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## ARTICLES

# TWENTY-FIVE YEARS OF THE COURT OF ARBITRATION FOR SPORT: A LOOK IN THE REAR-VIEW MIRROR

RICHARD H. MCLAREN\*

### I. INTRODUCTION

The Court of Arbitration for Sport (CAS) has grown up<sup>1</sup> and is flourishing after its first quarter century of development. It has lived up to its founders' expectations and is recognized as the world's supreme court of sport.<sup>2</sup> The umbilical cord tied to the International Olympic Committee (IOC) at its formation has been severed.<sup>3</sup> The now independent CAS has established a widely recognized body of arbitral jurisprudence and created a strong reputation that is recognized by athletes, federations, and sporting officials around the globe. The institution has blossomed as one of the world's arbitration adjudication bodies as revealed in its jurisprudence and its history. This Article is about the achievement of maturity by the CAS as the definitive

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1. See Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515 (2001) [hereinafter McLaren I].

2. Foreword by H.E. Judge Kéba Mbaye, President of ICAS and CAS, in DIGEST OF CAS AWARDS II 1998-2000 xi, xii (Mathieu Reeb ed., 2002).

3. See Richard McLaren, *A New Order: Athlete's Rights and the Court of Arbitration at the Olympic Games*, 7 OLYMPIKA: THE INT'L J. OF OLYMPIC STUDIES 1 (1998) [hereinafter McLaren II].

appeals body for a broad range of high profile sporting disputes.

## II. THE INCEPTION OF CAS

The IOC, at its 1982 session in Rome,<sup>4</sup> approved the creation of the CAS. His Excellency Juan Antonio Samaranch, IOC President at the time, wanted to create a “supreme court of world sport.”<sup>5</sup> At the Rome session, the IOC was inspired by the vision of its leader and accepted the idea for a court of arbitration for sports-related disputes.

The neophyte institution of CAS was proposed in response to the increasing need to create a specialized body that could settle international sporting disputes, while offering a rapid and flexible procedure that was inexpensive for the parties involved.<sup>6</sup> The originating statute for the organization was drafted by a group of three members of the IOC, including Kéba Mbaye of Senegal, who was then a judge of the International Court of Justice in The Hague.<sup>7</sup> The IOC later accepted the statute at its New Delhi Session in March 1983, and the statute was ultimately entered into force on June 30, 1984.<sup>8</sup> The first members of the new organization were appointed that same day, with Mbaye acting as president,<sup>9</sup> and new CAS regulations were adopted to complement the preliminary statute.<sup>10</sup>

CAS’s initial efforts centered on information and promotional activities with sports organizations.<sup>11</sup> The CAS held its first arbitration proceedings in 1986 and rendered its first award in 1987.<sup>12</sup> The arbitrators for the court were generally not obligated to endorse any earlier decisions or to follow the principle of *stare decisis*; yet for the sake of clarity they will typically do so.<sup>13</sup>

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4. Bruno Simma, *The Court of Arbitration for Sport*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004* 21 (Ian S. Blackshaw, et al., eds., 2006).

5. Mbaye, *supra* note 2.

6. Matthieu Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004* 31-32 (Ian S. Blackshaw, et al., eds., 2006).

7. *Id.*

8. Simma, *supra* note 4.

9. Reeb, *supra* note 6, at 32.

10. Simma, *supra* note 4.

11. Mbaye, *supra* note 2, at xi.

12. Foreword by H.E. Judge Kéba Mbaye, President of ICAS and CAS, in *DIGEST OF CAS AWARDS II 1986-1998*, xi at xii (Matthieu Reeb ed., 1998).

13. IAN S. BLACKSHAW, *MEDIATING SPORTS DISPUTES: NATIONAL AND INTERNATIONAL PERSPECTIVES* 51 (2002).

## III. FORMATION OF ICAS

The CAS, at its inception, had both judicial and executive functions under a single umbrella of the institution. It was financed entirely by the IOC, which also held the proxy to modify CAS statutes, and considerable power was given to it and the IOC President to appoint the members of CAS. This structure changed in 1994, after a ruling from the Swiss Federal Tribunal in *G. v. Fédération Equestre Internationale and Court of Arbitration for Sport*,<sup>14</sup> which raised the spectre of the independence and impartiality<sup>15</sup> of the CAS from the IOC. Gundel was a horse rider who appealed an International Equestrian Federation (FEI) horse-doping decision to CAS. The CAS Panel ruled against him and Gundel appealed to the Swiss Federal Tribunal. He argued that CAS did not meet the independence and impartiality requirements for an arbitration court under Swiss law.

The Federal Tribunal found that CAS was sufficiently independent from the FEI. However, the more significant outcome of the case was the *obiter* statement of the Federal Tribunal, which held that the links between the IOC and CAS were strong enough that the independence of CAS would be questionable if the IOC became a party in proceedings before it. The landmark case led to many reforms and to the restructuring of CAS,<sup>16</sup> the most significant being the creation of an administrative and finance branch to oversee the judicial functions of CAS, called the International Council of Arbitration for Sport (ICAS). It replaced the IOC in financing and controlling CAS and formed a buffer layer of governance between the two organizations.

Other reforms implemented in 1994 included the division of the adjudicative branch of CAS into ordinary and appeals arbitration divisions so as to distinguish disputes of the first instance from those arising on appeal from decisions by sports bodies such as the international federations (IFs) or the IOC. The rules by which CAS would arbitrate matters were significantly revised to both accommodate the two new divisions and to expedite the court's

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14. (CAS)(1993), Arrêt Du Tribunal Fédéral Suisse, 1st Civil Division, 15 March 1993.

15. At issue was whether CAS was an international arbitration system as it was proposed to be or merely an internal system of arbitration not recognized as international in nature and capable of being considered as such under Swiss law. See GABRIELLE KAUFMANN-KOHLER, *ARBITRATION AT THE OLYMPICS: ISSUES OF FAST-TRACK DISPUTE RESOLUTION AND SPORTS LAW* 15-17 (2001) (discussing the case of Dieter Baumann, the German track and field gold medalist at the Barcelona Games). That matter involved the IAAF, whose by-laws did not provide for CAS arbitration at the time, challenging the jurisdiction of CAS to resolve the relevant dispute. It was thought that the IAAF's own internal adjudication panel did not meet the standards for being an independent international arbitration institution.

16. The restructuring of the CAS was approved with the signing of the Agreement Concerning the Constitution of the International Council of Arbitration for Sport in June 1994.

judicial procedures. The creation of the Code of Sports-Related Arbitration affirmed all of these changes, clarified the governance of the organization, and codified the arbitration procedures offered by CAS.<sup>17</sup> The reforms following the *Gundel* decision dramatically changed the institutional shape and structure of CAS. In so doing, a more independent adjudicative body was created that was capable of resolving sports disputes without the taint of influence from sporting organizations, as well as national or other influences. The independence of CAS has been challenged in subsequent cases, as mentioned below. However, the outcome of these cases has confirmed the independence and credibility of the ICAS and the CAS institutional shapes and structures, and thereby has strengthened the authority of the court as an arbitral institution.

The independence of CAS, put forward by Swiss law in the *Gundel* decision, came under further scrutiny early in the history of the organization upon a challenge by Australian athletes to the CAS system in place in that country in the case of *Raguz v. Sullivan*.<sup>18</sup> In that case, CAS, in its Oceania Division, resolved a team selection dispute between two Australian judokas competing for a place on the Australian Olympic team. The matter was an entirely domestic Australian matter as to who should be on the Olympic team for the yellow and gold. The losing competitor challenged the CAS award in the Australian courts. The New South Wales Court of Appeal took control of the case because of the pending Olympic Games in Sydney. It dismissed the athlete's application on the grounds that the parties had selected arbitration as the method of dispute resolution and designated the CAS with its seat of arbitration in Lausanne, Switzerland as the institution for resolution of such disputes. Therefore, the New South Wales Court of Appeal reasoned that the domestic courts of Australia did not have the same jurisdiction over the dispute as they would have had the case been purely domestic, with none of the international arbitration connections that the parties had chosen.

The court found that the arbitration agreement between the athletes and their sports federation was "foreign." Even though the arbitration procedure occurred in Australia and was related to the Australian Olympic team membership, the parties had agreed to CAS as the arbitration institution, which chose Lausanne as the seat for all of its arbitrations. Therefore, any appeal from a CAS Australia first instance arbitration decision must be taken to the

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17. JAMES A. R. NAFZIGER, *INTERNATIONAL SPORTS LAW* 43 (2d. ed. 2004). The Code has since been revised in 2003 (in force as of 2004) to incorporate certain long-established principles of CAS case law and practices.

18. [2000] N.S.W. Ct. App. 240 (unpublished opinion), *reprinted* in KAUFMANN-KOHLER, *supra* note 15, at 51.

