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### The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes

Richard H. McLaren

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# THE COURT OF ARBITRATION FOR SPORT: AN INDEPENDENT ARENA FOR THE WORLD'S SPORTS DISPUTES

Richard H. McLaren\*

## I. INTRODUCTION

The very essence of sport is competition. Through the competitive spirit, athletes play against one another to determine who is best. Fundamental to each athlete's competitive spirit is the concept of an equal playing field, enshrining the importance of honor and mutual respect.

A simplistic view of sports, however, is no longer possible as politics and economic incentives cast a darkening shadow across the playing field. In a world where the stakes of winning have risen enormously, the Olympic ideal is in danger of becoming an anachronism. At one time it was thought that "[t]he most important thing in the Olympic Games is not to win but to take part . . ."<sup>1</sup> It is no longer just the thrill of competing, however, but winning that is required. "Olympic athletes, especially gold medallists, stand to make a fortune on lucrative endorsement contracts."<sup>2</sup>

Today athletes can achieve their goals by adhering to strict regimens of training, diet, and practice. They can also excel beyond the boundaries of their natural ability by enhancing their performance with drugs. The magnetism of performance enhancing drugs is stronger than ever as the riches associated with victory continue to grow. Athletes feel pressure from all directions to win and often succumb to the lure of drugs, to gain an unfair advantage over their competitors.

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\* Professor Richard H. McLaren, Faculty of Law, University of Western Ontario. I would like to acknowledge the contribution and assistance of my researcher Jim Bunting of the Western Law Class of 2002. I am indebted to him for his excellent work with me on this Article.

<sup>1</sup> *Oversight of Activities of the Olympic Committee: Hearings Before the Consumer Subcomm. of the Senate Comm. on Commerce, Science and Transportation*, 103d Cong., 2d Sess. 26 (1994) (statement of Anita L. Defrantz, President, Amateur Athletic Foundation of Los Angeles) (quoting statement attributable to Pierre De Coubertin).

<sup>2</sup> Edward E. Hollis, Note, *The United States Olympic Committee and the Suspension of Athletes: Reforming Grievance Procedures Under the Amateur Sports Act of 1978*, 71 IND. L.J. 183, 183 (1995).

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A challenge of the new millennium is to eradicate performance enhancing drugs from sport and to redirect sport back to its competitive roots without the influence of unfair advantages and victory without honor. When sufficient time has passed, historians may look back on the Summer Olympic Games at Sydney and find that those games were the turning point on the anti-doping attack.<sup>3</sup>

The Court of Arbitration for Sport ("CAS") is the final checkpoint in the preventative process for doping in sport. If successful, the CAS reinforces the deterrent effect of drug testing carried out at the Olympic Games by the World Anti-Doping Agency ("WADA").<sup>4</sup> This paper examines the legal machinery that attempts to channel all athletes to compete in every respect on a level playing field, particularly without the unfair advantage of performance enhancing drugs. The CAS case developments of the millennium year, including the fifteen cases and fourteen decisions of the Ad Hoc Division,<sup>5</sup> are examined to determine if the machinery of CAS will contribute to the containment of drugs<sup>6</sup> and more broadly to a fairer playing arena for the athlete.

## II. THE PRIVATE CONTRACTUAL NATURE OF SPORT

Most sports organizations are private, voluntary associations and are not governed by public authorities exercising statutory powers.<sup>7</sup> As a

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<sup>3</sup> WADA Independent Observer Report, *Olympic Summer Games 2000: Sydney, Australia*, available at <http://www.wada-ama.org/asiakas/003/wada-english.nsf/Home?OpenPage> (last visited Jan. 9, 2001).

<sup>4</sup> The World Anti-Doping Agency ("WADA") was created on November 10, 1999. See World Anti-Doping Agency, *WADA History*, available at <http://www.wada-ama.org/asiakas/003/wada-english.nsf/SWP/12> (last visited Jan. 9, 2001). This agency was joined at the national level in the United States by the United States of America Anti Doping Agency ("USADA"). See USADA, *Doping Control Officers Program*, available at [http://www.usantidoping.org/control\\_program/index.htm](http://www.usantidoping.org/control_program/index.htm) (last visited Jan. 9, 2001). The USADA is an independent agency that has contracted with the USOC to do all the testing for competition, with no advanced notice, in the United States. *Id.*

<sup>5</sup> For a discussion of the AHD experience at the Atlanta and Nagano Games see Richard McLaren, *A New Order: Athletes' Rights and the Court of Arbitration at the Olympic Games*, 7 OLYMPIKA 1, 3 (1998). See also Michael Beloff, *The Court of Arbitration for Sport at the Olympics, Sports and L.J. of the British Assoc. for Sport and the Law* (1998) (on file with author).

<sup>6</sup> The Sydney Summer Olympic Games resulted in the greatest number of positive drug tests during any games. For a partial listing of modern history of doping in sport see COMMISSION OF INQUIRY INTO THE USE OF DRUGS AND BANNED PRACTICES INTENDED TO INCREASE ATHLETIC PERFORMANCE 71-74 (1990) (the "Dubin Report"). This is an idea which is picked up on by the Office of the Independent Observer in its report to WADA. See WADA Independent Observer Report, *Olympic Games 2000: Sydney Australia*, *supra* note 3, at 14.

<sup>7</sup> John Barnes, SPORTS AND THE LAW IN CANADA 143 (3d ed. 1996).

result the majority of disputes involving sports organizations are governed by contractual principles. Differing legal systems and principles may be applied to various sports and athletes. Each nation and indeed each sport, is different and it is an immense task to effectively bring together a diverse number of rules, legal systems, opinions, philosophies of law, and goals. Further, the nature of sport makes expeditious dispute resolution a necessity. As a consequence, sports related disputes are increasingly resolved by arbitration panels. In this respect sports bodies either employ their own arbitration panel<sup>8</sup> or submit their disputes to the CAS.

The CAS was established on April 6, 1983, at an IOC session in New Delhi,<sup>9</sup> and since that time has dealt with sports-specific disputes of a private nature. The court provides a forum for the world's athletes and sports federations to resolve their disputes through a single, independent and accomplished sports adjudication body that is capable of consistently applying the rules of different sports organizations and the world wide rules of the Olympic Movement Anti-Doping Code.<sup>10</sup>

The CAS provides a unifying institution that can help deliver sport back to its origins. It can be the unifying body that ensures fairness and integrity in sport through sound legal control and the administration of diverse laws and philosophies.

In this respect, the CAS is in the course of developing universal principles that will some day be widely recognized as the *lex sportiva*.<sup>11</sup> Despite the growth and success of the CAS, some International Federations ("IFs") have not agreed to use the CAS for dispute settlement. The International Amateur Athletic Federation ("IAAF") and Fédération Internationale de Football Association ("FIFA") choose to have their own competing body of adjudicative experts. The difficulty with such IF based sport specific arbitration panels is that they lack independence and have not developed a universal body of sports jurisprudence.<sup>12</sup> The lack of independence has also been a criticism of

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<sup>8</sup> The International Amateur Athletic Federation ("IAAF") is one such body.

<sup>9</sup> Nancy K. Raber, *Dispute Resolution in Olympic Sport: The Court of Arbitration for Sport*, 8 SETON HALL J. SPORT L. 75, 82-83 (1998).

<sup>10</sup> Olympic Movement Anti-Doping Code 2000, available at <http://www.olympic.org/ioc/e/org/medcom/pdf/dopingcode.pdf> (last visited Jan. 15, 2001).

<sup>11</sup> A term coined by the Acting General Secretary of CAS Matthieu Reeb at the time of the publishing of the first digest of CAS decisions stretching over the period from 1983-1998.

