc/news/story?id=4840845>. The NCAA Eligibility Center and Iowa State athletics compliance office spent considerable time and resources to make sure the SA was eligible for competition, providing scholarships and academic opportunities only to have the SA leave prior to graduation, thus affecting the team, graduation rates, and various other issues.

76. The Amateurism Clearinghouse began in the Fall of 2007 to ease the burden placed on compliance personnel. For more information about the Eligibility Center, which is now in charge of the amateurism certification process, see NCAA, Amateurism Certification Clearinghouse, <http://www.ncaa.org/wps/ncaa?ContentID=270> (last visited March 21, 2010).

77. Kaburakis, *supra* note 5, at 53-54 (“An institution is responsible for notifying the NCAA when it receives additional information, or otherwise has cause to believe that a PSA amateur status has been jeopardized.”) (internal citation omitted). This process remains in effect even though the certification is now conducted through the Eligibility Center. *Id.*

78. See Weston, *supra* note 6, at 834-35 (considering whether the worldwide “arms race” quest detracts from the mission of NCAA).

status and consequently participate in college athletics.<sup>79</sup> Of the 542 cases in the past two years in which incoming athletes were found to have violated amateurism guidelines in some way, 472 involved foreign student athletes.<sup>80</sup> A student-athlete who is found to have violated the amateurism rule is immediately declared ineligible unless the student-athlete can be reinstated.<sup>81</sup> The NCAA's solution was to make student-athlete reinstatement the vehicle by which ISAs could regain their amateur status<sup>82</sup> despite violating elements of the NCAA's stated definition of amateurism.<sup>83</sup> The process to reinstate the student-athlete is controlled by the Student-Athlete Reinstatement Committee.<sup>84</sup>

First, membership institution compliance personnel work with the ISA through the student-athlete reinstatement (SAR) process and begin to gather additional facts regarding the case. After the institution submits interviews and explanations concerning how the violation occurs, the SAR Committee considers the case and subsequently renders a decision.<sup>85</sup> The SAR staff takes into account case precedent, seriousness of the violation, mitigating circumstances, and the extent to which the student-athlete is culpable.<sup>86</sup> Typical violations of amateurism status include receipt of payment, participation on professional teams, use of agents, employment by a professional team,

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79. David Allen Pierce, *Applying Amateurism in the Global Sports Arena: Analysis of NCAA Student-Athlete Reinstatement Cases Involving Amateurism Violations* 105 (Dec. 6, 2007) (unpublished Ph.D. dissertation, Indiana University) (on file with author).

80. Wieberg, *supra* note 7, at D1.

81. This process applies to all rules violations, just not amateurism.

82. One possible punishment after the NCAA reinstates a student-athlete is missing the opportunity to compete. An ISA is subject to a "one-game for one-game withholding penalty not to exceed the loss of one season of eligibility" if a student-athlete participated on a professional team. For example, in men's basketball, the ISA would lose one collegiate game for each game played as a professional.

83. Pierce, *supra* note 79.

84. For more on the mission of the SAR, see NCAA, Student-Athlete Reinstatement, [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/wps/wcm/connect/ncaa/NCAA/Legislation%20and%20Governance/Compliance/Student-Athlete%20Reinstatement/student\\_athlete\\_reinstatement.html](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/ncaa/NCAA/Legislation%20and%20Governance/Compliance/Student-Athlete%20Reinstatement/student_athlete_reinstatement.html) (last visited March 21, 2010).

85. Pierce, *supra* note 79, at 29.

86. *Id.* The SAR staff assesses the actions and knowledge of the student-athlete. A student-athletes' actions; commitment to maintaining or preserving their amateur status; the extent to which they were familiar with NCAA rules; whether or not they were aware a violation was committed; and personal or family circumstances are considered when determining eligibility. See e.g., NCAA, Student-Athlete Reinstatement Process, [http://www.ncaa.org/wps/wcm/connect/2923e4004e0b8df6a809f81ad6fc8b25/sar\\_process\\_c hart.pdf?MOD=AJPERES&CACHEID=2923e4004e0b8df6a809f81ad6fc8b25](http://www.ncaa.org/wps/wcm/connect/2923e4004e0b8df6a809f81ad6fc8b25/sar_process_c hart.pdf?MOD=AJPERES&CACHEID=2923e4004e0b8df6a809f81ad6fc8b25) (last visited March 21, 2010).

and illegal promotional activities.<sup>87</sup> Cases involving ISAs accounted for a little over twenty-three percent of DI amateurism SAR cases and were concentrated in two main areas: (1) receipt of prohibited forms of pay (almost forty-five percent) and (2) professional competition (fifty percent).<sup>88</sup> Although these rules are supposed to be applied equally and fairly to all student-athletes, it appears that the culpability standard is lower for ISAs than for domestic student-athletes.