CAS appeals division at Lausanne and not to the domestic courts of Australia. The matter before the court was an international arbitration in which the parties had determined that the arbitration institution remained the appropriate site to resolve the dispute, even though the actual location of the first instance of CAS had been in Australia. The deferment by the Australian court to the seat of arbitration in Lausanne greatly strengthened the stature and authority of CAS, while limiting the power of a national court to review the CAS's decision. Independence was being recognized in countries other than Switzerland.

The effectiveness of the reforms implemented in 1994 was further strengthened by the Swiss Federal Tribunal when they recognized the independence of CAS from the IOC in *Lazutina and Danilova v. IOC*.<sup>19</sup> This was an appeal by two Russian cross-country skiers against a CAS award disqualifying them from an event at the 2002 Winter Olympics in Salt Lake City. In this case, the court had the opportunity to decide whether CAS could be considered a truly independent international arbitral tribunal even if the IOC was a party to the dispute, an issue the *Gundel* court addressed only in dicta. The Swiss Federal Tribunal found that CAS was sufficiently independent and its decisions in cases involving the IOC were to be considered as "true awards, equivalent to the judgements [sic] of State courts."<sup>20</sup> This decision confirmed that CAS is a credible and true court of international arbitration and attempts to challenge its rulings on these grounds in the future would likely fail.

Subsequent appeals to the Swiss Federal Tribunal have not succeeded in dislodging the foundation upon which the early cases have built the principle of independence. An attempt to challenge a CAS decision at the Swiss Federal Tribunal failed in *N., J., Y., W. v. FINA*,<sup>21</sup> where the CAS decision to suspend four Chinese swimmers for doping violations was upheld. The Swiss Federal Tribunal ruled that "even the manifestly wrong application of a rule of law or the obviously incorrect finding of a point of fact is still not sufficient to justify revocation for breach of public policy of an award made in international arbitration proceedings."<sup>22</sup> This line of reasoning by the Swiss Federal Tribunal was confirmed in *Azerbaijan Field Hockey*

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19. (IOC) (2003), Arrêt Du Tribunal Fédéral Suisse, 1<sup>st</sup> Civil Division, 27 May 2003.

20. Excerpt from the judgement of May 27, 2003, delivered by the 1st Civil Division of the Swiss Federal Tribunal in the case A. & B. versus International Olympic Committee (IOC) and International Ski Federation (FIS) (4P. 267, 268, 269 & 270/ 2002/ translation) in DIGEST OF CAS AWARDS III 2001-2003, at 689 (Matthieu Reeb & Estelle du La Rochefoucauld eds. 2004).

21. 39 SP.83/1999 (2d Civil Ct., 31 Mar., 1999) in DIGEST OF CAS AWARDS II, 1998-2000, 779 (Matthieu Reeb ed., 2002).

22. *Id.*

*Federation v. Fédération Internationale de Hockey*, a case arising out of the Ad Hoc Division of CAS (AHD) at the Summer Olympics in Beijing.<sup>23</sup> The Azerbaijan field hockey team appealed two CAS ad hoc decisions from Beijing to the Swiss Federal Tribunal to replace the Spanish team with their own because of Spanish team doping violations. The Tribunal dismissed the appeal and in its decision stated that the tribunal “does not review whether the arbitration court applied the law, upon which it based its decision, correctly.”<sup>24</sup> All these decisions by the Swiss Federal Tribunal when viewed as a whole, leave no doubt as to the fact that the CAS is an independent, credible international arbitral body which is authoritative in resolving sports disputes. Since the 1994 reforms, CAS has evolved into an independent international court of arbitration and its decisions have been recognized as final and binding.

Although the previous cases upheld the legitimacy and independence of CAS from the IOC, in reality, the 1994 reforms did not create a completely separate body. After the *Gundel* decision, the ICAS was created to oversee CAS and replace the IOC. However, during its creation, the ICAS was not given the power to control how the CAS president was to be elected. It was not until the death of the CAS president, Kéba Mbaye, more than ten years following the creation of ICAS, that it was realized that the IOC still controlled the appointment of the president. Although the establishment of the ICAS was an attempt to create an independent structure from the IOC, it was not entirely complete in the governance of the organization.

#### IV. OLYMPIC AHD

The Olympic Games are a high stakes, high pressure, fast paced experience with potentially big rewards for athletes, nations, and large corporate sponsors. Under such pressure and time constraints the fate of an athlete or sporting body involved in a dispute must be decided in a timely and organized manner. The AHD was established to ensure fair results are given to Olympians in a manner that is efficient and non-disruptive to the flow of the Games. It was no coincidence that the AHD emerged at the Centennial Games in Atlanta, Georgia in the United States. The other *raison d'être* for the AHD was to preclude disgruntled athletes or sports bodies from going to the American courts and implementing legal actions that would be disruptive to the summer Olympic spectacle.

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23. 4A\_424/2008 (1st Civil Ct., 22 Jan. 2009) at 6.

24. Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 PEPP. DISP. RESOL. L.J. 51, 59 n.47 (2009).

The IOC inserted Article 74 in the Olympic Charter (OC) in 1995, which stated that “[a]ny dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the *Code of Sports-Related Arbitration*.”<sup>25</sup> Article 74 gave CAS the jurisdiction to create the AHD in time for the 1996 Summer Olympics in Atlanta.<sup>26</sup> Six cases emerged at the Centennial Games and were submitted to the AHD dealing with a range of topics including disqualification, eligibility, and doping. The adjudication system of the AHD was provided at no cost. Commencing with the 2000 Summer Olympics in Sydney, local bar members involved in sport where the Games are located have made themselves available at no cost to assist athletes, IFs, and national Olympic committees (NOCs) who desire counsel and are otherwise not likely able to afford it.<sup>27</sup> That has led to the practice of many IFs, NOCs, and certainly the IOC showing up at the Olympic Games with a phalanx of lawyers to assist them if desired.

The AHD in Atlanta swung into action early in the Games to settle an entry issue involving the Irish swimmer, Michelle Smith,<sup>28</sup> in the 400-meter freestyle after the entry deadline.<sup>29</sup> The Irish swim team wished to substitute Smith for the original swimmer who was set to compete and was originally registered as the competitor in that event. U.S. Swimming argued that although Smith was registered to participate in the Games prior to the deadline as a swimmer for Ireland, she was not specifically entered for the 400-meter freestyle event. FINA had originally disallowed the swimmer, but reversed this decision on the advice of the IOC. It was this new decision that U.S. Swimming appealed. The AHD recognized that the IF and the IOC Executive Board have the power to approve entries after the deadline at their discretion. The AHD found that there was no violation of the current rules. The

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25. The OC is the codification of the fundamental principles of Olympism, Rules and By-Laws adopted by the IOC.

26. See McLaren I, *supra* note 1 at 521; see also McLaren II, *supra* note 3 at 4.

27. Today there is also the Sports Law Clinic of Valparaiso University School of Law, which began its operations in 2005 and has offered on-site services at both the Torino and Beijing Games and has plans to return to the Vancouver and London Games. The Valpo Sports Law Clinic, run by Professor Michael Straubel with the assistance of several law students, offers its services to individuals involved in amateur sports that experience sports-related legal issues and are unable to afford legal representation. See generally Valparaiso Law School, *Sports Law Clinic*, VALPO.EDU, <http://www.valpo.edu/law/clinic/sportslawclinic/index.php> (last visited Feb. 20, 2010).

28. Michelle Smith de Bruin, as she later became, was caught after the Olympics in one of the first circumstantial evidence cases involving an out-of-competition doping test. She was given a four-year suspension from all swimming competitions under the FINA rules at the time and the matter was confirmed by the appeals division of CAS. See *B. / Fédération Internationale de Natation (FINA) CAS/A/98/211*.

29. *U.S. Swimming / Fédération Internationale de Natation Amateur (FINA) CAS OG 96/001*.



applicable regulations were the general rules that cover all entries to the Games, which provided a textual basis for the practice of allowing exceptions with regard to formally deficient entries. The application was rejected, allowing Smith to compete and win gold for Ireland.

The CAS next assembled an AHD at the 1998 Winter Games in Nagano, Japan. During the Games the division received five applications for hearings. One decision, which attracted a great deal of attention, was the International Ice Hockey Federation (IIHF) case.<sup>30</sup> This was the very first time that professional hockey players from the National Hockey League (NHL) were permitted to compete in the Olympic Games. The matter involved a hockey player, Ulf Samuelson, a Swede by birth, who was playing for the New York Rangers in the NHL in the United States and who had acquired a United States citizenship by naturalization. The AHD found that Sweden did not allow dual citizenship and, as a result, he was not able to compete for the Swedish team, since he no longer held Swedish status after having acquired United States citizenship.