<sup>12</sup> See Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 06, Dieter Baumann v. IOC, award of 22 Sept., 2000, reprinted in MATTIEU REEB, CAS AWARDS-SYDNEY 2000: THE

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CAS;<sup>13</sup> at its extreme CAS has been described as a court of vassals of the IOC brought along to the Games to do its bidding. A proper assessment of both systems will demonstrate that CAS has developed into an independent body, while the IF's arbitration panels are burdened by problems inherent to internal sport specific panels.

Whatever the merits of these different adjudicative panels, they are all established by contractual agreement to arbitrate disputes when they arise. This consensual basis to the arbitration mechanism must be kept in mind when analyzing decisions. Sports arbitrations only exist because the athlete, the national governing body ("N.G.B."), and others in the sport world have agreed to be bound by arbitration and the outcome of the case.

### A. *The CAS as an Independent Body*

The CAS was subjected to a great deal of criticism following its decision regarding Romanian gymnast Andreea Raducan. As mentioned above, the CAS has been referred to as vassals of the IOC brought along to the Games to do the IOC's bidding. Criticism of this nature is unfounded. Following a recommendation by the Swiss Federal Tribunal that the CAS reduce its level of dependence on the IOC,<sup>14</sup> it created the International Council of Arbitration for Sport ("ICAS").<sup>15</sup> It is composed of a twenty-member council and its membership consists of

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DECISIONS DELIVERED BY THE AD HOC DIVISION OF THE COURT OF ARBITRATION FOR SPORT DURING THE 2000 GAMES IN SYDNEY 65 (Lausanne, ICAS, 2000). The internal adjudicative body of German Athletics is trying to insert a notion of intent into doping cases and the IAAF panel rejects the theory. *Id.* It is this CAS decision that ultimately finds favor both with the athlete and with the sports world press. See *First-Class Verdict of Guilt*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 23, 2000; *It Is Not Over, It Just Started*, SAARBRUCKER ZEITUNG, Sept. 23, 2000. The German athlete Dierter Baumann was a former Olympic champion in Barcelona (5,000 m.) who had filed an appeal with the Ad Hoc Division of the CAS seeking to have the decision of the IAAF arbitration panel on September 18, 2000, rendered without effect on his admission to the Games. The IAAF panel had imposed a two year ban for a positive test for nandrolone arising out of two competition doping control tests in October and November of 1999.

<sup>13</sup> RECUEIL DES SENTENCES DU TAS/DIGEST OF CAS AWARDS 1986-1998 561 (Matthieu Reeb ed., 1998).

<sup>14</sup> Raber, *supra* note 9, at 83. See also RECUEIL DES SENTENCES DU TAS/DIGEST OF CAS AWARDS 1986-1998, *supra* note 13, at 561.

<sup>15</sup> The IOC approved the creation of ICAS on June 22, 1994. The new body acts as supervisor and financier of CAS, effectively transferring the responsibility of guaranteeing the autonomy of CAS from the IOC to the new body. This notion of an independent agency, free of control from its creator and founder, has been the model selected for the establishment of WADA in 2000 and the effectuation of the USADA on October 1, 2000. The model originally adopted by CAS is proving to be a very workable one.

representatives from IFs, National Organizations ("NOs"), and the International Olympic Committee ("IOC"). Each member of CAS signs a declaration "undertaking to perform their functions in a personal capacity, with total objectivity and independence, and in conformity with the provisions of the Code of Sports-Related Arbitration."<sup>16</sup> ICAS members are also prohibited from serving as CAS arbitrators or acting as counsel to any party appearing before CAS. Generally, it is thought that this restructuring has aided in a perception that the CAS is an independent body.

The strongest proof that the CAS has achieved independence can be found within numerous decisions of the court. Indeed, the CAS has asserted its independence by overturning cases decided differently by the IOC<sup>17</sup> and by criticizing the IOC where it has failed to act with decisiveness.<sup>18</sup> The IOC's inaction has even been met with remedial corrective action by the CAS when it recognized the unwillingness of the IOC to respond.<sup>19</sup>

In addition, the New South Wales Court of Appeal ("NSWCA") gave the CAS a resounding endorsement when it dismissed an application from an Australian athlete who had lost a team selection issue before the CAS (Oceania Registry).<sup>20</sup> The appeal marked the first court challenge to a ruling from the Oceania Division of CAS. The NSWCA dismissed the case holding that "the various documents signed by the . . . athletes and

<sup>16</sup> Melissa R. Bitting, *Mandatory, Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for Job Security?* 25 FLA. ST. U. L. REV. 674 (1998).

<sup>17</sup> During the Sydney Games the CAS removed a suspension imposed by an IF and affirmed by the IOC Executive Board. See Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 10, Alan Tzagaev v. IWF, award of 25 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 101. Further, at the Atlanta and Nagano Games, the CAS reversed decisions of the IOC Medical Commission confirmed by the Executive Board of the IOC in the cases of *Andrei Korneev v. IOC*, *Zakhar Gouliev v. IOC*, and *Ross Rebagliati v. IOC*.

<sup>18</sup> See Arbitration CAS Ad Hoc Division (O.G. Sydney), 01, USOC and USA Canoe/Kayak v. IOC, award of 13 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 13; Arbitration CAS Ad Hoc Division (O.G. Sydney), 03, Arturo Miranda v. IOC, award of 13 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 29.

<sup>19</sup> Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 05, Angel Perez v. IOC, award of 19 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 53; Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 09, *in the matter of Angel Perez*, award of 25 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 91.

<sup>20</sup> Angela Raguz v. Rebecca Sullivan & ORS N.S.W.C.A. 290 (2000). This case involved only Australian parties and the proceedings were exclusively conducted in Australia. The deferment to the seat of arbitration in Lausanne Switzerland was a remarkable result which greatly enhanced the CAS's authority. It is doubtful the court would have come to such a conclusion without confidence in the independence and ability of the CAS.

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the . . . Federation of Australia constituted an interlocking arbitration agreement to submit potential disputes . . . exclusively to arbitration, . . . before the Court of Arbitration for Sport . . . .”<sup>21</sup>

### B. Independence of Sport Specific Arbitration Panels

Sport specific panels can fail, or give the appearance of failing, to adhere to the same standards of independence and neutrality that have been established by the CAS. They do not have as much experience as the CAS, and as a result may be more prone to reaching an erroneous conclusion.<sup>22</sup> They may also suffer from the fact that, at the end of the case, the politics of the sports organization can overrule the compelling legal logic of the sports panel.<sup>23</sup> Such difficulties are inherent to internal sport specific arbitration panels. They lack independence, a fact for which the CAS has been critical and taken steps to correct. They represent a failure to recognize the necessity for the arbitration panel to be independent, neutral, and impartial. These are the essential features of an adjudicative process in which the athletes and the public can have confidence.

The IAAF has recently addressed a significant number of doping cases. Sports icons such as Dieter Baumann, Linford Christie, Merlene Ottey, and Javier Sotomayor have all tested positive for prohibited substances. The IAAF submitted these and other controversial/high profile cases to their arbitration panel. The results of these arbitrations indicate the difficulty and controversy that can arise in the absence of an independent arbitration panel.

#### 1. Merlene Ottey

Merlene Ottey ran in her first international track meet at the Pan American Games in 1979. Since that time she has established herself as Jamaica’s most revered athlete, winning fourteen World Championship

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<sup>21</sup> *Id.*

<sup>22</sup> Merlene Ottey v. IAAF, Int’l Amateur Athletic Fed’n (July 3, 2000) (Christopher Vedder, Monty Hacker, James Murphy, arbitrators) (on file with author). The decision in this case is wrong and the IAAF acknowledges the error in subsequent cases. See also Istvan Gyulai, *The Case of Merlene Ottey*, IAAF NEWS, July, 2000, at 4.