Research revealed that over ninety-four percent of student-athletes were reinstated despite violating stated amateurism rules, and DI international prospective student-athletes were reinstated at a rate similar to, if not higher than, domestic student-athletes in violations of amateurism regulations.<sup>89</sup> Accordingly, prospective ISAs were reinstated at a higher percentage for violations of NCAA Bylaw 12.2<sup>90</sup> than domestic student-athletes.<sup>91</sup> Stated differently, international prospective student-athletes were declared ineligible in almost thirteen percent of Bylaw 12.2 infractions, while domestic student-athletes were declared ineligible in thirty percent of such cases.<sup>92</sup> Overall, ISAs were reinstated at a notably higher percentage than domestic student-athletes.<sup>93</sup> Such cases of reinstatement included bylaws violations of professional competition,<sup>94</sup> prohibited forms of payment,<sup>95</sup> and use of agents.<sup>96</sup> Finally, ISAs were declared permanently ineligible less frequently than domestic student-athletes.<sup>97</sup> These results indicate that perhaps the NCAA amateurism statutes are not fair as applied to international student-athletes, resulting in comparatively greater leniency for the international student-athlete than for the domestic

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87. Pierce, *supra* note 79, at 42. The use of agents is the least lenient category and, accordingly, the SAR process typically does not reinstate student-athletes who have used agents.

88. *Id.* at 45.

89. *See id.* at 50.

90. *See generally* NCAA MANUAL, *supra* note 2, art. 12.2 (dealing with limitations to involvement with professional teams, including tryouts, practices, and competitions).

91. Pierce, *supra* note 79, at 37. ISA's were reinstated in 34 out of 39 Bylaw 12.2 cases at a rate of 87.2%, compared to a mere 69.7% for domestic student-athletes.

92. *Id.*

93. *Id.* at 47.

94. *See id.* (stating that ISA's were reinstated at 86.5% in professional competition violation cases, compared to 75% reinstatement for domestic student-athletes who committed similar violations).

95. *See id.* (showing that in cases involving violations for receipt of prohibited payment ISA's were reinstated at 97% compared to 93.3% for domestic student-athletes).

96. *See id.* ISA's reinstated at 66.7% versus 42.9% for violations involving use of agents.

97. *See id.* at 46. For cases resulting in permanent ineligibility, ISA's accounted for 36.8% while domestic student-athletes accounted for 46.4%.



student-athlete.

#### VI. RECENT EXAMPLES OF ISAS AND AMATEURISM STATUS

Several recent examples of ISAs attempting to reverse violations of NCAA amateurism rules show the difficulty in determining amateurism status and the discrepancies in evaluating this standard. Muhammad Lasege, a Nigerian basketball player and prospective international student-athlete, desired to participate in intercollegiate athletics at the NCAA DI level.<sup>98</sup> Prior to enrollment at the University of Louisville, Lasege moved from his native Nigeria to Russia to play basketball with the hopes of eventually coming to the United States. While in Russia, he signed a contract with a professional team in Moscow.<sup>99</sup> Lasege received a salary of \$9,000 a year with additional monetary incentives and living accommodations.<sup>100</sup> The University of Louisville declared him ineligible to compete and then asked the NCAA to reinstate Lasege's eligibility due to Lasege's ignorance of the NCAA regulations and other mitigating factors. The NCAA's SAR staff, however, found that Lasege had violated its bylaws relating to contracts, compensation, usage of agents, and preferential treatment or services.<sup>101</sup>

While the trial court granted an injunction and ordered the NCAA to immediately restore the eligibility of Lasege, the Court of Appeals overruled the holding and declared Lasege ineligible for intercollegiate athletics competition. Specifically, the Court found that the NCAA has an unquestionable interest in enforcing its regulations and preserving the amateur nature of intercollegiate athletics.<sup>102</sup> Lasege was declared permanently ineligible for intercollegiate athletics competition.<sup>103</sup>

More recently, Ohio State University men's basketball player Nikola Kecman was required to sit out the first twelve games of the 2008-09 basketball season.<sup>104</sup> The NCAA eligibility center determined that

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98. See *Nat'l Collegiate Athletic Ass'n v. Lasege*, 53 S.W.3d 77, 85 (Ky. 2001) (holding that "the NCAA unquestionably has an interest in enforcing its regulations and preserving the amateur nature of intercollegiate athletics.").