The Czech Republic ice hockey team brought a companion case to the Swedish case to the AHD in which it alleged that the Swedish team should forfeit the games in which Samuelson played because the team had played an ineligible player in violation of the IIHF rulebook. The structure of the playoff round made it strategically advantageous for the Czech Republic to try and have games in the earlier rounds in which Sweden had played forfeited. The effect would have been to change the playoff alignments thereby making the opponent for the Czech Republic a perceived much easier team to beat than the United States team, which they would otherwise have had to play. The AHD did not agree with the arguments on behalf of the Czech Republic and the Swedes were able to maintain their position in the quarterfinals. The AHD dismissed both appeals, stating that the IIHF solution was in accordance with the OC and the purpose of its underlying rules. This was the second time after the Smith decision in Atlanta that a case had been brought to the AHD primarily to seek strategic advantage in the playing of the various sports at the Olympics. It would become a consistent feature of future AHDs.

As the AHD continued to develop at the 2002 Winter Games in Salt Lake City, the disputes became more court-like in their procedure. After a highly controversial and well publicized judging controversy involving the gold and silver medalists in the Figure Skating Pairs Competition, the Canadian Olympic Association (COA), now the Canadian Olympic Committee, made an

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30. *Czech Olympic Committee, Swedish Olympic Committee and S. / International Ice Hockey Federation (IIHF) CAS OG 98/004-005.*

application to the AHD for preliminary relief.<sup>31</sup> The COA alleged that improprieties occurred amongst the judges and that one or more of them were pressured to cast their vote in the competition in a particular manner. It requested that CAS make an order that certain judges in the competition be compelled to appear before CAS to provide evidence. It also requested that the CAS seek the aid of the United States courts to issue subpoenas to those individuals requiring them to appear before CAS to give evidence. The subpoenas would have been issued under the United States Federal Arbitration Act.<sup>32</sup>

Chapter 12 of the Swiss Act governs the AHD arbitrations; as such, its power to enter provisional or conservatory orders is given by the Swiss Act. However, the Panel was sitting in Salt Lake City. The Swiss Act provides that a tribunal may request the assistance of a judge with jurisdiction who shall apply his own law.<sup>33</sup> The governing law was the United States Federal Arbitration Act, which gives arbitrators the power to summon any person to attend as a witness. The Panel then summoned referees and judges to attend the hearing. The Panel did not make any request to the United States courts because the International Skating Union (ISU), being the federation in charge, compromised the matter by suggesting to the IOC that it issue two sets of gold medals. This compromise was quickly accepted by the IOC when it was realized that the CAS, if it proceeded to hear the matter, would present a spectacle to a worldwide television audience that could be a major distraction to the Olympic Games. These series of events are an example of how the strength of the CAS and its operation was further developed as an arbitral institution. This further solidified the AHD's reputation as a legitimate and valuable dispute resolution mechanism for the Olympic Games.<sup>34</sup>

The Salt Lake judging scandal marked the first time the AHD had sought external judicial authority to compliment its own powers. It marked the coming of age of the CAS as an institution to be reckoned with when engaging in scandalous conduct.

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31. *Canadian Olympic Association (COA) / International Skating Union (ISU)* CAS OG 02/004.

32. See generally 9 U.S.C. §§ 1-14 (2009).

33. Switzerland's Federal Code on Private International Law, Dec. 18, 1987, Art. 183, available at <http://www.umbrecht.com/pdf/SwissPIL.pdf>.

34. The case of Jean Senft acted as the forerunner to the Skategate scandal. That case involved a Canadian skating judge, Senft, who brought forth evidence proving biased judging within major figure skating competitions. Senft was subsequently suspended by the ISU for her own national bias, since her scoring appeared suspiciously weighted toward Canadian competitors in comparison to the cheating judges that were ranking them lower. She also lost her appeal to CAS. This case exposed the fact that biased judging had been going on in skating events for years, eventually culminating with the fiasco at the Salt Lake Games. See *Senft / ISU* TAS 99/A/224.

One of the important features of the AHD is the speedy resolution of disputes with effective implementation of decisions. This is a foundational principle which has been crucial to the success of the division at the Olympic Games. The AHD has a twenty-four-hour dispute resolution policy, meaning from the time an athlete files an application some sort of decision or resolve is reached within a day. Though it is not always possible to reach a final decision in this time constraint, the committee will give some judgment as to the athlete's fate.<sup>35</sup> If the issue is of great urgency, for example disqualification from an event, a stay may be granted allowing the athlete to compete and after the matter is resolved the results can be adjusted accordingly if need be. Such a speedy dispute resolution process with effective implementation of the decision is a significant improvement from the years of no AHD, in which athletes had to wait an inexcusable amount of time for results. Consider the case of Sylvie Fréchette, the Olympic synchronized swimmer who was at the center of a judging controversy during the 1992 Summer Games in Barcelona. The referee refused to alter Fréchette's score after a judge immediately admitted to mistakenly pressing the wrong button, giving her a lower score than intended. It took several appeals and the assistance of IOC vice-president Dick Pound before Fréchette was awarded her medal sixteen months after the Games.

Contrast the Fréchette example with Ross Rebagliati, a Canadian snowboarder who tested positive for use of marijuana at the 1998 Winter Games in Nagano. Rebagliati won gold on February 8th, on the morning of February 11th, the IOC withdrew his medal, and a few hours later Rebagliati filed an appeal to the AHD. Immediately, a panel of three arbitrators was assembled and a hearing was scheduled for later that night. Within twenty-four hours of the initial appeal it was decided that Rebagliati could retain his medal.<sup>36</sup> The juxtaposition of these two cases demonstrates the success of ICAS in creating the AHD. Athletes like Rebagliati no longer have to deal with the stress and anxiety associated with waiting for the results of a lengthy appeal process long after the closing ceremonies are over.

The Rebagliati case demonstrates more than the time efficiency of the AHD and the effective implementation of remedies. It is also one of the doping cases decided by the AHD to spark controversy. At the time marijuana was not on the prohibited substance list except for a specific agreement between an IF and the IOC. That had not been done for snowboarding;

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35. A practice has grown giving the disposition of the matter and providing the reasons at a later time. This procedure was used to dramatic effect in the case of *Dal Balcon / Comitato Olimpico Nazionale Italiano Turin* CAS OG 06/008.

36. KAUFMANN-KOHLER, *supra* note 15, at 96.

therefore, there was no legal basis to discipline Rebagliati. Though the outcome was controversial it was in accordance with the basic principles of law that Rebagliati have his medal reinstated. In this case, following the letter of the law worked in the athlete's favor. However, sometimes following the rules so strictly can lead to controversial decisions. Consider Andrea Raducan, a Romanian gymnast whose medal was stripped at the 2000 Summer Olympic Games in Sydney after she tested positive for pseudoephedrine.<sup>37</sup> At the advice of her team doctor, the then seventeen-year-old took two Nurofen Cold and Flu tablets for a headache and congestion. The IOC issued a decision for the return of one of her gold medals. Raducan appealed the IOC decision to the AHD. Doping is a strict liability offense, and all that is required to enforce it is the presence of a banned substance. Therefore, Raducan's intentions were not considered. The AHD adhered to the strict liability principle of the doping regime and dismissed the appeal.

#### V. JURISPRUDENTIAL DEVELOPMENT OF CAS

The case load in the first decade of CAS meant that there was little to report on an annual basis. The initiative of establishing the AHD in the second decade proved to be the catalyst which lead non-participating Olympic sports, such as athletics and football, to join the fold in 2001 and 2002 respectively. These two organizations, the International Association of Athletics Federations (IAAF) and Fédération Internationale de Football Association (FIFA), each had its own internal panel that had previously heard and deliberated on internal important decisions. The IAAF and FIFA brought with them a dramatic increase in the number of cases going to CAS, with FIFA now accounting for about 30-40% of the CAS caseload. FIFA was the last remaining Olympic sport to accept the CAS as its final appeals body. The milestone of the IAAF and FIFA joining the CAS process brought to completion the developmental stage for CAS. It was now ready to take a large step onto the world stage as the final and supreme court for sport arbitration that its sponsors had dreamed would be the case almost twenty years before.

There had also been growth independent of the caseload from these organizations. The other significant catalyst to the increasing case load was the adoption by the IOC and some non-Olympic sports of the World Anti-Doping Code (WADC), which came into effect for all Olympic sports with the opening ceremonies of the 2004 Summer Olympic Games in Athens. CAS began to have a steady load of anti-doping cases to go along with the football cases of FIFA and the athletics cases of the IAAF. Today, CAS is averaging

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37. *Raducan / International Olympic Committee (IOC) CAS OG 00/011.*

between 250 and 300 cases per year, a dramatic increase and strong evidence that CAS is achieving the vision of its promoter Juan Antonio Samaranch.

The dramatic increase in caseload has brought with it administrative expansion. The CAS moved to new headquarters, the Chateau Bethusy, in June of 2005. Prior to that, the CAS Oceania had been established as a division of CAS centered in Sydney, Australia. The experiment with a regional division has not been repeated but there now is a satellite office established in conjunction with the American Arbitration Association based in New York. CAS in Lausanne has a number of full time legal counsels who assist the arbitration panels and a considerable compliment of administrative assistants and others to support the work of the CAS. It is now a recognized institution in the arbitration world and has as large of or even a larger caseload than the major world commercial arbitration systems of the London Court of International Arbitration and the International Chamber of Commerce. The increasing number of cases has brought with it the development of arbitral jurisprudence in sport.