<sup>23</sup> Javier Sotomayor v. IAAF, Int’l Amateur Athletic Fed’n. (July 24, 2000) (Christopher Vedder, Loh Lin Kok, Cabo Verde Filho, arbitrators) (on file with author). In this case the IAAF Council invoked an “exceptional circumstances” clause to reinstate Sotomayor after he was found guilty of committing a doping offense by the IAAF Arbitration panel. *Id.*

medals.<sup>24</sup> She has competed in eight Olympic Games and amassed a total of eight Olympic medals, including a silver medal in the 4 x 100 meter relay at the 2000 Games. Off the track Ottey has been a prominent spokesperson for her country and the IAAF. Jamaica appointed her Ambassador to the World and in 1998 the IAAF appointed her "Patron of the Year of Women in Athletics."<sup>25</sup> The Jamaican born sprinter was the undisputed pride of her nation and poster girl for the IAAF until July 9, 1999, when an IOC accredited laboratory in Lausanne discovered the presence of the prohibited substances 19-norandosterone and 19-noretiocolane in a urine sample acquired from Ottey during competition.

On confirmation of the B sample analysis, Ottey was suspended by the IAAF pending a hearing before the Jamaican Amateur Athletic Association Tribunal ("JAAA"). The JAAA tribunal determined that she had not committed a doping offense and her suspension was lifted. The IAAF, being dissatisfied with the national decision, appealed the dispute to its own sports specific IAAF panel.<sup>26</sup>

Nandrolone is endogenously produced in males and females. The threshold is 2 ng/ml for males and 5 ng/ml for females. This difference reflects the fact that greater quantities of nandrolone may be produced during pregnancy or certain phases in a woman's menstrual cycle. Ottey's A and B samples were recorded at 15 ng/ml and 14 ng/ml, respectively. However, the panel found the specific gravity<sup>27</sup> reading of Ottey's samples to be above 1.025. As a result, the correction formula was applied. After the application of the correction formula, the A and B samples fell below the IOC threshold of 5 ng/ml for females. Therefore, the panel held that a doping offense had not been committed and the suspension was lifted.

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<sup>24</sup> IAAF, *Who to Watch*, available at [http://cbc.ca/olympics/02\\_sports/02\\_athletics/01\\_100\\_women/100\\_women\\_who.html](http://cbc.ca/olympics/02_sports/02_athletics/01_100_women/100_women_who.html) (last visited Jan. 10, 2001).

<sup>25</sup> IAAF, 1998 - *The Year of Women in Athletics*, at <http://www.iaaf.org/ywa/patron.html> (last visited Jan. 10, 2001).

<sup>26</sup> This is a practice that the IAAF is resorting to on an increasingly frequent basis. There are many explanations for the conduct of national decision making bodies, but nationalism and the fear of being sued seem to be compelling in national bodies letting the athlete off in doping cases. In the recent past, the IAAF has intervened in the cases of Baumann, Christie, Ottey, Sotomayor, Cadagon, and Walker. In each of these cases matters have been brought forward to the IAAF panel after a successful defense by the athlete at the national level.

<sup>27</sup> Specific gravity is the ratio of the density of a sample compared to an equal volume of water. Water has a specific gravity reading of one and as a sample becomes more concentrated the specific gravity of the sample will rise.



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Since its release, the decision has been highly criticized and regarded by the scientific community as flagrantly wrong. Dr. Christiane Ayotte, a member of the IAAF Doping Commission and Laboratory Chief of the IOC Accredited Laboratory in Montreal, indicated that the decision was erroneous on two grounds. First, the Tribunal erred in accepting that there was a change in the specific gravity of the specimen from the time of voiding and the reading taken at the laboratory. A tentative measure of the specific gravity was taken at the time of voiding using the dipstick method, while the reading obtained by the laboratory testing was an exact measure of the specific gravity. Given that the laboratory testing measured specific gravity at 1.019, the correction formula should not have been applied. Dr. Ayotte's position has the unanimous support of at least six of the heads of IOC Accredited Laboratories.<sup>28</sup>

Perhaps more intriguing is Dr. Ayotte's second ground for concluding that the Tribunal reached an erroneous conclusion. She states that

even if one takes 1.025 as the specific gravity of the specimen, the correction [formula] correctly applied affords a value of 12 [ng/ml], still clearly above the threshold of 5 ng/ml. The 'expert' took the wrong formula which directly correlates to the control urine containing 2 ng/ml for males. The panel then used a multiplying factor of 2.5 (to make it 5 ng/ml for a female) and therefore the result of 4.5 ng/ml is 2.5 times lower [than what would have been achieved if the proper formula had been applied].<sup>29</sup>

The panel erroneously concluded that "the correct specific gravity reading to accept would be that taken at the time of voiding, which would thus trigger the application of the correction formula."<sup>30</sup> The panel reached this conclusion after relying on scientific experts. Thus, it is difficult to say whether or not a different panel would have been misled. Further, the IAAF took action to acknowledge the decision as wrong. This demonstrates the IAAF's interest in being accountable and accurate. However, the fact that IAAF arbitrators are not entirely

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<sup>28</sup> Interview with Dr. Christiane Ayotte, Member of IAAF Doping Comm'n and Laboratory Chief of the IOC Accredited Laboratory in Montreal, Que. and London, Ont. (Aug. 14, 2000).

<sup>29</sup> *Id.*

<sup>30</sup> *Merlene Ottey v. IAAF, Int'l Amateur Athletic Fed'n.* (July 3, 2000) (Christopher Vedder, Monty Hacker, James Murphy, arbitrators) (on file with author).

independent from the IAAF Council makes it difficult for those goals to be met. An excellent example of this difficulty is demonstrated by the Cuban high jumping case, where the IAAF panel correctly found a doping offense,<sup>31</sup> but the decision was overturned.

## 2. Javier Sotomayor

Javier Sotomayor holds the world record in the high jump and is the only man in the world to have jumped eight feet in height. In 1992, Javier won an Olympic gold medal in the high jump and became a sports icon in his home country of Cuba. Javier is also a member of the IAAF Athlete's Commission and has stood as an example of excellence in athletics. However, on July 30, 1999, after his victory at the PanAm Games, Javier Sotomayor tested positive for cocaine. Javier adamantly denied using the drug. Cuban president Fidel Castro "and Cuban sports officials . . . suggested that someone set up Sotomayor to besmirch the country's sports program."<sup>32</sup> Cuba's national adjudication panel cleared Sotomayor of the charges.

The IAAF arbitration panel addressed the arguments raised by the Federación Cubana de Atletismo ("FCA"). The FCA's contentions included procedural arguments, allegations of tampered samples, and an attack on the credibility of the Montreal Laboratory. The panel addressed and dismissed each issue. They held that many of the FCA's arguments "were mere allegations without any proof raised."<sup>33</sup> As a result, the panel concluded that Sotomayor "committed a doping offense on 30 July 1999 and the FCA Hearing Boards decision . . . was erroneous. Accordingly, Sotomayor became ineligible to compete for a minimum of two years from 30 July, 1999 until 29 July, 2001."<sup>34</sup>

The IAAF Council reduced Sotomayor's suspension to 1 year of ineligibility and Javier competed in the Sydney 2000 Olympic Games winning the silver medal in High Jump. The IAAF overruled the arbitration panel's decision by invoking Rule 60.8 of the IAAF Rules and Regulations. Rule 60.8 allows an athlete to apply for reinstatement in exceptional circumstances. The rule reads:

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<sup>31</sup> *Javier Sotomayor v. IAAF, Int'l Amateur Athletic Fed'n.* (July 24, 2000) (Christopher Vedder, Loh Lin Kok, Cabo Verde Filho, arbitrators) (on file with author).

<sup>32</sup> Associated Press, *Sotomayor to Make Pre-Olympic Run in Europe* (Aug. 8, 2000), available at <http://espn.go.com/oly/news/2000/0808/674424.html>.