99. *Id.* at 80-81.

100. *Id.* at 81.

101. *Id.* at 80.

102. *Id.* at 88-89.

103. *Id.* See also *Shelton v. NCAA*, 539 F.2d 1197, 1198-99 (9th Cir. 1976) (holding that the NCAA rule that a student who has signed a professional contract, regardless of its enforceability, is ineligible to participate in intercollegiate athletics in that sport has a legitimate purpose).

104. ESPN.com, Ohio State Transfer Kecman Benched 12 games for Time With Serbian Club, <http://sports.espn.go.com/ncb/news/story?id=3681110&campaign=rss&source=NCAA> Headlinesretrieved (last visited Dec. 28, 2009).

Kecman may have received more than “actual and necessary expenses” while playing for a Serbian team called Vizura. Apparently Kecman did not receive money to play for Vizura but was nonetheless penalized for playing with others who the NCAA considered professionals.<sup>105</sup> Interesting enough, Kecman played his freshman season at Eastern Arizona College in 2007-08 and was not required to sit out any games at that institution.<sup>106</sup> The difference between Kecman and Lasege seems to be receipt of benefits. Although the detailed analysis of the SAR committee is not mentioned in either of these cases, it appears that Kecman did not purposefully receive the benefits and was therefore subjected to lesser penalties than Lasege.

The most recent case deals with the Michigan Wolverines basketball team, which has added Robin Benzing—a 6-foot-10, 205-pound international student-athlete—to the roster. Benzing has played for the German youth national team in recent years.<sup>107</sup> Michigan Coach John Beilen has said that “[t]he recruitment of foreign players is a bit more complicated now than in the past. The NCAA’s current academic and amateur certification process may affect Robin’s initial eligibility to play at Michigan. We will follow the situation closely and hopefully know more as soon as possible.”<sup>108</sup>

While the Lasege cases show that signing a contract with a professional team gives rise to equal penalties for both domestic and ISAs, the Kecman and Benzing cases provide a softer penalty, allowing players who may have played against professionals to compete against domestic amateurs who might otherwise be considered ineligible for competing against professionals.

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105. See NCAA Bylaw art. 12.2.3.2.1, in NCAA MANUAL, *supra* note 2, at 67 (an individual may participate with a professional on a team, provided the professional is not being paid by a professional team or league to play as a member of that team). Here, the Vizura team members were getting paid and although Kecman was not, he was still violating the bylaw. New NCAA legislation effective August 1, 2010 will override the current bylaw, permitting individuals (like Kecman) to participate on a professional team without jeopardizing his or her eligibility so long as the individual is not given more than actual or necessary expenses.

106. Eastern Arizona College is a member of the National Junior College Athletics Association (NJCAA) and does not have to abide by the NCAA DI rules regarding amateurism. Eastern Arizona College, Gila Monster Athletics, [http://www.eac.edu/Campus\\_Life/Athletics](http://www.eac.edu/Campus_Life/Athletics) (last visited March 20, 2010).

107. Mark Snyder, *U-M Basketball Signs New Forward*, DETROIT FREE PRESS, May 22, 2008.

108. *Id.*

## VII. UNFORTUNATE RESULTS AND PROPOSED SOLUTIONS

Due to the recent influx of ISAs, some parents and coaches have grumbled that some of these semi-professional ISAs are unfairly competing against U.S. players.<sup>109</sup> Not only does competitive equity impact ISAs, but it also affects domestic students. Since amateurism is defined quite differently in other countries, the current rules often place domestic athletes at a competitive disadvantage.<sup>110</sup> ISAs are able to amass talent and increase skill level from playing on a professional circuit, only to come to the United States and be able to reign over domestic student-athletes who have much more limited experience. Inevitably, many domestic student-athletes view ISAs as competitors for scholarship opportunities. One DI women's tennis coach said, "We have to find a way to stop players [from being allowed to play at the DI level] who basically play a full-time professional circuit until they realize they are not good enough. Afterwards, they declare themselves as amateur, accept a scholarship, and beat up on younger, less experienced players."<sup>111</sup>