In reflecting on the last twenty-five years of jurisprudence, the following cases highlight the jurisprudential advancements. The cases reflect the maturation process for CAS and its companion games related division, the AHD.

#### *A. Challenges to IOC Decisions*

Increasingly over the last quarter century and particularly recently, there has been a growing number of appeals brought to CAS involving athletes and other parties that were directly affected by a decision from the IOC. The AHD decision discussed previously involving Ross Rebagliati, the Canadian snowboarder at Nagano,<sup>38</sup> was an early instance<sup>39</sup> where CAS effectively reversed an IOC executive board decision. Such an outcome was a step for CAS toward testing its powers and establishing independence. The IOC was treated similarly to all other parties before the CAS. There was no deference to the founding parent.

In 1998, the IOC Medical Commission, at that time the body responsible for overseeing anti-doping measures at the Olympic Game, had advised and the IOC Executive Board accepted<sup>40</sup> the Medical Commission

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38. *R. / IOC CAS OG 98/002.*

39. A CAS panel had previously overruled an IOC decision at the Atlanta Games in the case of *K. and G. / IOC CAS OG 96/003-004.* See *infra* note 42.

40. The IOC based its actions on Chapter II, article III, paragraph B of the IOC Medical Code, which provided that the use of marijuana is treated as a doping offense only if there is an agreement between the IOC and the IF.

recommendation to strip Rebagliati's gold medal due to a finding of marijuana in his urine sample following his win in the snowboard giant slalom competition. The newly admitted sport of snowboarding was an orphan when it came to having a sport federation. The International Ski Federation (FIS) had agreed to take the sport under its auspices and was the IF for snowboarding in Nagano. Due to an oversight by the FIS, an agreement had never been entered into between the IF and the IOC to test for marijuana in snowboarding or to treat it as a banned substance. There was no agreement in snowboarding brought about by the inattentive FIS. Because marijuana was not explicitly prohibited or restricted anywhere else in the IOC Medical Code at the time of the review by CAS, the outcome was a legal certainty.<sup>41</sup> There was simply no legal foundation for the IOC action and it was reversed.<sup>42</sup> A critical test of CAS and its willingness to use the powers of the new adjudication body had been passed. The new Olympic sport of snowboarding had its first ever Olympic medal restored to the Canadian winner of the race by order of the CAS.

From that initial gold medal reinstatement various other challenges have been raised to CAS<sup>43</sup> by athletes, national federations, IFs, and NOCs seeking to have an IOC decision overturned. The outcomes sometimes were akin to the Rebagliati case, with CAS deciding to overturn the initial result. In *Williams v. IOC*,<sup>44</sup> a Columbian track cyclist tested positive for a non-prohibited substance that was similar to ones that were listed as prohibited, which caused the substance to be considered prohibited under the IOC Rules. The athlete, therefore, had her medal removed by the IOC. Upon appeal to CAS, the court held that the substance could not be classified as prohibited since the IOC failed to prove a similarity to any of the already listed substances and also failed to consider the relevant criteria; therefore, the

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41. In response to this case, marijuana was added to the Olympic Movement Anti-Doping Code, which replaced the IOC Medical Code in January 2000. IOC MEDICAL CODE, CHAPTER II, ART. III, P. B (2010).

42. The facts of the Rebagliati case are similar to those of the prior Korneev and Ghouliev cases in Atlanta. The two Russian athletes, one a wrestler and the other a swimmer, tested positive for bromantan and had their medals stripped by the IOC. On appeal to CAS, the athletes actually admitted to taking the drug yet contested whether the substance was a prohibited stimulant. The panel acknowledged that the drug was not specifically designated on the IOC Medical Code of prohibited substances and decided to let the athletes keep their medals. Although this case did very little to define the jurisdiction of CAS, it parallels the Rebagliati case in demonstrating the independence of CAS from the IOC. See McLaren II, *supra* note 3 at 9-10, n.39.

43. It should be noted that there was a single challenge concerning an IOC decision brought to the CAS AHD during the Torino Games in 2006. However, no final award was ever rendered as the case was ended before an AHD panel was even assembled. The issue surrounded a stay of execution of a disciplinary sanction, which the IOC willingly accepted.

44. *Williams v. IOC* CAS 2004/A/726.

athlete was able to keep her medal. In *A., B., C., D. & E. v. IOC*,<sup>45</sup> suspicious blood transfusion equipment was found in the chalet that had been occupied by the Austrian cross-country skiing team during the Salt Lake Games. Following a hearing, the IOC found that doping offenses had occurred and accordingly declared an accredited chiropractor, who was involved in performing medical acts on several athletes, ineligible to compete in any Olympic Games up to 2010 for using and advocating prohibited methods. On appeal, CAS found that there insufficient evidence to find that the individual engaged in doping in connection to the relevant offenses, and therefore, removed his period of ineligibility. However, CAS did order a strong warning to the party since it found that his medical practices at the Games were not in accordance with the rules regarding medical care. Additionally, CAS upheld the IOC decisions to disqualify the Austrian skiers and suspend the team coach that were involved in the matter.<sup>46</sup> In *Prusis & Latvian Olympic Committee (LOC) v. IOC*,<sup>47</sup> a Latvian bobsledder who had tested positive for nandrolone was given a convenient three-month suspension by the International Bobsleigh and Skeleton Federation (FIBT) expiring just six days before the first bobsleigh event at the Salt Lake Games.<sup>48</sup> The LOC received confirmation from an officer of the Salt Lake Organizing Committee that the athlete could be accredited and admitted to the Olympic Village before the end of the suspension period. However, the IOC Executive Board issued its own decision that the inscription of the athlete was not accepted, spurring an application to the CAS AHD to overturn the IOC decision. CAS held that there was no legal mechanism within the OC that allowed the IOC to intervene in the circumstances, even if the FIBT had acted improperly in its conduct of the suspension decision.<sup>49</sup> The application was allowed and the IOC decision

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45. *A., B., C., D. & E. / IOC* CAS 2002/A/389, 390, 391, 392 & 393.

46. The Austrian ski team again was met with trouble at the 2006 Winter Games in Torino, Italy. Controversy arose following a raid on the Austrian cross-country and biathlon teams' quarters by the Italian police uncovering large amounts of doping equipment and products. Four skiers and two biathletes ultimately received lifetime suspensions issued by the IOC in response to these events. Walter Mayer, the coach that had been involved in the Salt Lake ordeal and as a result had been banned from the next two Winter Olympics, had been spotted with the Austrian team in Torino, which was in violation of his suspension, and he attempted to flee back to Austria in response to the raid. En route he crashed his vehicle into a police roadblock, later admitting this to be a suicide attempt. He received several criminal charges for his actions and was placed into a psychiatric hospital. Mayer filed defamation lawsuits against World Anti-Doping Agency (WADA) head Dick Pound and IOC President Jacques Rogge but later withdrew both suits.

47. *Prusis & LOC / IOC* CAS OG 02/001.

48. Latvia was considered a gold medal contender and the suspension was conveniently set to expire just prior to the Olympic Games in Salt Lake. There was no harmonization of suspension time periods then as there now is under the WADC.

49. That outcome prompted United States bobsledder Pavle Jovanovic to apply to CAS to have

set aside. In *Perez v. IOC*,<sup>50</sup> the IOC denied a United States kayaker's right to participate in the Sydney Olympic Games. The IOC relied on the relevant rules in the OC, the issue centering upon the fact that the athlete had previously competed for the Cuban team and was only recently a United States citizen. Upon an application to CAS, it was held that the athlete had changed his nationality earlier by becoming stateless, and therefore, was within the confines of the relevant rules of the OC. Due to this broad interpretation of the rules, CAS held that the athlete was eligible to participate in the Sydney Olympics and overturned the IOC decision.<sup>51</sup>

In the case of *Canadian Olympic Committee (COC) & Beckie Scott v. IOC*,<sup>52</sup> CAS overruled the IOC decision and then prescribed exactly how the organization was to implement the CAS decision. Three skiers had all competed in the women's 5 km pursuit cross-country skiing competition at the Salt Lake Games. Beckie Scott placed third behind D. and L.; however, by the end of the Games, D. and L. both failed subsequent doping tests. That resulted in the IOC annulling all of L.'s results obtained at the games, yet only removing D.'s results for an event that the athlete participated in after the negative doping test had been conducted. Beckie Scott moved up one position to a silver medal and D. did the same and was awarded the gold. The IOC decision was challenged to CAS on the basis that Scott was entitled to receive the gold medal in the event since D. should have had all her medals from the Games withdrawn, and not just the one after the positive test. CAS disagreed with the IOC's interpretation of the OC that had led to its decision and instead

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his suspension reduced in a like manner in order to compete in the Winter Games. See *Jovanovic v. United States Anti-Doping Agency (USADA)* CAS 2002/A/360. Jovanovic had tested positive for doping and was issued a nine-month suspension by the USADA, which he appealed to CAS. CAS held firm and denied the application, as well as increased the suspension to two years, to further compound the problematic decision in the Latvian bobsleigh case.