<sup>33</sup> *Javier Sotomayor v. IAAF, Int'l Amateur Athletic Fed'n.* (July 24, 2000) (Christopher Vedder, Loh Lin Kok, Cabo Verde Filho, arbitrators) (on file with author).

<sup>34</sup> *Id.*

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In exceptional circumstances, an athlete may apply to the Council for reinstatement before the IAAF's period of eligibility has expired.

Where an athlete has provided substantial assistance to a Member in the course of an enquiry into doping carried out by that Member, this will normally be regarded by the Council as constituting exceptional circumstances.

However, it is emphasized that *only truly exceptional circumstances* will justify any reduction. Details of the procedure and the criteria for application are to be found in the "Procedural Guidelines for Doping Control."<sup>35</sup>

Pursuant to this Rule the IAAF Council reduced Sotomayor's suspension to one year. IAAF president Lamine Diack stated "We thought the athlete deserved a lot of our support . . . . We said we can give him the possibility to compete again. He is a human being he made a mistake."<sup>36</sup> The basis for the reduction appears to have been Sotomayor's "previously clean drug record and humanitarian work."<sup>37</sup> The Council's decision has been met with a great deal of controversy. Mr. Ljungqvist, head of the IAAF's Medical Committee believes that "it was a decision against [IAAF] rules . . . ."<sup>38</sup> An examination of the Rule itself and Sotomayor's history raises a great deal of skepticism about the decision.

The Rules indicate that "only truly exceptional circumstances will justify any reduction."<sup>39</sup> There is no doubt that Sotomayor is a high profile athlete and that he has made a significant contribution to his sport. There is, however, some controversy over whether the Council should have invoked the rule to reinstate Sotomayor. With the recent public outcry against the use of drugs in sports, and the high number of positive doping results that have emerged, it is imperative to strictly enforce the anti-doping provisions of all sports, particularly those in high profile cases. Notwithstanding the fact that a positive test raises skepticism about such achievements, it is inappropriate to make

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<sup>35</sup> RULE 60.8 IAAF RULES AND REGULATIONS (emphasis added).

<sup>36</sup> ESPN.com News Services *High Junper Has Another Positive Test* (Aug. 4, 2000), available at <http://espn.go.com/oly/news/2000/0804/668038.html>.

<sup>37</sup> Associated Press, *IAAF Opens Door for Olympic Champ Baumann* (Aug. 4, 2000), available at <http://espn.go.com/oly/news/2000/0802/664944.html>.

<sup>38</sup> *High Junper Has Another Positive Test*, *supra* note 36.

<sup>39</sup> RULE 60.8 IAAF RULES AND REGULATIONS.

exceptions for the world's best athletes because of their past achievements.

The existence of the rule itself is problematic. It is contrary to sports jurisprudence established by the CAS and it undermines the credibility, independence, and neutrality of the IAAF arbitration panel. It had been established that testimony professing innocence and a previously clean record cannot exonerate an athlete where there is clear, scientific evidence as to guilt. This principle was well stated in the CAS decision of *Mecca-Medina*:

It is regrettable that the currency of such denial is devalued by the fact that it is the common coin of the guilty as well as the innocent. Oral testimony as to innocence, however impressively given, cannot trump scientific evidence as to guilt . . . . Strict liability rules do not require investigation of motive or even consideration of what sensible competitors might have done: it can indeed be surmised that those who use prohibited substances are by definition risk takers. Nor is a clean record by itself impressive, when the offence is constituted by the finding of a banned substance on a particular date, not of a reprehensible course of conduct.<sup>40</sup>

The IAAF exceptional circumstances provision clearly goes against this established legal canon.<sup>41</sup>

Perhaps the most illuminating point that the Sotomayor case draws out is that IAAF arbitrations are not necessarily binding. This is contrary to the fundamental principle that arbitration be final and binding on the bodies it presides over.<sup>42</sup> It is completely inappropriate for one party to an arbitration to have the power to alter the outcome of the arbitration award. The exceptional circumstances provision allows IAAF arbitration

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<sup>40</sup> See CAS 99/A/234 & TAS 99/A/235 *David Mecca-Medina & Igor Majcen v. FINA*, at 10.17 (on file with author).

<sup>41</sup> The CAS reaffirmed the application of the strict liability regime in the case of Andreea Raducan. Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 11, *Andreea Raducan v. IOC*, award of 28 Sept., 2000, reprinted in REEB, *supra* note 12, at 111 (holding that it had no power to consider the subjective circumstances of a case under a strict liability regime).

<sup>42</sup> By definition "[a]rbitration is a binding process of dispute resolution in which the facts of a dispute are presented to an independent, neutral arbitrator or panel of arbitrators . . . ." MCLAREN & SANDERSON, *INNOVATIVE DISPUTE RESOLUTION: THE ALTERNATIVE 1-5* (1994).

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to impose full sanctions on athletes only where the IAAF Council deems it appropriate. As a consequence, IAAF Arbitrations can be reduced to a formality and the ultimate outcome of a dispute may lie in the hands of the IAAF Council.

#### C. Conclusion

An international arbitration system that is not independent and for which there is a political override, no matter how well intended, will ultimately bring both itself and its sports federation into disrepute. In the end, the international panel is no more independent in its actions than the national panels whose decisions they are reviewing.

At the Olympic Games, the CAS has the final say in any dispute. Even the authority of the IOC cannot overturn a CAS decision. Contrast this to the IAAF, where any arbitration result is subject to the scrutiny of the IAAF council. Having established the foregoing principles it is time to turn to the CAS jurisprudence at the Summer Olympic Games in Sydney. Did the world's independent sports adjudication body remain independent and impartial at the Games?

#### III. THE AD HOC DIVISION OF THE CAS

The inaugural appearance of the Ad Hoc Division ("AHD") of the CAS coincided with the Centennial Olympic Games in Atlanta in 1996. The AHD was established under Rule 74 of the Olympic Charter. During the defined period of the Olympic Games it presides over any dispute in accordance with the Ad Hoc Rules of Arbitration.

The AHD is designed to augment, not attenuate, athletes' rights.<sup>43</sup> The court's jurisdiction over the Games is affirmed by Article 74 of the Olympic Charter and a clause contained in the Athletes Entry Form. Disputes are presided over by a panel of three arbitrators from a pool of ICAS arbitrators specially selected by CAS for the Games. Any decision is final and binding with no possibility of appeal. Prior to the Sydney Games, the AHD presided over the Atlanta and Nagano Games.<sup>44</sup>

All CAS proceedings are governed by the CAS Arbitration Rules for the Games of the XXVII Olympiad in Sydney ("the Ad Hoc Rules"), enacted by the ICAS on November 29, 1999. They are further governed

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<sup>43</sup> See Beloff, *supra* note 5.

<sup>44</sup> For a discussion of the AHD experience at the Atlanta and Nagano Games see MCLAREN, *supra* note 5, at 1.

by Chapter 12 of the Swiss Private International Law Act ("PIL Act") of December 18, 1987. The PIL Act applies to arbitration as a result of the express choice of law contained in Article 17 of the Ad Hoc Rules. It is also the result of the choice of Lausanne, Switzerland as the seat of the Ad Hoc Division and of its panels of arbitrators, pursuant to Article 7 of the Ad Hoc Rules. Further, under Article 17 of the Ad Hoc Rules, arbitration panels must decide disputes "pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate."<sup>45</sup> Finally, Article 16 provides that a panel has "full power to establish the facts on which the application is based."<sup>46</sup>

#### A. *The Development of Lex Sportiva During the Sydney Games*

The Sydney Olympics proved to be a fruitful time for the development of *lex sportiva*. A variety of disputes arose prior to and during the Games. The breadth of disputes that the CAS deals with is demonstrated by these cases and the existing CAS jurisprudence.<sup>47</sup> The disputes ranged from Olympic selection disputes brought before the Australian CAS prior to the Games, to national eligibility, rules of the sport, doping, and finally to commercial issues that arose during the Games.