Furthermore, coaches have also been critical of the NCAA's response to ISA problems, describing it as lackadaisical and asserting that it has emboldened some colleges to more loosely interpret amateur status.<sup>112</sup> It appears that some coaches want to take a harder line on international student-athletes found in violation of amateur rules.<sup>113</sup> In the past three years, the NCAA has ruled on the eligibility of thirty-one foreign tennis players. Only three of these athletes were barred from competition; some of the twenty-eight ruled eligible were asked to sit out matches.<sup>114</sup> One coach commented that many coaches seek no reinstatement;<sup>115</sup> "If there are the rules, we need to enforce them. If you break them, you're out."<sup>116</sup> Other coaches are more concerned with the responsibility and obligations to state taxpayers who fund public institutions.<sup>117</sup> Mark Wetmore, head track and field coach at the

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109. See Bachman, *supra* note 28 (arguing that a spot occupied by an ISA is one less spot for a U.S. citizen).

110. Pierce, *supra* note 79, at 86.

111. Joe Drape, *NCAA and Coaches to Discuss New Limits for International Players*, N.Y. TIMES, July 9, 2006, at C3.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* (quoting Shelia McInerney, women's tennis coach at Arizona State University and co-chairwoman of the Intercollegiate Tennis Association's ethics and infractions committee).

116. *Id.*

117. See Wilson & Wolverton, *supra* note 6, at 19.

University of Colorado, said that “as a state institution we have a responsibility . . . to make sure their [taxpayers] sons and daughters have first priority.”<sup>118</sup> Additionally, some professors are also concerned that an athletic program funded by state dollars, but not benefitting the people paying for it directly, is inconsistent with the overall purpose of the state institution.<sup>119</sup>

In contrast, some coaches are very excited to bring in foreign players. One example is coach John Calipari, who spent eight seasons as the Memphis Tiger’s head men’s basketball coach<sup>120</sup> and took the team to Beijing this summer.<sup>121</sup> He hopes to one day bring several Chinese players to his already top-tier DI men’s basketball program.<sup>122</sup> Calipari described his vision for the program at a sports business conference, indicating that if he were able to recruit an ISA from China, other universities would benefit as well. Additionally, Calipari mentioned that the NCAA has never broadcast a tournament game on Chinese television; therefore, the NCAA stands to increase its already generous income from intercollegiate athletics,<sup>123</sup> specifically the NCAA Men’s Basketball Tournament.<sup>124</sup>

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118. *Id.* (stating that “some parents may feel upset after 18 years of paying taxes in the state . . . your daughter has been able to throw the shot put 42 feet, but your state institution does not offer her an athletics scholarship because they can get someone from Iceland who can throw 43 feet”).

119. *Id.* (stating that universities could also raise the academic profiles of undergraduate institutions by recruiting overseas). For example, the chemistry department could win more prizes if they recruited heavily from Beijing, but the department does not do that.

120. Coach Calipari is now the head coach at the University of Kentucky. His former institution has been under scrutiny for several NCAA violations. *See* NCAA, Division I Committee on Infractions Issues Decision on University of Memphis (Aug. 20, 2009), [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/ncaa/media+and+events/press+room/news+release+archive/2009/infractions/20090820+coi+rls+memp](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/media+and+events/press+room/news+release+archive/2009/infractions/20090820+coi+rls+memp) his.

121. Wilson & Wolverson, *supra* note 6, at 19.

122. *Id.* However, Calipari indicated that he does not wish to have a team full of Chinese basketball players; he would be happy with just one, preferably a player with professional potential.

123. *See* Robert A. McCormick, *The Emperor’s New Clothes: Lifting the NCAA’s Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 509 (2008) (stating that millions of dollars are generated in the college sports industry and that NCAA revenue is projected at over \$647 million dollars for 2008-09).

124. *See* Steve Wieberg & Michael Hiestand, *NCAA Reaches 14-Year Deal with CBS/Turner for New Men’s Basketball Tournament, Which Expands to 68 Teams for Now*, USA TODAY, Apr. 22, 2010, available at <http://content.usatoday.com/communities/campusrivalry/post/2010/04/ncaa-reaches-14-year-deal-with-cbturner/1>. If the NCAA were able to expand the viewing area to places such as China, the revenue would increase even more substantially.