50. CAS OG 00/005. The panel hearing the matter considered the fact that the case raised many of the same issues that were raised in *United States Olympic Committee (USOC) and USA Canoe/Kayak / IOC*, CAS OG 00/001. Since the cases involved different applicants, the Panel held that the matter was not being relitigated and the new application was admissible.

51. On somewhat similar facts, an application was brought by a Canadian diver, Arturo Miranda. The AHD did not apply the same principles based on the difference in the facts of the two cases. In *Miranda / IOC* CAS OG 00/008, the IOC declared that the diver, nominated by the COA as a member of its diving team, was not eligible to represent Canada at the Olympic Games in Sydney. The issue was that he had previously represented Cuba in an international diving event prior to becoming a Canadian citizen, and the relevant rules of the OC regarding changes to nationality had not been satisfied. Miranda lodged an appeal against the IOC decision to CAS; however, CAS again dismissed the application. This case was the second challenge for the same matter following a CAS Panel dismissing an appeal in the CAS arbitration *Miranda / IOC*, CAS OG 00/003. The Panel decided to consider the merits of the application a second time because the arbitration process was consensual. However, the Panel noted that it would not revisit prior decisions in the absence of consent.

52. *COC & Beckie Scott / IOC* CAS 2002/O/373.



provided its own interpretation of the relevant rule thus finding that D. should have been disqualified from all the competitions in which she had participated at the Salt Lake Games. CAS annulled the IOC decision and remitted the matter back to the IOC Executive Board to render a new decision in accordance with the CAS award, which contained specific directions as to how its decision was to be implemented by the Executive Board. Scott thus became the gold medalist in the 5 km pursuit cross-country competition.<sup>53</sup> The case is a benchmark decision concerning the willingness of CAS to ensure that its decisions are effectively implemented, and when necessary, CAS will instruct sporting federations how to implement their decisions over affected athletes.

As would be expected from an adjudicative body who is exercising a balanced and objective approach toward its litigants, there are also numerous cases where CAS has upheld the actions of the IOC and its Executive Board. In *NOC of Sweden and Ara Abrahamian v. IOC*,<sup>54</sup> a Swedish Greco-Roman wrestler who won the bronze medal match rejected receiving the award during the medal ceremony at the Beijing Games. The wrestler's action was in response to the poor officiating during his semi-final bout.<sup>55</sup> The IOC Executive Board, following the recommendation by the Disciplinary Commission (DC), decided to disqualify the athlete and remove his medal. Both the wrestler and the Swedish Olympic Committee appealed to CAS seeking to have the medal returned. The CAS panel upheld the IOC decision and dismissed the appeal. In *Moldova National Olympic Committee (MNO) v. IOC*,<sup>56</sup> the IOC held that a swimmer was not eligible to represent the Republic of Moldova at the Beijing Games because the athlete had represented Romania within the prior three years, which is the minimum amount of time that must elapse before representing a different country. The MNO applied to CAS to have the IOC decision set aside. CAS held that although neither the MNO nor the Romanian Olympic Committee had opposed the swimmer representing Moldova, there was no indication that FINA, the relevant IF, had approved it. Therefore, the relief being sought was denied. In *Russian Olympic Committee (ROC) & Viatcheslav Ekimov v. IOC, United States Olympic Committee (USOC) & Tyler Hamilton*,<sup>57</sup> the United States gold

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53. The episode lasted over two years after the Salt Lake Games had ended. Scott was finally given the medal at a ceremony held in Vancouver on June 25, 2004.

54. *NOC of Sweden & Abrahamian / IOC* CAS 2008/A/1647.

55. The officials issued a warning to the wrestler at the end of the second period that resulted in him losing the match. The Swedish team requested for a video review to see if the warning was justified but was denied the request.

56. *MNO / IOC* CAS OG 08/006.

57. *ROC & Ekimov / IOC, USOC & Hamilton* CAS 2004/A/748.

medalist in men's cycling at the Summer Olympics in Athens provided a blood sample that gave an adverse analytical finding and was suspicious for blood transfusions. The IOC President, Jacques Rogge, launched a disciplinary procedure and an analysis of the rider's B sample was performed. The results of the B sample analysis were inconclusive, which caused the IOC to end the disciplinary procedures and allow the American to keep his medal.<sup>58</sup> A Russian athlete had received silver and the ROC, wished to have him awarded a gold medal much like Beckie Scott had achieved through CAS.<sup>59</sup> The ROC appealed the IOC decision to CAS, yet CAS declined to adjudicate because the applicants lacked standing to appeal.<sup>60</sup> In *Baxter v. IOC*,<sup>61</sup> a British male skier that had received bronze at the Salt Lake Games tested positive for methamphetamine as a result of his use of an American version of a nasal decongestant product that was familiar to the athlete. However the product had a different formulation than the one sold in the United Kingdom. The IOC Executive Board disqualified the skier and removed his medal. The athlete appealed to CAS, which upheld the decision of the IOC because of the strict liability principle which results in the automatic disqualification of race results when there is a positive test because the competitor has had the benefit of the substance and thus an advantage over the remainder of the field of competitors who have not had the benefit.

All three cross-country skiing<sup>62</sup> cases in which darbepoetin had been detected resulted in confirmations of the decisions of the IOC Executive Board to strip the athletes of their medal results in the events in which they tested

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58. After the Olympics, Hamilton competed at the Vuelta a España in Spain and tested positive for having two blood populations in violation of the WADC. The case was prosecuted at first instance by the American Arbitration Association in *USADA v. Hamilton* (case number 30 190 00130 05) and then appealed to CAS in *Hamilton / USADA & UCI CAS 2005/A/884*, but was upheld at both levels as an anti-doping rule infraction. Later in February 2009 Hamilton again tested positive for doping and was eligible for a lifetime suspension. However, Hamilton made an agreement with USADA to not contest the case in return for an eight-year suspension, the smallest penalty possible for a second doping offence. WADA announced in July 2009 that it would challenge the USADA suspension to CAS for being too lenient, but later dropped the appeal in September 2009. WADA issued a statement that the suspension imposed by USADA was "appropriate in the particular circumstances of this case." WADA, *WADA Withdraws Appeal in Tyler Hamilton Case*, STAGE.WADA-AMA.ORG, Sept. 4, 2009, available at <http://stage.wada-ama.org/en/News-Center/Articles/WADA-Withdraws-Appeal-in-Tyler-Hamilton-Case/>.

59. *COC & Scott / IOC CAS 2002/O/373*.

60. *ROC & Ekimov / IOC, USOC & Hamilton CAS 2004/A/748*.

61. *Baxter / IOC CAS 2002/A/376*.

62. See *M. / IOC CAS 2002/A/374*; *L. / IOC CAS 2002/A/370*; *D. / IOC CAS 2002/A/371*. Two of those cases, which involved the Russian athletes Lazutina and Danilova, were later appealed to the Swiss Federal Tribunal. See (IOC) (2003), Arrêt Du Tribunal Fédéral Suisse, 1<sup>st</sup> Civil Division, 27 May 2003 and the corresponding discussion on page 5 of this Article.

positive, and CAS upheld those decisions.<sup>63</sup>

In yet another skiing case at Salt Lake, the CAS upheld an IOC decision in *Bessani-Antivari v. IOC*,<sup>64</sup> where a Grenada skier was denied eligibility to compete because the Grenada Olympic Association had failed to send an entry form for the skier to the Salt Lake Organizing Committee. The athlete filed an application with CAS requesting for allowance to enter and compete at the Games. The CAS Panel relied on the language in the provisions of the OC to decide that it did not have the authority for the discretion that was being sought and therefore, denied the application. In *L. v. IOC*,<sup>65</sup> a German wrestler tested positive for doping after winning a gold medal at the Summer Olympics in Sydney. The IOC Executive Board disqualified the athlete and withdrew his medal. On appeal to CAS, the Ad Hoc Panel rejected each of the athlete's arguments, dismissed the appeal, and upheld the IOC decision. In *Baumann v. IOC, National Olympic Committee of Germany and IAAF*,<sup>66</sup> an athlete that had been nominated by the German National Olympic Committee to take part in the Summer Olympics in Sydney was placed under a sanction of a two-year ban from competition for a doping offense by the IAAF, resulting in the IOC removing his accreditation. The athlete applied to CAS to have the IOC and IAAF decisions set aside and to be determined eligible for the Olympics; however, both were upheld.