#### B. *AOC Selection Cases*

Prior to the commencement of the 2000 Olympic Games, the Australian Olympic Committee ("AOC") encountered problems involving team selections. A number of Australian athletes who were not selected to their Olympic Team contested nomination decisions. In fact the number of appeals relating to Olympic selection reached over forty-eight and included applications from eighteen different sports.<sup>48</sup> Of these appeals only the more controversial situations were adjudicated by the CAS Oceania Division. These cases demonstrate the difficulties that can arise when arbitration awards affect a third party.

The CAS Oceania Division heard and rendered a decision in relation to a dispute between an Australian judo athlete, Rebecca Sullivan, and

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<sup>45</sup> See Arbitration Rules of the Games of the XXVII Olympiad in Sydney, Article 17, available at <http://www.tas-cas.org/english/rules/PraRules.asp> (last visited Feb. 11, 2001).

<sup>46</sup> *Id.* at Article 16.

<sup>47</sup> See RECUEIL DES SENTENCES DU TAS/DIGEST OF CAS AWARDS 1986-1998, *supra* note 13.

<sup>48</sup> Louise Evans, *Gang of Six Appealing Games Selections*, SYDNEY MRN. HLD., Aug. 22, 2000, available at 2000 WL 24965122.

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the Judo Federation of Australia, Inc. The decision was eventually appealed to the New South Wales Court of Appeal.<sup>49</sup> Sullivan claimed that a proper implementation of the nomination criteria would have resulted in her selection to the Olympic team over Angela Raguz.

The only issue for determination by the CAS was the proper construction of the agreement between the applicant and the Judo Federation of Australia. The court determined that the Agreement was intended to confer rights and legitimate expectations to Australia's Judo Athletes and that the Agreement formed a comprehensive code for the nomination of athletes to the Olympic team. The Oceania CAS found that under the proper construction of the Agreement the nomination criteria had not been properly followed. The appeal was upheld and Sullivan was nominated to the AOC in substitution of Raguz.

A second case before the CAS Oceania Division involved Kathryn Watt, a member of the Australian Cycling – Federation Inc. ("ACF"). Watt applied to the CAS alleging that the nomination criteria had not been properly applied. The purpose of the nomination criteria is to nominate athletes most capable of producing medal winning performances at the 2000 Olympic Games. The court noted that the paragraphs set-out in relation to the nomination criteria specifically referred to this goal and indicated that meeting the stipulated criteria would not guarantee an athlete nomination.

The applicant made numerous criticisms of the considerations made by the selectors. However, the CAS held that the Athlete Agreement conferred a level of discretion on the Federation. The court stated that "unless the non-compliance with the nomination criteria was so substantial as to satisfy the Court that the decision could have been different then any such non-compliance should be regarded as inconsequential or immaterial and not provide a proper basis to overturn the selectors decision."<sup>50</sup> Accordingly, the CAS dismissed the appeal.

In the United States, these cases had an interesting and equally troubling parallel in the case of *Lindland v. United States Wrestling Association*.<sup>51</sup> These problematic cases seem to have their initial impetus for going on to further proceedings from the fact that, the first time they

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<sup>49</sup> See *supra* note 22 and accompanying text.

<sup>50</sup> *Kathy Watt v. ACF, CAS Oceania* (August 25, 2000) (Malcolm Holmes, Arbitrator) (on file with author).

<sup>51</sup> 227 F.3d 1000 (7th Cir. 2000).

were heard, the other individuals affected were not made parties before the proceeding. Therefore, when initial selection decisions were reversed by the first arbitration panel, the other athlete wanted and did launch their own case to have the matter reconsidered. They raised the issue of the binding effect of adding a third party to a proceeding. That issue is troubling because the contractual arrangement to arbitrate is a consensual process of conferring jurisdiction on an arbitration panel.

### C. Sydney

The cases heard by the AHD in Sydney can be split up into five broad categories: doping violations, IF athlete suspensions, commercial advertising issues, dispute with sports officials, and national eligibility. Out of the fifteen cases that arose at the Games, three of them involved doping violations.<sup>52</sup> Two of the doping cases involved IAAF athletes, Dieter Baumann and Mihaela Melinte. The third doping case was the most highly publicized dispute at the Games and involved the Romanian Gymnast, Andreea Raducan.

The Baumann and Melinte cases involved positive drugs tests that occurred prior to the commencement of the Games. Both athletes were initially accredited by the IOC at the request of their respective national Olympic committees. In the case of Baumann, following an official determination by the IAAF arbitration panel that he had committed an offence, he was suspended and his accreditation was revoked. Following a positive test Melinte was provisionally suspended and her accreditation was revoked. Thus, the focus of these cases was on the preliminary question of jurisdiction rather than doping infractions.

Baumann's dispute reached the AHD in a unique manner. The famous German athlete tested positive for nandrolone on two separate: out of competition tests in mid-October and November of 1999. The German Anti-Doping panel cleared him in July 2000, accepting arguments that a doping infraction required an element of intent. Referral to IAAF arbitration was made by the IAAF on August 11, 2000. Thereafter, Baumann was named to the German Olympic Team and received accreditation from the IOC to compete in the 2000 Games. From September 16-18, 2000, the IAAF arbitration panel heard

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<sup>52</sup> Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 6, Dieter Baumann v. IOC, award of 22 Sept., 2000 *reprinted in* REEB, *supra* note 12, at 65; Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 15, Mihaela Melinte v. IAAF, award of 29 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 145; Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 11, Andreea Raducan v. IOC, award of 28 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 111.



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Baumann's case in Sydney. The panel overturned the prior German National decision enforcing the strict liability regime and relying heavily on CAS jurisprudence. The outcome of the application of the doping controls was a two-year ban on the athlete. Following the IAAF decision, the IOC removed Baumann's accreditation, prompting Baumann to apply to the CAS in order to have the IAAF and IOC decisions set aside.

Before the panel could examine the merits of the case, the IAAF raised the issue of jurisdiction. It claimed that the CAS was without jurisdiction to determine the matter on the grounds that the IAAF does not provide for a CAS jurisdiction in its bylaws and because the issue had already been determined by the final and binding arbitration of the IAAF panel. Further, the IAAF refused to participate in the arbitration process and walked out of the proceedings. The court held that pursuant to Rule 74 in the Olympic Charter, and by virtue of the Athlete Entry Form, it had jurisdiction to hear a dispute raised by any athlete at the Games. The court also noted that the enforceability of the arbitration agreement was affirmed in the Australian New South Whales decision of Raguz.<sup>53</sup> Upon concluding that they had jurisdiction over Baumann, the panel examined its jurisdiction over the IAAF. The panel acknowledged that Article 29 of the Olympic Charter ensures that the IAAF acts "in conformity with the Olympic Charter."<sup>54</sup> As a consequence the court held that the lack of a CAS clause in the IAAF bylaws does not affect the CAS jurisdiction because Article 74 of the Olympic Charter grants it the necessary jurisdiction to hear the dispute. Finally, the panel determined that the CAS has jurisdiction over NOs and the IOC by virtue of Article 74.

After establishing jurisdiction over the involved parties, the CAS addressed a preliminary claim that the case could not be heard because it would be contrary to the principle of *res judicata*.<sup>55</sup> The panel dismissed this contention noting that neither Baumann nor the IOC was a party to the IAAF arbitration and that the issues in dispute had been expanded. Therefore, the AHD was able to examine the merits of Baumann's case. Despite reaching this determination, the court did not interfere with the IAAF's previous decision once it was satisfied that the IAAF panel

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<sup>53</sup> See *supra* note 20 (discussing an example where the court dismissed the application referring the matter to final and binding CAS arbitration clauses).