Yet, some critics argue that when an intercollegiate athletics team becomes dominated by or comprised solely of non-domestic players, local fan interest may wane.<sup>125</sup> Among the proposals to be discussed are limits on the number of professional events that an international player can compete in before entering college and uniform rules on the amount of expenses a player can claim as prize money.<sup>126</sup> It is unclear whether these limitations will help to ameliorate or to actually resolve the discrepancy. Additionally, some say that limiting the influx of international student-athletes would not be fair because putting a cap might violate federal antidiscrimination laws.<sup>127</sup>

How can the NCAA make a level playing field for both international student-athletes and domestic student-athletes? One solution is to get rid of the amateurism requirements altogether and to allow student-athletes to be considered professionals.<sup>128</sup> A removal of the amateurism requirement, however, would defeat the purpose of the NCAA.<sup>129</sup> Although the NCAA can define amateurism in whatever way it chooses,<sup>130</sup> the amateurism rules were created with a sound purpose.<sup>131</sup> If the NCAA did not field regulations such as amateurism, larger universities, donors, and alumni could pay “blue-chip” recruits a sizeable salary to attend a certain university. Therefore, amateurism is necessary to rid intercollegiate athletics from the possibility of impropriety and corruption.<sup>132</sup> Amateurism itself should not be sent up to the chopping block as a means to solve the disparity.

Arguably, the issue of international student-athletes receiving more lenient treatment resulting in an unfair playing field stems from a deeper issue. The overarching desire to have the best athletes in college athletics has promulgated the relaxation of the amateurism bylaws, applying them in such a lenient way that coaches are able to obtain the

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125. Weston, *supra* note 6, at 839. However, there is not enough data to indicate such results. Additionally, since there are such a minute number of ISAs trying to compete in NCAA Division I football, there will be little impact from such a theory.

126. *Id.* at 847.

127. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244 (2003).

128. See, e.g., Rascher & Schwarz, *supra* note 61; Kristin R. Muenzen, *Weakening It's Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257 (2003).

129. See NCAA, Mission Statement, <http://www.ncaa.org/wps/ncaa?ContentID=1352> (last visited March 31, 2010) (stating that the purpose of the NCAA is “to govern competition in a fair, safe, equitable and sportsmanlike manner, and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount”).

130. Menzel, *supra* note 17, at 878.

131. See Christian Dennie, *Amateurism Stifles a Student-Athlete's Dream*, 12 SPORTS LAW. J. 221, 243 (2005) (stating that “[t]he rationale behind amateurism rules is two fold: parity and education”).

132. *Id.* at 244.

best athletes and to achieve winning programs that not only produce championships but also produce revenue for the institution. Perhaps the blame lies with a confusing rulebook (the NCAA manual) and with a lack of oversight by prospects, coaches, parents, universities, and the NCAA. These entities, however, can do little to counteract what is primarily to blame for the problem: society in general for creating a climate in which a win-at-all-cost-mentality has seeped into sports.<sup>133</sup> The pressure to win has forced coaches to seek out not only the best athletes in the area but also the world.<sup>134</sup> The NCAA is trying to catch up to the evolving world stage of collegiate athletics but is still struggling. Some clear cut rules need to be in place as the aforementioned coaches asserted. The consequences should be firm; breaking the rules, no matter how innocently, should result in violation of one's amateurism status. The reinstatement of such status should be applied as evenly as possible to all student-athletes.

If the administrators are not going to alter the rules to create a level playing field, the reality will be a large amount of litigation on behalf of both ISAs and domestic student-athletes. Thus, the courts will be left to determine where the line should be drawn between an individual's own responsibility to look after him- or herself, on the one hand, and society's responsibility, on the other hand, to protect its members.<sup>135</sup> Inevitably, the courts will be responsible for assessing the ISAs' culpability and for determining whether the mitigating circumstances were sufficient to evade any sort of amateurism statute that is in place. Yet, is this really a matter for the courts? As the court in *Yeo* stated, "judicial intervention in [student athletic disputes] often does more harm than good and judges should not be looked upon as 'super referees.'"<sup>136</sup> Therefore, the court system should not be the officiating crew for such disputes.<sup>137</sup>

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133. *Id.*

134. The financial cost of recruiting overseas can drastically affect the budget of an athletics department. According to a recent study, 48% of NCAA DI athletics doubled their recruiting budgets from 1997-2007. Sander notes that the desire to bolster the competitiveness of college teams by recruiting overseas has contributed to the increase. See Libby Sander, *Have Money, Will Travel: The Quest for Top Athletes*, 54 CHRON. HIGHER. EDUC. 47 (2008). However, such increases make one ask the subtle question about values, balance and propriety; where does this (recruiting budget) fit into our mission and our priorities?