### B. Advisory Opinions

The CAS provides a mechanism whereby it will prepare advisory opinions on any legal question concerning the practice or development of sport or any sports-related activity. Rule 60 of the Code provides that the IOC, IFs, NOCs, WADA, IOC-recognized associations, and the Olympic Games organizing committees (OCOGs) all have the right to seek an advisory opinion from CAS. The fact that large international sporting organizations seek the advice of CAS when issues arise and expertise is needed demonstrates the level of confidence in the institution that has been earned amongst the sporting world. Advisory opinions are not binding on the persons who request them.<sup>67</sup> The process involves a CAS member or panel being given specific questions to answer formulated by the President of the ICAS. A full judicial process is developed

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63. See Richard H. McLaren & Patrick Clement, *Court of Arbitration for Sport: The Ad Hoc Division at the Salt Lake City Olympic Games*, 2 INT'L SPORTS L. REV. 44, 53-54 (2004).

64. *Bessani-Antivari / IOC CAS OG 02/003*.

65. *L. / IOC CAS 2000/A/310*.

66. *Baumann / IOC, National Olympic Committee of Germany and IAAF CAS OG 00/006*.

67. Richard McLaren, *CAS Advisory Opinions*, in, THE COURT OF ARBITRATION FOR SPORT 1984-2004 180, 181 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek, eds., 2006).

to receive submissions after which the CAS renders a review and opinion of the events opined upon in the form of an advisory opinion.

The function and role of an advisory opinion is perhaps best illustrated thorough the use of the process by two titans in the anti-doping world. WADA held a strong belief that FIFA and its anti-doping rules were not in compliance with the WADC, which had been put in place by agreement of all thirty-five Olympic sports federations and many others as a new harmonized standard for use in all sport. Specifically, WADA was concerned by FIFA's unwillingness to adopt a two-year suspension for first-time drug offenses. FIFA, on the other hand, disagreed with the WADC two-year ban because it disregarded the extent of the offender's guilt. FIFA believed that it was important that each case be dealt with flexibility and discretion as opposed to a set of rigid rules. Both organizations independently asked CAS for an advisory opinion on the subject. The two requests were consolidated into one single advisory opinion.

In April 2006, prior to the World Cup and the commencement of the Olympic qualifying tournament, the CAS was commissioned to write the advisory opinion<sup>68</sup> on whether the FIFA anti-doping rules complied with the WADC. CAS wrote that there were issues of non-compliance in several areas of the FIFA anti-doping rules, such as sanctioning, which were too lenient in comparison to the WADC. The CAS panel additionally highlighted several other material differences between FIFA's anti-doping rules and the WADC. CAS wrote that although FIFA and other IFs are bound by the OC, neither the IOC nor WADA had the right to dictate how to establish anti-doping and disciplinary regulations. Even though FIFA's rules were not in full compliance with the WADC, CAS noted that the organization was not required by any Swiss law to amend its policies. Still, the OC states that no sport can be included or remain in the Olympic Games if it does not comply with the WADC, which was a risk that FIFA would face if it decided not to follow the WADC. FIFA took the CAS opinion to be the foundation for resolving its differences with the WADC. FIFA decided to accept the WADC into its regulations upon the enforcement of the 2009 amendments to the WADC. The newer version of the WADC provided for the flexibility that FIFA had desired relating to lesser punishments in doping cases where mitigating circumstances played a role. WADA has now recognized the current FIFA Anti-Doping Regulations and will be testing them in practice prior to a reassessment in 2010.

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68. *FIFA & WADA CAS 2005/C/976 & 986.*

*C. CAS Reliance on External Bodies and Powers*

An arbitration system is dependent upon its participants to comply with the decision of the panels and apply the conclusions arrived at by the arbitration panels. On those relatively rare occasions in which the parties will not implement their award, the national courts of the parties must be enlisted in pursuit of the remedy and its completion. No arbitration system can stand alone without the support of the national courts and the CAS is not any different in this respect.

The Skategate case was one instance where the CAS relied on external legislation to help issue the remedy being sought. The judging controversy surrounding the pair's figure skating competition at the Salt Lake Games was discussed earlier. In essence, the Canadian pair executed a flawless performance in the free skate, however they were outscored by the Russian pair based on the judging. The Russian team took the gold medal while the Canadians received silver. Suspicions of cheating on the part of the judges immediately arose. Upon being confronted by ISU officials, the French judge admitted to having committed biased voting in favor of the Russian pair.

The COA filed an application to the CAS AHD for preliminary relief requesting they make an order compelling the judges from the event to provide evidence, and further wanted the CAS AHD to issue a decision that the United States Federal Court should issue subpoenas to the skating judges to this effect.<sup>69</sup> The CAS Panel relied on both the Swiss Law on Private International Law together with the United States Federal Arbitration Act<sup>70</sup> in determining its power to summon in writing any witnesses or evidence. The Panel therefore decided that it was capable of issuing an order to compel the judges to remain in Salt Lake City until the matter was resolved. The Panel did not think it was necessary to make a request to the United States courts as the applicant had requested. The outcome of the CAS decision resulted in the ISU and the IOC awarding a co-gold medal to the Canadian pair for the event and suspending the French judge for her misconduct.

## VI. PROCESS OF INDEPENDENCE FROM THE NATIONAL SYSTEM

Elite athletes at the international level represent a somewhat unique combination of private international law. The athlete will be a member of a particular national sports organization (NSO). That body will either in turn be a member of an IF in the same discipline or the athlete themselves may be a direct member of the IF. In either event, the principal actors in international

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69. COA / ISU CAS OG 02/004.

70. 9 U.S.C. §§ 1-14.

sports arbitration are non-government agents comprising of individual athletes, NSOs from time to time, and IFs. However, doping matters in particular are part of the international sports arbitration system under the color of the national government from whence the athlete is a citizen or resident. This is caused by two features. First, the athlete will frequently compete internationally as an elite participant in sport<sup>71</sup> and not as a representative of the country of citizenship or residence. However, the NSO of which the athlete is a member will also be a participant through its IF in the international arbitration process. Therefore, sports law tends to have both individual and non-governmental entities involved while, at least in doping matters, the state may also have involvement as a consequence of the national adherence to the WADC. Therefore, while there is no direct link to the national government, the shadow of national governments is certainly evident in many international arbitration matters in sport,<sup>72</sup> particularly in the anti-doping arena.

Article 13 of the WADC sets out a codified standard for when a CAS appeal is permitted in the context of decisions related to doping offenses. Article 13.1.1 gives WADA the right to bring an appeal directly to CAS when no party to a dispute has appealed the arbitration award that was initially rendered and it involves a doping matter and an international level athlete. Such an athlete also has under Article 13.2.1 a right to appeal decisions which would have been made by the NSO, or, if their authority from the IF has been delegated to a National Anti-Doping Organization (NADO), directly to CAS in accordance with the NSO's and IF's arbitral provisions. This provision, together with R. 47 of the CAS Code, provides for the exhaustion of all internal appeal mechanisms before an appeal from the national or first instance level to the CAS can be allowed. Article 13.2.2 of the WADC provides that national-level athletes may appeal decisions to an independent tribunal established within the guidelines of the relevant NADO.<sup>73</sup> There is no allowance provided to national-level athletes to appeal directly to CAS.

The rationale behind the different treatment toward the two groups of athletes is based on the varying needs for harmonization and consistency.

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71. Many professional sportsmen in golf, tennis, and other sports tend to compete within the sport not as a representative of their country but certainly identified with the country. For example, most tennis fans would identify Rodger Federer as being of Swiss nationality but he is frequently not competing as a member of a Swiss team or for the Swiss NOC.

72. Abbas Ravjani discusses these ideas. Abbas Ravjani, *The Court of Arbitration for Sport: A Subtle Form of International Delegation*, 2 J. INT'L MEDIA & ENTERTAINMENT LAW 241, 255 (2009).

73. For example see Article 7 in the Canadian Sport Dispute Resolution Code authored by the Sport Dispute Resolution Centre of Canada, which sets out the arbitration procedures for appeals arising from decisions that were issued under the Canadian Anti-Doping Program.

International-level athletes must be subject to standardized sanctions for doping infractions in order to ensure harmonization in the sport and amongst sports disciplines, thereby avoiding different sanctions being administered for similar infractions at the international level in a given sport.<sup>74</sup> Otherwise, scenarios could arise where one NSO or NADO could administer more lenient sanctions on its athletes in order to remain competitive<sup>75</sup> or conversely impose harsher ones toward an individual athlete for political or other reasons. National level decisions only need to remain consistent within each particular country. Additionally, a large burden would be placed on CAS if allowances were made for each and every national-level athletes to bring their appeals to the court.