<sup>54</sup> Olympic Charter, Article 29, available at [http://www.olympic.org/ioc/e/facts.charter/charter\\_if\\_e.html](http://www.olympic.org/ioc/e/facts.charter/charter_if_e.html) (last visited Feb. 22, 2001).

<sup>55</sup> A matter that has been previously determined shall not be heard again.

properly addressed the evidence. The AHD effectively operated as an appeal court over the IAAF. The removal of Baumann's accreditation was valid and the athlete was no longer eligible to compete in the Games.

The CAS relied upon the decision in Baumann for the resolution of a dispute brought before the court by Melinte. Melinte is the world record holder in the Women's Hammer Throw and had been accredited by the IOC to compete in the Games upon her arrival in Sydney. However, she had tested positive for nandrolone on June 7, 2000. On September 17, the IAAF requested an explanation for the result from the applicants Athletic Federation. Thereafter, the IAAF provisionally suspended Melinte on the strength of the positive sample. She was removed from competition the morning she was to compete.

The case raised many of the jurisdictional issues that were addressed in the Baumann case and the panel relied upon its previous determinations in support of their jurisdiction to resolve the dispute. The IAAF still refused to be recognized as a party to the dispute, but unlike the Baumann case, they participated during the hearing by answering questions. The IAAF attempted to distinguish the jurisdictional issues in this dispute from those in Baumann on the grounds that the IOC did not revoke Melinte's accreditation, and therefore, the CAS did not have jurisdiction to hear the dispute. The court dismissed this claim, reasoning that the athlete's removal from the field of play constituted a dispute arising during the Games within the meaning of Article 74 of the Olympic Charter.

The primary issue raised by Melinte was that she had been denied due process. The court concluded that the information put before the AHD by Melinte would have been the same information provided to the IAAF. The panel was not persuaded by the applicants submissions and dismissed the application. However, the court noted that its decision was not to be viewed as a determination of whether or not Melinte had committed a doping offense. Rather, the panel decision only denied the applicant emergency relief in respect of the IAAF suspension.

The third doping case at the Games arose from a doping test following competition.<sup>56</sup> This case demonstrated the principle of strict

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<sup>56</sup> There were thirteen positives at the Games which resulted in the removal of three gold medals, one silver, and one bronze. All the other athletes left the Olympic Village and were sent home without using the appeal process of CAS. World Anti-Doping Agency,

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liability. Andreea Raducan, a Romanian gymnast, placed first in the Women's Individual All-Round Event. Following her victory, she tested positive for the prohibited substance pseudoephedrine. Despite the high publicity this case received, from a legal perspective it was not complex. Although, it should be noted that the athlete had not been previously tested, as her prior gold medals were for team sports and the IOC medical commission only required random testing of the team athletes.<sup>57</sup>

Raducan argued that she bore no responsibility for the doping violation because the positive test resulted from pills given to her by the team doctor. She also claimed that the level of the drug in her system was not sufficient to have been performance enhancing. The CAS sympathized with the applicant, but acknowledged that doping is a strict liability offense and intent is not required for the commission of a violation. The panel also stated that whether or not a competitive advantage is achieved does not affect whether there has been a doping offense.<sup>58</sup> On the evidence before it, the court found that a doping offence had been committed. The applicable rules resulted in the invalidation of Raducan's performance. A great deal of sympathy was generated for the athlete among the public, but the CAS noted that an appreciation of the subjective elements of individual cases is allowed in the IOC's determination of the particular disciplinary sanction that will arise following the necessary disqualification. The IOC executive board, in an attempt to make the punishment fit the crime, only took away the medal and did not impose any suspension on the athlete.

These three doping cases reinforce the principles of strict liability that the CAS jurisprudence has been developing. They respect the jurisdiction of the sports specific panel of the IAAF, while reviewing its decisions to ensure the independence, impartiality, and proper due process of the rights of the athlete. The Sydney Games also resulted in a number of challenges with regard to IF suspensions. Two of the cases involved appeals against the International Weightlifting Federation

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Office of the Independent Observer, Independent Observers' Medical Report on the Sydney Games (Oct., 2000) at Annex 20 (on file with author).

<sup>57</sup> This is a point which is noted by the Office of the Independent Observer in its report to WADA. See WADA Independent Observer Report, *Olympic Games 2000: Sydney Australia*, *supra* note 3, at 14.

<sup>58</sup> However, it should be noted that it is often difficult to determine when a competitive advantage has been achieved. See Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 11, Andreea Raducan v. IOC, award of 28 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 114. On the facts of this particular case, Raducan had concentrations of pseudoephedrine of 90.6 and 88.0. *Id.* The reporting threshold is 25. *Id.*

("IWF"). The first of these cases<sup>59</sup> addressed the effect of a national court order on IFs. The IWF adopted the Samoan Weightlifting Federation's ("SWF") suspension, precluding a Samoan weightlifter from participating in the Olympic Games. However, the athlete obtained a Samoan court order lifting the suspension of the SWF. The CAS acknowledged that the court order clearly affected the SWF and as such required it to remove the suspension on the athlete. The CAS held, however, that the Samoan court order was not binding on the IWF. Nonetheless, the IWF's suspension was an endorsement of the SWF's decision. Therefore, its validity depended on the validity of the SWF's suspension. In effect, the Samoan court order removed the foundation of the IWF's suspension and as a result the IWF's decision became invalid. Accordingly, the CAS set aside the IWF suspension.

The second case involving the IWF was similar to the one rendered during the Nagano Games in respect to Ross Rebagliati.<sup>60</sup> In both instances an international federation attempted to exercise powers that were not within its rules. In these situations, the CAS continues to find that a federation must have a legal basis for their disciplinary action. The dispute in question occurred after three positive drug tests of the Bulgarian Weightlifting Federation ("BWF") athletes prompted the IWF to suspend the BWF.<sup>61</sup> The IOC Executive Board allowed the suspension of the entire team. As a consequence Tzagaev, a "clean" athlete and member of the BWF, became ineligible to compete.

The IWF claimed that it had the power to suspend a federation for one year following three positive drug tests in that year. The CAS noted that the provision the IWF relied on only allowed a fine to be imposed upon a federation. A suspension resulted only upon failure to pay the fine. The court held that the suspension of an entire federation from the Games, including athletes that have not committed a doping offense must have an explicit legal basis. Accordingly, the AHD annulled the suspension and Tzagaev went on to win a silver medal.

Both weightlifting cases reveal the independence with which CAS carried out its adjudicative function. It did not consider itself or the international federation to be bound by the Samoian court order. In the

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<sup>59</sup> Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 02, SAMOA National Olympic Committee and Sports Federation v. IWF, award of 12 Sept., 2000, reprinted in REEB, *supra* note 12, at 28.

<sup>60</sup> See REEB, *supra* note 12, at 419 (*Ross Rebagliati v. FIS*).

<sup>61</sup> Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 10, Alan Tzagaev v. IWF, award of 25 Sept., 2000, reprinted in REEB, *supra* note 12, at 101.

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case of the Bulgarian weightlifter, the CAS had no hesitation in striking down what it considered to be an unfounded decision of the IOC.

The Sydney Games also gave rise to a commercially based dispute.<sup>62</sup> The dispute arose in relation to the size of a logo on a French Gymnast's leotard. Pursuant to Rule 61 of the Olympic Charter, articles of clothing worn by athletes can not be marked conspicuously for advertising purposes. Specific size requirements are contained within the Rule. The major determination for the court was whether the Rule should be read to apply to clothing as it is manufactured or as it is worn. The CAS concluded that the Rule included the phrase "worn or used by the athletes"<sup>63</sup> and, therefore, applied to clothing as worn not as manufactured. The panel did find, however, that the Rule had been applied inconsistently because it had not been applied to other competitors. This factor did not alter the determination of the court that the Rule had been correctly applied to the athlete in this case. The FFG application was dismissed. Thus, in both Nagano<sup>64</sup> and Sydney, there was at least one commercially based case. This demonstrates the range and breadth of cases arising from the Games that may come forward to CAS.