135. Jeffrey B. Tracy, *Can I Play? Risk Management One Amateur Athlete at a Time*, ENT. & SPORTS L., Spring 2008, at 2, 2.

136. See *Yeo*, 171 S.W.3d at 870 (citing *Hardy v. Univ. Interscholastic League*, 759 F.2d 1233, 1235 (5th Cir. 1985)).

137. See also *DeFrantz v. United States Olympic Committee*, 492 F. Supp. 1181, 1188 (D.D.C. 1980) (supporting the proposition that the Amateur Sports Act of 1978 was intended to keep the courts out of eligibility disputes between an athlete and the USOC).

On the other hand, bogging down the NCAA manual with additional legislation for international student-athletes may not solve the problem either. From a fairness perspective, there are definitely country specific issues that arise for international prospects. It is impossible to fix all of those issues from a legislative perspective, however, since the scenarios become so fact specific.<sup>138</sup> If the courts should not interfere with athletics disputes and country specific issues will be nearly impossible to fix in a single legislative rule, what other options are available?

One possibility would be to develop an international amateurism standard to encompass all prospective student-athletes who desire to eventually compete at the NCAA level. As previously mentioned, this concept would certainly benefit the NCAA in terms of revenue: more broadcasting for collegiate athletics around the globe equals more money.<sup>139</sup> This Note proposes that the NCAA should expand and be structured more like the main governing body for an international amateurism organization.<sup>140</sup> Similarly, the NCAA needs to have the ability to maintain control over student-athletes but also over amateurism standards to reduce the discrepancies that are currently problematic in the SAR process. Other international sports organizations, besides the IOC, provide various patterns of governing structures that the NCAA could consider when developing this international amateurism standard.<sup>141</sup> The NCAA could work in unison with other countries to develop this standard and encourage legislation to be passed that would protect the rights of both domestic and international student-athletes alike.<sup>142</sup> The current situation of

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138. E-mail from Chris Rogers, *supra* note 70.

139. See *supra* note 125 and accompanying text.

140. See Mack, *supra* note 22, at 656 (noting that the IOC has unilaterally created a federative law for the entire Olympic Movement, binding not only the IOC itself but all parts of the Olympic Movement, including individual participants). The NCAA could be structured to cover the entire "intercollegiate athletic" movement.

141. See generally Jesse Gary, *The Demise of Sport? The Effect of Judicially Mandated Free Agency on European Football and American Baseball*, 38 CORNELL INT'L L.J. 293 (2005) (providing a more detailed description of the structure of the European Football organization, including the transfer of international players and influx of foreign players on other national teams); see also Robyn R. Goldstein, *An American in Paris: The Legal Framework of International Sport and the Implications of the World Anti-Doping Code on Accused Athletes*, 7 VA. SPORTS & ENT. L.J. 149 (2007) (providing background information on the development of the World Anti-Doping Code).

142. One possible model the NCAA could consider is the 1976 European Sport for All Charter, which established rights such as: (1) every individual has the right to participate in sport; and (2) sports shall be encouraged as an important factor in human development and appropriate funds shall be available for such activities. However, additions need to be made which include a higher priority in the social planning of sport organizations; a clearer definition and promotion of the inherent value of sport; and comprehensive

reinstatement of ISAs is predicated on thousands of mitigating factors and produces an unfair result; clearly, change is needed. Only when sport, specifically NCAA intercollegiate athletics, is recognized to have intrinsic worth, and features more systematically in social policy planning, will such a standard be developed.<sup>143</sup>

Until the need for this standard is universally recognized, the NCAA should be proactive and reexamine the SAR policies determining when ISAs have noteworthy mitigating circumstances. With technological developments such as the Internet, webcams, and the ability of computer programs to translate documents into nearly any language, ignorance of the existence of the NCAA amateurism rules and the lack of comprehending the consequences are no longer legitimate excuses. It appears that technological advances have surpassed the development and implementation of NCAA policies and procedures.<sup>144</sup> Thus, the current SAR interpretation on the amateurism status should be reexamined, specifically considering what actions count as mitigating circumstances. From a rules standpoint, the NCAA needs to reevaluate the SAR interpretations to keep up with the technological advances and the vast information increasingly available on a global level.