An example of the distinction between the two classes of athletes is illustrated in *IAAF v. FIDAL*.<sup>76</sup> This case involved a national-level athlete. CAS held that the IAAF rules provided that only a decision made by a national-level review body could be appealed by the IAAF to CAS in the case of a decision regarding a national-level athlete. The IAAF rules allowed for an appeal directly to CAS only if the Italian Track and Field Federation's (FIDAL) rules allowed for it. The FIDAL rules had no such allowance. Since no appeal had been made to the Federal Appeals Commission, the IAAF was unable to be heard by CAS. If the case had involved an international-level athlete then the IAAF would have been able to appeal directly to CAS.<sup>77</sup>

Another case that touches upon these rules involved Jose Salvador Carmona Alvarez,<sup>78</sup> a Mexican footballer. In that case, Carmona tested positive for a substance that he had previously tested positive for and for which he had already served a one-year suspension. Under FIFA regulations, a player that has committed a second doping violation will receive a lifetime ban from the sport. However, the Mexican Football Association (FMF) Disciplinary Committee failed to impose the lifetime ban. The FMF decision was founded on the fact that Carmona had not been notified of a forty-eight hour allowance to request a B-sample analysis, which was based on a mistaken

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74. See generally *Prusis & LOC / IOC CAS OG 02/001*; see also *Jovanovic / USADA CAS 2002/A/360*.

75. The case involving Prusis, the Latvian bobsledder at the Salt Lake Games, provides an example of the type of situation that needs to be avoided. The FIBT gave the athlete a three-month suspension for a doping infraction that ended in time for him to compete at the Olympics. Jovanovic, an American bobsledder, was handed a nine-month suspension by USADA for a comparable offence and was forced to miss the Games. *Id.*

76. *IAAF / FIDAL CAS 2005/A/946*.

77. See IAAF COMPETITION RULES, at 72, available at <http://www.iaaf.org/mm/Document/imported/42192.pdf> (last visited Feb. 21, 2010).

78. *WADA / Federación Mexicana de Fútbol (FMF) & Carmona Alvarez CAS 2006/A/1149*.

understanding that the B-sample had been destroyed.

The FMF decision was further confirmed by a Mexican national court of arbitration when the FMF appealed the decision of its own Disciplinary Committee to an agency governed by the Mexican Ministry of Public Education (the CAAD). The CAAD disregarded the new information surrounding the B-sample and rejected the appeal.

FIFA requested that WADA exercise its right to lodge an appeal with CAS under Article 13.1.1 of the WADC against the FMF decision. CAS heard the matter and in its ruling decided to treat Carmona as an international-level athlete. Therefore, the FIFA regulations applied to Carmona and CAS enforced the lifetime ban. The result was that there was a national ban that was less onerous in nature than the international ban, which was applied to the athlete whenever he attempted to compete outside of Mexico.

## VII. EVOLUTION OF THE IOC DISCIPLINARY PROCESS

The mission of the IOC is to promote Olympism throughout the world and lead the Olympic Movement.<sup>79</sup> The supreme authority of the Olympic Movement is the IOC, which is headquartered in Lausanne, Switzerland. The IOC has many roles as set out in Rule 2 of the OC. The overarching role of interest in this Article is that of the IOC to decide and enforce the rules surrounding the administration and development of the Olympic Movement. This includes the rules concerning the fight against doping in sport. At the Olympic Games, the IOC is the doping watchdog for the Olympic Movement and will commence action against any athlete that has violated the anti-doping regulations put in place for the Games, which in essence mirror those of the WADC.<sup>80</sup>

The Charter, in Chapter 2 Rule 19, provides for the establishing of the IOC Executive Board and its composition and powers. Rule 20 provides for how the President of the IOC is chosen from amongst the members of the IOC. For the purposes of this Article we are interested in Rule 23 in regard to “Measures and Sanctions.” Section 2 of that rule provides that in “the context of the Olympic Games, in the case of any violation of the OC, the World Anti-Doping Code, or any other decisions or applicable regulation issued by the IOC or any IF or NOC. . .” the IOC Executive Board may delegate its powers to a DC.<sup>81</sup> At the Olympic Games the DC conducts a hearing and determines

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79. See OLYMPIC CHARTER, at 14, available at [http://www.turin2006.com/Documents/Reports/E/En\\_report\\_122.pdf](http://www.turin2006.com/Documents/Reports/E/En_report_122.pdf) (last visited Feb. 20, 2010).

80. *Id.* at 83.

81. *Id.* at 52; see also *NOC of Sweden & Abrahamian / IOC CAS 2008/A/1647*.



the facts after which it makes a recommendation to the IOC Executive Board as to how it thinks the case ought to be disposed of by the Board.

Historically, until the advent of the AHD, there was no appeal from a decision of the Executive Board based upon the recommendations of the DC. Prior to the inception of the AHD at the 1996 Summer Olympics in Atlanta, an internal IOC process dealt exclusively with all violations of the OC. For example, at the 1988 Summer Olympics in Seoul, Canadian sprinter Ben Johnson tested positive for stanozolol immediately after his world record run in the 100 meter event. Upon discovery of the positive test, the DC convened and deliberated the matter. Johnson attended the meeting and maintained his innocence, claiming that a pre-race drink must have been spiked. The DC provided evidence discounting Johnson's explanation. The DC recommended to the IOC Executive Board that Johnson be disqualified and his medal returned. The very next day the IOC declared Johnson's result null and rescinded his medal, which was awarded to the second place runner, Carl Lewis.

The pre-AHD IOC Disciplinary Process operated similarly to the AHD disciplinary process in terms of basic mechanics. Upon identification of a positive sample, the IOC Medical Commission informed the IOC Executive Board. The IOC Executive Board would then decide whether or not to take action against the athlete. If action was decided upon then a DC would be established and hold a meeting to hear from the athlete and examine the validity of the evidence against the athlete. Based on the findings of the meeting, the DC would make its recommendations to the IOC Executive Board which would then render a decision. Therefore, the AHD process is substantially more streamlined than the pre-AHD process.

Final and binding decisions are now passed by the independent AHD. Advocates of the AHD argue that this provides for unbiased decisions based on the independence of the AHD from the IOC. Furthermore, there was no impetus on the pre-AHD process to deliver verdicts within a twenty-four hour period, unlike the AHD process which has adopted this as a top priority. Another significant difference between the two processes is that the AHD process provides for arbitrators to constitute the AHD and be present at the Games. The pre-AHD process did not have designated arbitrators; instead, a DC was established and heard the evidence.

In 1995, the OC was amended to accommodate the establishment of the AHD. Specifically, Rule 59 of the OC states that "any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the *Code*

*of Sports-Related Arbitration.*"<sup>82</sup> The functioning of the AHD is governed by a set of rules (the AHD Rules) for those particular Games.

The AHD acts as an appeal body for disputes arising during the Olympic Games. While the DC still exists and still has the authority to take action against breaches of the OC, pronouncements from the IOC are no longer final and binding. The creation of the AHD in 1995 significantly altered the once unchallenged base of the IOC's disciplinary authority. According to Article 1 of the Arbitration Rules for the Olympic Games, an athlete can request arbitration against a decision pronounced by the IOC, an NOC, an IF, or an OCOG through the AHD.<sup>83</sup> The IOC DC's decisions are thus no longer set in stone; athletes have the option to appeal the decision. This represents a significant change in the composition of the IOC. The creation of the AHD signalled a loosening of the IOC's once indisputable authority. This change in direction has insured that decisions are impartial and transparent. The ability to appeal an IOC decision makes it less likely than before that an unfair or biased decision will slip through the cracks. Over the years since the Atlanta Games there has been an increasingly more sophisticated process in use.

Specifically, it is the IOC's Executive Board that decides all matters of doubt or dispute that are of a non-technical nature concerning the Olympic Games or the Olympic Movement. The IOC has the power to take action itself, or at the behest of one of its members. Rule 19 of the OC dictates the composition of the Executive Board and outlines its powers. According to article 1 of the Bye Law to Rule 19, it is the President of the IOC who is responsible for the organization and preparation of all IOC Executive Board meetings. Rule 23 outlines the sanctions and measures attached to any violation of the OC or the WADC. Article 2.4 of Rule 23 allows the IOC Executive Board to delegate its powers to a DC, which has become the accepted procedure in the case of doping violations. Article 2.1 of Rule 23 provides the Executive Board with disciplinary powers such as imposing a period of ineligibility and the ability to revoke medals or prizes.

The case of the Spanish cross-country skier Johann Muehlepp is an excellent example of the IOC disciplinary process in action and also of the relationship between the IOC and CAS. Muehlepp, formerly a German citizen, was competing for Spain in three cross-country skiing events at the 2002 Winter Olympics in Salt Lake City. Muehlepp tested positive for

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82. *Id.* at 98-101.

83. The ICAS had enacted procedural rules governing the activities of the Olympic Division for the Atlanta Games. These rules were an integral part of the CAS Code of Sports-related Arbitration. See KAUFMANN-KOHLER, *supra* note 15 at 107. The current version of the CAS Arbitration Rules for the Olympic Games was adopted by the ICAS on October 14, 2003.

darbepoetin in an out of competition test two days before his involvement in the 50 km cross-country event. Upon discovery of his positive A sample, five members of the IOC Executive Board convened as a DC. The DC recommended to the Chairman of the IOC Executive Board that Muehlegg be disqualified from the 50 km event, that the gold medal obtained in that event be returned and that he should be excluded from the remainder of the games. The IOC Executive Board accepted the facts and the recommended sanctions.

