

The Court of Arbitration for Sport and its Global Jurisprudence: International Legal Pluralism in a World Without National Boundaries

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ABSTRACT *This article considers an issue of global importance that has received little scholarly attention: whether the Court of Arbitration for Sport (CAS), whose developing body of lex sportiva is a form of international legal pluralism, provides an appropriate level of procedural fairness and substantive justice to the world's athletes, who are subject to its jurisdiction as a condition of their participation in Olympic and international sports competition. It provides an overview of the CAS arbitration system and the very limited scope of national judicial review of its arbitration awards decisions. It concludes that the CAS is a procedurally fair private legal system for resolving Olympic and international sports disputes that generally provides substantive justice to athletes, thereby justifying judicial deference to its adjudications along with their recognition and enforcement by sovereign nations. It also makes some recommendations for internal CAS reforms to better achieve these objectives.*

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*D. Timely, Reasoned, and Final Decisions**E. Clearly Articulated Uniform Body of Law With Consistent, Predictable Application*

1. *Doping Violations and Sanctions*
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VI. CONCLUSIONS AND RECOMMENDATIONS

I. INTRODUCTION

The primary objective of this article is to analyze whether the Court of Arbitration for Sport (CAS), a private independent international arbitration tribunal based in Lausanne, Switzerland, provides an appropriate level of procedural fairness and substantive justice to the world's athletes, who are subject to its jurisdiction as a condition of their participation in Olympic and international sports competition, to justify an exceptional degree of judicial deference by national courts and sovereign countries' recognition and enforcement of its arbitration awards. This has enabled the development and evolution of a separate body of Olympic and international sports law jurisprudence by the CAS that is based primarily on underlying private agreements, which constitutes a form of global legal pluralism¹ that coexists with—and sometimes displaces—sovereign national laws. Thus far, however, there has been little scholarly analysis of this phenomenon and its implications for the resolution of disputes with international dimensions by private tribunals rather than international or national courts.

The International Olympic Committee (IOC), a private association based in Lausanne, Switzerland, has exercised monolithic rulemaking and governing authority over Olympic sports competition throughout the world

¹ See generally GUNTHER TEUBNER, *GLOBAL LAW WITHOUT A STATE*, xiii (1997) (“[The] globalization of law creates a multitude of decentred law-making processes in various sectors of civil society, independently of nation-states.... They claim worldwide validity independently of the law of nation-states and in relative distance to the rules of international public law. They have come into existence not by formal acts of nation-states but by strange paradoxical acts of self-validation.”); Matthew J. Mitten & Hayden Opie, “*Sports Law*”: *Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution*, 85 *TUL. L. REV.* 269, 289 (2010) (“For legal theorists, the evolving body of *lex sportiva* established by CAS awards is an interesting and important example of global legal pluralism without states, arising out of the resolution of Olympic and international sports disputes between private parties.”).

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since 1894.² There are no sport-specific national laws that directly regulate the IOC or the International Federations (IFs), which individually oversee a particular sport or related sports on a worldwide basis, international and national legislative bodies generally permit the IOC and IFs to govern their own affairs without government intervention.

Although Olympic athletes have a voice and representation on IOC rule and bodies, they lack any collective veto power and must “agree to” the eligibility rules (including anti-doping rules established by the World Anti-doping Agency) and dispute resolution processes chosen by the IOC as a condition of having the opportunity to participate in Olympic sports competition. The CAS arbitration system, which was established by the IOC in 1983,³ resolves the merits of virtually all disputes involving Olympic sport athletes with very limited judicial review by the Swiss Federal Tribunal (Switzerland’s highest court) and other national courts.⁴ Even if they have jurisdiction, courts generally are reluctant to apply national public laws in a manner that constrains the plenary governing authority of these international sports bodies in their relations with athletes, or that precludes or invalidates the final and binding resolution of disputes by the CAS.

Section II of this Article provides a brief description of the international governing structure and rulemaking processes for Olympic sports as well as the historical reluctance of national courts to use domestic non-sports specific public laws to externally regulate Olympic sports. Section III provides an overview of the CAS arbitration system and the very limited scope of national judicial review of its decisions. Section IV proposes several requirements that a procedurally fair and substantively just private legal system for resolving Olympic and international sports disputes should have, thereby justifying judicial deference to its adjudications along with recognition and enforcement by sovereign nations. Section V analyzes whether the CAS arbitration system generally satisfies these requirements. This Article concludes by determining that it does, while suggesting some potential reforms to enhance the existing level of procedural fairness and substantive justice the CAS arbitration system provides to athletes.

² See generally MATTHEW J. MITTEN, TIMOTHY DAVIS, RODNEY K. SMITH & N. JEREMI DURU, *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 259–62 (3d ed. 2013).