A number of cases during the Games required the CAS to consider the principle of non-interference with decisions made in the course of competition.<sup>65</sup> The CAS decisions in *Segura*<sup>66</sup> and *Nekyova*<sup>67</sup> addressed what aspect of the game the court could review. After finishing in first place, Segura was disqualified from the 20km walk event because three course judges determined that he had failed to keep one foot on the ground pursuant to the rules of the event. The panel held that they could not review a determination of the "rules of the game" unless the

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<sup>62</sup> Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 14, *FFG v. SOCOG*, award of 30 Sept., 2000, reprinted in REEB, *supra* note 12, at 137.

<sup>63</sup> *Olympic Charter*, *supra* note 54, at RULE 61.

<sup>64</sup> See *Schaatsfabrick Viking B.V. v. German Speed Skating Association*, in MCLAREN, *supra* note 5, at 12.

<sup>65</sup> This principle was established during the Atlanta Games in the AHD's decision in respect to *Christopher Mendy v. AIBA*. See RECUEIL DES SENTENCES DU TAS/DIGEST OF CAS AWARDS 1986-1998, *supra* note 13. It was also part of the reasoning in the advisory opinion on the body suit used in swimming. See Advisory opinion for the CAS TAS 2000/C/267 AOC, an Advisory Opinion Delivered by the CAS to the Australian Olympic Committee regarding the use of full body swimsuits (on file with author).

<sup>66</sup> Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 13, *Bernardo Segura v. IAAF*, award of 30 Sept., 2000, reprinted in REEB, *supra* note 12, at 131.

<sup>67</sup> Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 12, *Rumyana Dimitrova Nekyova v. FISA*, award of 29 Sept., 2000, reprinted in REEB, *supra* note 12, at 123.

rules had been applied in bad faith. Segura, however, did not directly challenge the decision of the judges. Rather, he focused on the judges' failure to convey his violation to him in accordance with the rules. The AHD panel held that the court could not reverse the judges' decision unless it was shown that the error on the part of the judges in failing to communicate the disqualification to Segura promptly would compel the reversal of the decision. There was no basis for such an outcome and the disqualification of Segura was upheld.

Nekyova applied to the CAS on the grounds that the equipment relied upon for the determination of her second place finish in the Women's Single Skull event was inaccurate. The AHD accepted that they cannot overturn judgment calls and technical decisions rendered during an event. However, the court can determine if equipment was faulty. The panel held that the technical equipment was sound since there was no proof indicating otherwise. The court dismissed the application.

These two cases confirm the principle of the *lex sportiva*; that decisions made during the course of competition will not be reversed later in the arbitration hearing. The remaining cases that arose during the Games involved Nationality and Eligibility. These cases called into question the structure of Article 46 in the Olympic Charter.<sup>68</sup> Article 46 requires an athlete to be a National in a country for three years before she is eligible to compete for that country. If an athlete fails to meet the criteria, she cannot compete unless her previous country's National Olympic Committee waives the eligibility requirement. On its face the Section appears to be reasonable, however, the effect of the Section was not entirely anticipated.

Two athletes, Angel Perez and Arturo Miranda, were nominated by their National Olympic Committees (the United States and Canada respectively) to compete in the Sydney Olympics. Both Athletes were born in Cuba and had previously competed for their home country. Neither Athlete established official citizenship in their new countries until 1999. Thus, they both fell below the three year Nationality requirement. Cuba refused to waive the three year requirement for either athlete.

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<sup>68</sup> This rule is in place to ensure that any competitor in the Games is a National for the country they are competing for. It is designed to prohibit a country from inappropriately accrediting the athletes of another country.

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Miranda had not competed for Cuba in nine years and had been residing in Canada since 1995 as a landed resident. However, as mentioned above Miranda did not obtain Canadian citizenship until 1999. The CAS found that Miranda's Cuban citizenship never continued to exist. As a result, Miranda was not a Canadian national within the meaning of Article 46.

The major issue before the CAS in this decision was to decide whether Cuba had absolute discretion in allowing a reduction of the three year requirement. The court considered the wording of Rule 46 and was forced to conclude that National Olympic Committees ("NOCs") were intended to have absolute discretion in this area. As a consequence, it was not open to the CAS to examine the Cuban's decision. The court was forced to dismiss the appeal and reaffirm Miranda's ineligibility. However, in view of the circumstances of this case, the CAS suggested "that the IOC reexamine paragraph 2 of the By-law to Rule 46 as presently worded to determine whether an amendment could reduce unintended hardship in individual cases."<sup>69</sup> In so doing, there was a critical implication that the IOC could have done more.

The Perez scenario unfolded in a similar manner to that of Miranda's. However, the initial appeal to the court was raised by the United States Olympic Committee ("USOC") and USA Canoe and Kayak.<sup>70</sup> In this appeal the USOC failed to establish that Perez had been a US National for three years. Thus, as a matter of international law, as in Miranda, the court ruled against the USOC.

After the CAS dismissal of *Perez I*, Perez applied directly to the court for a declaration that he could compete in the Olympics as a member of the U.S. Olympic Team.<sup>71</sup> The AHD upheld its determination in *Perez I*, that Perez had not been a US National for three years. In addition, Perez also argued that he should be deemed to have been a stateless person in 1993. Evidence was presented to the panel that convinced it that Perez had been deprived of his civic rights as a Cuban when he defected in 1993 and, therefore, he should be treated as an ad hoc stateless person. The panel adopted a definition of stateless persons as "persons who without having been deprived of their nationality no longer enjoy the

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<sup>69</sup> Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 03, Arturo Miranda v. IOC, award of 13 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 29.

<sup>70</sup> Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 01, USOC and USA Canoe/Kayak v. IOC, award of 13 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 13 (hereinafter *Perez I*).

<sup>71</sup> Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 05, Angel Perez v. IOC, award of 19 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 53 (hereinafter *Perez II*).

protection and assistance of their national authorities.”<sup>72</sup> The panel held that Perez was stateless and no longer a Cuban national within the meaning of Rule 46. Finally, the CAS considered the meaning of the word “changed” in the By-law. The By-law specifically states: “[a] competitor who has represented one country in the Olympic Games . . . , and who has *changed* his nationality or acquired a new nationality, shall not participate in the Olympic Games to represent his new country until three years after such *change* or acquisition.”<sup>73</sup> (emphasis added). The court held that the term change should be given a broad definition so that it captures a change from nationality to statelessness and does not require a change of one nationality to another. Therefore, regardless of whether Perez was a U.S. National prior to 1999, he had been a National since 1999 and as such may be entered as a competitor in the Games by his new country. On these grounds, the CAS concluded that Perez changed his nationality in 1993 and meet the requirements of Rule 46. Perez was able to compete for the United States.

The fourth case in the series was an application by the Canadian Olympic Association (“COA”) to the court to have the Miranda issue resolved by the principle in *Perez II*.<sup>74</sup> The COA raised the same argument that Perez relied on to demonstrate that Miranda met the change of Nationality requirements. The court found that Miranda had not cut off his ties with Cuba and could not be considered a stateless person. The panel concluded that Miranda’s participation in the Games remained subject to the approval of the Cuban Federation and the appeal was dismissed.

The variety of applications brought before the court by these cases raised issues about the principles of *res judicata* and *estoppel*. The court had to determine who could raise an appeal to the CAS, particularly where the court had already rendered a decision in relation to the dispute. The possibility of appeal arose because, in these situations, not all of the parties effected by the court’s decision were initial parties before the court. This problem was previously noted in the Australian and American selection cases before the Games.