This case is unique in that the DC initially let Muehlegg keep his medals from the two events that he participated in before testing positive. It is likely that the IOC arrived at this decision based on the fact that the athlete tested negative on February 6, 2002 in Salt Lake City prior to the Games. Additionally, the athlete was subject to regular in-competition testing during the Games from which no action was brought on behalf of the IOC. The case was then appealed to CAS,<sup>84</sup> who upheld the IOC decision, even going so far as to allow the athlete to keep his two gold medals from the previous events.

However, the fate of Muehlegg's two remaining gold medals was to take a turn based on the outcome of a related CAS hearing, that of Beckie Scott.<sup>85</sup> Scott's CAS hearing had originally been suspended with the parties' agreement, pending the outcome of the three Salt Lake cross-country skiers' cases.<sup>86</sup> After final awards had been rendered dismissing the appeals in those three cases, the parties agreed to consolidate the two proceedings<sup>87</sup> with a single panel of three arbitrators to be appointed.<sup>88</sup>

CAS ruled that the IOC decision to allow athletes to retain medals from a set of Games in which they later tested positive was wrong and that the athlete should have been disqualified from all events. CAS reasoned that it would be contrary to the fundamental principles of the Olympic Movement as outlined in the OC to allow an athlete excluded from Olympic Games for doping to retain any Olympic medals gained at such games. This conclusion was in stark contrast to that of the original IOC sanction. It seems that the CAS was intent on using this case as an opportunity to establish a strong deterrent against the use of performance enhancing drugs. The IOC decision in comparison seems significantly less heavy handed. Deterrence is, however, an effective weapon in the fight against doping, and as a result the integrity and purity of sport would seem to benefit from such strict tactics.

This case demonstrates exactly the devolving power that the IOC has

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84. *M. / IOC CAS 2002/A/374.*

85. *COC & Scott / IOC CAS 2002/O/373. See discussion supra Part V.*

86. *M. / IOC CAS 2002/A/374.*

87. The consolidated cases were CAS 2002/A/372 and *COC & Scott / IOC CAS 2002/O/373.*

88. *Id.*

developed in terms of decentralizing authority. Whereas the IOC was once the sole authority when it came to handing down sanctions for breaches of the OC, in the Muehlegg case the IOC largely took a backseat, preferring instead to accept recommendations and findings of the CAS. The development of the CAS has brought with it a concomitant reduction in the prominence and power of the IOC and its DC.

Another unique case that was initially brought before the IOC DC is that of the Swedish Greco-Roman Wrestler Ara Abrahamian, discussed earlier in this Article. In that matter, the DC found that the athlete acted contrary to the ideals of the Olympic Movement based on his actions at the medal ceremony. The DC recommended that he be disqualified from the event, excluded from the remainder of the Games, and stripped of his Olympic accreditation and identity card. The Executive Board accepted the results. The athlete appealed to CAS,<sup>89</sup> seeking a reduced penalty based on certain mitigating factors surrounding his actions. The CAS rejected the appeal.

This case is of particular interest because of the jurisdictional struggle that accompanies it. The athlete sought to use an officiating error as justification to have the penalty reduced. However, the IOC's jurisdiction does not extend to disputes which arise from sports rules and officiating at a bout, instead this area falls within the jurisdiction of the IFs. The IOC's jurisdiction is the medal ceremony. Therefore, the IOC cannot rule on the occurrences during the bout which the athlete argued influenced his actions. The athlete's submission that his conduct was caused by an error in officiating falls on deaf ears since the IOC can only take into account his conduct at the medal ceremony. This case is thus an interesting example of an apparent limitation in the jurisdiction of the IOC disciplinary process since the IOC, and also CAS, would not have been able to find in the athletes favor even if his arguments were legitimate.

#### VIII. DEVELOPMENT OF THE AHD OUTSIDE THE OLYMPIC GAMES

In 1996, ICAS created an AHD for the purpose of settling disputes within a twenty-four hour period. An AHD was also created for the Commonwealth Games in Kuala Lumpur in 1998. AHDs have been established for each subsequent set of Commonwealth Games, including the upcoming 2010 games in India.

During the Commonwealth Games, any disputes arising from an athlete's participation in the Games are to be resolved by the athlete's Commonwealth Games Association or the IF governing the sport. The dispute can be appealed

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89. *NOC of Sweden & Abrahamian / IOC CAS 2008/A/1647.*

to the Commonwealth Games AHD for a final and binding arbitration, in accordance with the Arbitration Rules for that particular set of Games. Resolution of disputes shall be by means of a panel set up in accordance with the Rules. The panel may make a final award, grant preliminary relief, or refer the dispute to the regular CAS procedure. Like the Olympics, the Commonwealth Games have CAS arbitrators on site at the Games. The arbitration process itself is identical to that at the Olympics, with a panel of three arbitrators presiding over the hearings.

An application to the AHD arose at the 2002 Commonwealth Games in Manchester in the case of *G. v. Commonwealth Games Canada (CGC) & Triathlon Canada (TC)*.<sup>90</sup> The matter involved a triathlete representing Canada who had a positive pre-games doping test and was subsequently removed from the Games by the Canadian Centre for Ethics in Sport (CCES). TC had delegated the authority and responsibility for carrying out doping control procedures to the CCES. The athlete made a request to the CGC and TC to be reinstated on the ground that he had been suspended without having had a fair hearing. The request was not complied with and so the athlete sought relief by appealing to CAS.

The issues raised at the CAS hearing centered on whether the athlete's removal from the triathlon team was valid and whether the CAS Panel had the jurisdiction to make such a determination. The Panel ruled that it had jurisdiction to hear the dispute based on a clause in the athlete's entry form listing CAS as the final and binding body to settle any disputes. Since CGC was the sole authority to submit competitors' entry forms, doing so on behalf of TC, both organizations agreed to be bound by the conditions of the entry form including the dispute resolution mechanism. The AHD Panel heard the matter and dismissed the application.

Outside of athletics, FIFA recognized the CAS's jurisdiction in 2002, giving CAS a very broad jurisdiction as outlined in Article 60-1 of the FIFA Statutes. CAS established the first World Cup AHD for the 2006 tournament held in Germany. The World Cup AHD differed from that found at the Olympics since the members of the division were not based in Germany, but instead were ready to travel to Germany once a case was referred. Another difference was that cases were to be decided in forty-eight hours instead of twenty-four hours. This is likely because of the low number of anticipated cases during the World Cup. The President of the World Cup AHD was Judge Jean-Jacques Leu of Switzerland. Upon a case being referred, he was required to appoint a three-member panel that would hear the case. The members of this panel were to be selected from a pool composed of CAS arbitrators based

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90. *G. / CGC & TC CG 02/001*.

in Europe. This pool of arbitrators was drawn up by the CAS office in Lausanne. It is interesting to note that no cases were actually referred to the World Cup AHD during the 2006 tournament. This could partially be a result of the infancy of the division. It will be informative to observe the impact of this trend at the 2010 tournament.

Additionally, CAS was asked by the football governing body of Europe, UEFA, to create an AHD for the 2000 European Cup Finals held in Belgium and the Netherlands. CAS has also established AHDs at the 2004 and 2008 European Cup Finals held in Portugal, and Austria and Switzerland respectively. CAS was given jurisdiction to deal with any disputes between UEFA, football clubs, players, officials, or national leagues.

#### IX. CONCLUSION

Twenty-five years ago CAS was merely a glimmer of something to bring about change. CAS began as an idea and has evolved, as its originators hoped, as the world supreme court for sport. Today it is recognized by every international Olympic sporting organization and many non-Olympic ones as the final and binding appeals body for disputes in sports. An AHD has been established at the largest world international sporting competitions including the Olympic Games, Commonwealth Games, and World Cup. CAS has heard appeals involving and made rulings against the IOC, which convincingly established its independence from its founding origins. It has provided advisory opinions to the largest IFs on pressing matters that have shaped those sports. Further, the Swiss Federal Tribunal has repeatedly ruled on the credibility of the CAS decisions and in large measure has endorsed the procedures and process by which it makes its awards thereby leaving them to go unchallenged.

The next quarter century will be a process of consolidating the gains to date. Where CAS goes from here remains to be seen. The mediation services offered by CAS present an opportunity to further contribute a vital and needed process to world sport which would also expand the reputation of the organization beyond sporting federations and into the business side of the sporting world. The CAS has not yet refused to hear a matter for being outside the realm of sports law. As even more complex and diverse matters are raised to CAS, the organization will no doubt play a significant role in the advancement of *lex sportiva*. One can only speculate what developments will continue to enhance the CAS in the future. For now, we all must anxiously await to see the standing of the court at its fiftieth anniversary.