Additionally, there needs to be a collaborative effort on behalf of the NCAA and European clubs to educate ISAs about the components of the rules and how one's amateurism status can be jeopardized long before a person reaches adulthood. An extensive educational effort should focus on informing prospects and their families early on about future educational and athletic opportunities.<sup>145</sup> Since the member institutions of the NCAA may not engage in recruiting attempts during these early stages of competition,<sup>146</sup> the NCAA staff will be relied upon to organize this educational effort.<sup>147</sup> Athletes need to understand the bylaws and to appreciate the array of activities that potentially jeopardize eligibility. Too often, athletes and their families do not know or understand the bylaws and do not appreciate the way in which their activities will be

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research and effective communication of the beneficial outcomes of sport. William J. Morgan, *Sport in the Large Scheme of Things*, in *PHILOSOPHY OF SPORT: CRITICAL READINGS, CRUCIAL ISSUES* 476, 492 (M. Andrew Holowchak ed., 2002).

143. *Id.*

144. The bylaw prohibiting electronically transmitted correspondence such as Instant Messenger and text messaging was not issued until August of 2006. *See, e.g.*, NCAA MANUAL, *supra* note 2, art. 13.4.1.2.

145. Kaburakis, *supra* note 5, at 83.

146. Accordingly, the NCAA defines a prospect student-athlete as a student who has started classes for the ninth grade. NCAA MANUAL, *supra* note 2, art. 13.02.11. Thus, in general it is a violation for a member institution to recruit a student before such a time.

147. Kaburakis, *supra* note 5, at 83.



interpreted, inadvertently jeopardizing their NCAA eligibility in the process.<sup>148</sup>

Furthermore, an effort by the European club sports to borrow the amateurism standard used by the NCAA would help deter these ISAs from playing on professional teams and would mandate that these student-athletes cannot be paid above actual and necessary expenses.<sup>149</sup> In theory, this solution may have the most potential in resolving the problem. It is highly unlikely, however, that sport federations around the world would want to jeopardize their own financial gains in an effort to support the NCAA bylaws.

### CONCLUSION

Bridging the gap between the professionalization threshold existing in various parts of the world with the amateurism regulatory framework enforced by the NCAA is one of the most challenging areas in contemporary sports law and management.<sup>150</sup> The current interpretation of the NCAA rules is insufficient, resulting in confusion and controversy over the amateurism status of many ISAs, costing institutions, the NCAA, and others time, money, and resources that could be spent elsewhere. The goal of the amateurism bylaws was to create a level playing field, where academics trumped athletics,<sup>151</sup> with the term *student* always remaining superior to the term *athlete*. This goal is being diluted with the addition of ISAs who have violated their amateur statuses in numerous ways, only to be reinstated at a higher rate than those who may have committed similar violations here on American soil. What was intended to be a mechanism to retain amateurism in intercollegiate athletics is now a loophole for athletes who have played against professionals and have received compensation to compete against those that are truly amateur. This discrepancy that results in a semi-professional and unfair playing field will only continue to increase as the pressure for schools to maintain winning athletics programs increases.

Unfortunately, those who are truly disadvantaged by this ongoing problem are those student-athletes who have purposefully maintained

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148. Christopher A. Callanan, *Advice for the Next Jeremy Bloom: An Elite Athlete's Guide to NCAA Amateurism Regulations*, 56 CASE W. RES. L. REV. 687, 694 (2006).

149. See NCAA MANUAL, *supra* note 2, art. 12.1.2.4.1 (stating that prior to college enrollment, an individual may only accept prize money for a performance that does not exceed actual and necessary expenses, which include such monetary expenses such as entry fee, transportation to and from the event, and a reasonable per diem allowance).

150. Kaburakis, *supra* note 5, at 106.

151. See Snyder, *supra* note 107.

their amateur status but have been denied an athletic scholarship and left without a place on the roster. Even if the student-athlete is fortunate enough to actually compete at the NCAA DI level, the student-athlete could be competing against athletes who are considered professionals. International student-athletes disguised as amateurs are altering what was once a level playing field in college athletics. Until NCAA policies are reexamined, new procedures developed, bylaws enforced properly, and moreover, the win-at-all costs mentality and pressure fade away, these professional student-athletes will undoubtedly continue to dominate intercollegiate athletics competitions for years to come.