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<sup>72</sup> *Id.*; see generally PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW (2d ed. 1979).

<sup>73</sup> *Olympic Charter*, *supra* note 54, at RULE 46 para 2.

<sup>74</sup> Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 08, COA v. IOC, award of 24 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 83.



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The CAS allowed both Perez and the COA to appeal despite the fact that both cases raised many of the same issues that were addressed in the original appeals of the USOC and Miranda. In respect to Perez's application the court noted that Perez was not summoned or joined as a party to the USOC appeal. Therefore, the parties were different and his application was deemed to be admissible on its merit. The COA appeal was allowed as the panel acknowledged that the arbitration process is consensual and, unless there is a lack of consent, the court will be able to review a previous decision. While the principle of *res judicata* might not apply, the issues could have been subject to estoppel.

The fifth case involved an appeal by the Cuban Olympic Committee to overturn the court's earlier decision allowing Perez to participate.<sup>75</sup> The panel distinguished this application from Perez's application on the grounds that unlike Perez, the Cuban NOC had been a party to the previous proceedings. The court emphasized that both fairness and finality are desirable objectives of arbitration and, that in the Perez application, the importance of fairness compelled the panel to hear the dispute. However, with respect to the Cuban NOC's application, the panel felt that finality was a more pressing concern than any submissions that would be made. The panel concluded that the Cuban NOC was estopped from initiating new proceedings because it had been a party to the Perez decision. As with the selection cases before the Games, the underpinnings of the arbitration process hearing by contract and consent were called into question.

The USOC and Perez decisions indicate that the structure of the appeal process at the Games is such that an arbitration award rendered by the CAS may affect parties that are not directly involved in an appeal. This does not mean that such an award will be final and binding upon those affected third parties. Rather, it will be at the discretion of the third parties to raise their own applications to the court. Whether this means that third parties will always be allowed to raise an appeal to the court is difficult to determine. It is anticipated that the third party will have to bring a new element to the case before the CAS will hear a subsequent application.

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<sup>75</sup> Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 09, in *the matter of Angel Perez*, award of 25 Sept., 2000, reprinted in REEB, *supra* note 12, at 91 (hereinafter Perez III).

#### D. Conclusions from Sydney

Athletes are entitled to have their cases reviewed absent any potential bias. CAS in its ad hoc forum has established itself as an independent, neutral arbitration panel. The Australian Court of Appeal decision highlights the importance of the independence and neutrality of arbitration panels. On the face of the dispute, Raguz demonstrated that she was an excellent athlete. However, the role of the CAS is not to assess the ability or performance of an athlete or the appropriateness of the selection process. The CAS's sole purpose is to determine the legal rights that relate to an athlete and to ensure that they are complied with. In this circumstance, the CAS made a decision, notwithstanding the possibility that Raguz was the better athlete.

Decisions from the Sydney Games established the breadth of the CAS Jurisdiction. Athletes, NOCs, the IOC, and IFs with CAS arbitration clauses are explicitly within its jurisdiction. Further, those IFs that do not provide for CAS arbitration are also subject to the AHD's jurisdiction pursuant to Articles 29 and 74 of the Olympic Charter.<sup>76</sup>

The court's jurisdiction over doping offenses committed prior to the games, however, is unclear. It appears that the court will assess an alleged infraction on its face and render a provisional decision in respect to the accused athlete's eligibility to compete in the Games. The ultimate determination of the athlete's case will fall under the appropriate jurisdiction outside of the Games, where the positive drug test occurred.<sup>77</sup>

The Sydney Games also reaffirmed existing legal principles that were applied at previous Olympic Games. Following the principles developed in Atlanta, the Sydney Games affirmed the principle of non-interference with decisions made in the course of competition.<sup>78</sup> The Raducan decision illustrated the court's continued application of strict liability regime to all doping offenses and that the consideration of the

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<sup>76</sup> Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 06, Dieter Baumann v. IOC and NOC and IAAF, award of 22 Sept., 2000, reprinted in REEB, *supra* note 12, at 65.

<sup>77</sup> Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 15, Mihaela Melinte v. IAAF, award of 29 Sept., 2000, reprinted in REEB, *supra* note 12, at 145.

<sup>78</sup> See the Atlanta decision *Christopher Mendy v. AIBA*. See also Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 13, Bernardo Segura v. IAAF, award of 30 Sept., 2000, reprinted in REEB, *supra* note 12, at 131; Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 12, Rumyana Dimitrova Nekyova v. FISA and IOC, award of 29 Sept., 2000, reprinted in REEB, *supra* note 12, at 123.

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subjective elements of each case is left in the hands of the IOC. The independence of the court from the IOC was asserted and applied.

A number of the disputes during the Sydney Games raised the question of *res judicata*.<sup>79</sup> The decisions in these cases suggest that this axiom may not apply where the party that is affected by a prior arbitration award was not a part of the prior proceedings. It is important, however, to uphold this principle and, any time a party was part of the prior proceedings, they will not be able to raise a new appeal.<sup>80</sup> The difficulties that can arise from the concept of *res judicata* indicate that, where possible, all parties that could be affected by an arbitration award should be part of the arbitration proceedings.<sup>81</sup>

The final concept that is displayed by the Sydney decisions is the ability of the CAS to exercise discretionary powers. Although the court's action is constrained entirely by the law, judicial interpretation may be exercised to provide relief to the aggrieved parties where an injustice is committed through a strict application of the law.<sup>82</sup> It should be noted that the court will stay entirely within the legal realm and will only make logic interpretations that flow from the appropriate legal frame work. Thus, the law still provides unjust results for some parties, and in these

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<sup>79</sup> Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 01, USOC and USA Canoe/Kayak v. IOC, award of 13 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 13; Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 03, Arturo Miranda v. IOC, award of 13 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 29; Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 05, Angel Perez v. IOC, award of 19 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 53; Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 06, Dieter Baumann v. IOC. and NOC and IAAF, award of 22 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 65; Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 08, COA v. IOC, award of 24 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 83; Arbitration CAS Ad Hoc Division (O.G. Sydney 2000), 09, *in the matter of* Angel Perez, award of 25 Sept., 2000, *reprinted in* REEB, *supra* note 12, at 91.

<sup>80</sup> This is illustrated by No. 9 Sydney. See *supra* note 75 and accompanying text.

<sup>81</sup> The importance of adhering to this concept is also demonstrated by the difficulties that arose out of the Olympic Selection criteria cases and the National Eligibility cases. The two Olympic Selection Criteria cases are *Lindland v. U.S.A. Wrestling Association and U.S. Olympic Committee*, 227 F.3d 1000 (7th Cir. 2000), and *Angela Raguz v. Rebecca Sullivan & ORS N.S.W.C.A.* 290 (2000). The National Eligibility cases are No. 1 Sydney *USOC and USA Canoe/Kayak v. IOC*, No. 3 Sydney *Arturo Miranda v. IOC*, No. 5 Sydney *Angel Perez v. IOC*, No. 8 Sydney *COA v. IOC*, and No. 9 Sydney *in the matter of Angel Perez*. See *supra* notes 69-75 and accompanying text.

<sup>82</sup> This is illustrated by No. 5 Sydney *Angel Perez v. IOC*. See *supra* note 71 and accompanying text.

situations the court can only recommend that the IOC alter the Olympic Charter.<sup>83</sup>

#### IV. CONCLUSION

The *lex sportiva* developed by the CAS appears to provide the appropriate legal machinery to resolve a breadth of sports related disputes. The eradication of illegal drugs from sport and the return to a fair playing field in sport will require a great deal of work from international and national organizations around the world. Nonetheless, the success of the CAS suggests that one of the pieces required to solve this complex puzzle is in place.

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<sup>83</sup> This is illustrated by No. 3 Sydney Arturo Miranda v. IOC. See *supra* note 69 and accompanying text.