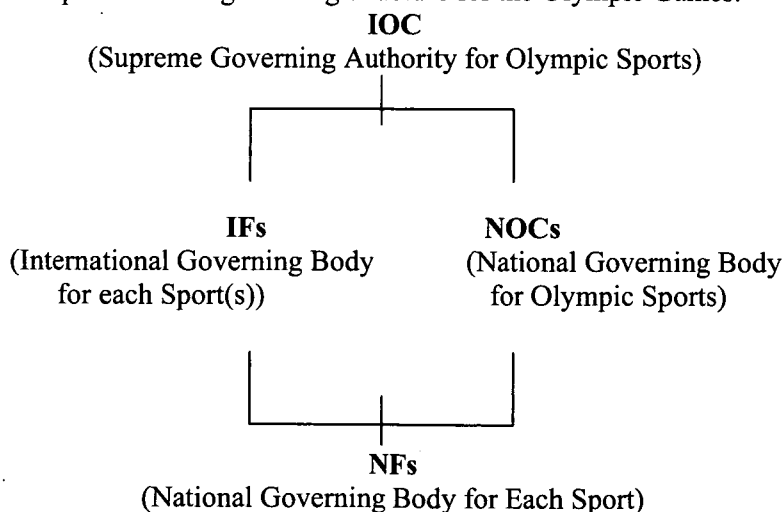
³ *Origins*, CAS, <http://www.tas-cas.org/history> (last visited Sept. 4, 2014).

⁴ See *infra* notes 81–90.

II. OLYMPIC SPORTS INTERNAL GOVERNANCE STRUCTURES AND RULEMAKING PROCESSES

The modern Olympic Movement “is the concerted, organised, universal and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympism,” which “is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind.”⁵ It “[b]lend[s] sport with culture and education” and “seeks to create a way of life based on the joy of effort, the educational value of good example, social responsibility and respect for universal fundamental ethical principles.”⁶ In addition to the IOC, the Olympic Movement includes IFs, the international governing bodies for each Olympic sport; National Olympic Committees (NOCs), such as the United States Olympic Committee (USOC); National Federations (NFs) for each Olympic sport recognized by each NOC (for example, USA Track & Field); thousands of individual athletes, judges, and coaches who are members of the NFs for their respective Olympic sports; and others.⁷

The following diagram illustrates that a series of hierarchical contractual relationships define the governing structure for the Olympic Games:



⁵ INT’L OLYMPIC COMM., OLYMPIC CHARTER, 11 (entered into force Sept. 9, 2013) [hereinafter OLYMPIC CHARTER], available at http://www.olympic.org/Documents/olympic_charter_en.pdf.

⁶ *Id.*

⁷ *Id.* R. 1(1)–(3), at 15.

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The Olympic Charter codifies the fundamental principles, rules, and bylaws adopted by the IOC, and it establishes the framework for governance of the Olympic Movement and operation of the Olympic Games.⁸ It states that the IOC, an “international non-governmental not-for-profit organisation”⁹ is the “supreme authority” of the Olympic Movement,¹⁰ and that all members of the Olympic Movement are “bound by the provisions of the Olympic Charter and shall abide by the decisions of the IOC.”¹¹

The IOC currently has 105 members,¹² all whom are individuals who “represent and promote the interests of the IOC and of the Olympic Movement in their countries.”¹³ The total number of IOC members cannot exceed 115; no more than 15 of them may be active athletes who are members of the IOC Athletes’ Commission.¹⁴ The duties of IOC members include adopting and amending the Olympic Charter, electing the IOC president, vice presidents, and other members of the executive board, and collectively making final decisions on behalf of the IOC.¹⁵

The IOC Athletes’ Commission “serves as a consultative body and is the link between active athletes and the International Olympic Committee.”¹⁶ It represents athletes within the Olympic Movement and to ensure that their interests are protected. A majority of the Commission’s members must be athletes who are elected by Olympic athletes;¹⁷ elections of new members occur when the Games of the Olympiad (i.e., Summer Games) and the Olympic Winter Games are held.

⁸ *Id.* at 9.

⁹ *Id.* R. 15, at 31.

¹⁰ *Id.* R. 1(4), at 16.

¹¹ *Id.*

¹² *IOC Members*, OLYMPIC.ORG, <http://www.olympic.org/content/the-ioc/the-ioc-institution/ioc-members-list/> (last visited May 5, 2013).

¹³ OLYMPIC CHARTER, *supra* note 5, R. 16(1.4), at 33.

¹⁴ *Id.* R. 16(1.1), at 32. New IOC members are elected by the IOC’s existing membership for renewable eight-year terms after being submitted as candidates by “IOC members, IFs, associations of IFs, NOCs, world or continental associations of NOCs and other organisations recognised by the IOC,” reviewed by the IOC Nominations Commission, and proposed by the IOC Executive Board. *Id.* R. 16, Bye-law 2.1, at 36–37.

¹⁵ *Id.* R. 18, at 41.

¹⁶ *Athletes’ Commission*, OLYMPIC.ORG, <http://www.olympic.org/athletes-commission> (last visited May 5, 2013).

¹⁷ OLYMPIC CHARTER, *supra* note 5, R. 21, Bye-law 1, at 48–49.

The governance of Olympic sports is based on the European model of sports, a hierarchical, inverted pyramid model in which each sport is governed vertically on a global basis by an international body with corresponding transnational, national, regional, and local federations.¹⁸ Each of the 64 IFs currently recognized by the IOC are international nongovernmental organizations that function as the worldwide governing body for a particular sport (or a related group of sports), and each one's respective members are the NFs that administer the particular sport(s) in each country.¹⁹ An IF's statutes, practices, and activities, including its athlete eligibility criteria for the Olympic Games, must conform to the Olympic Charter and be approved by the IOC; each IF must adopt and implement the World Anti-Doping Code (WADC).²⁰ Subject to these requirements, "each IF maintains its independence and autonomy in the administration of its sport."²¹

The more than 200 NOCs develop and protect the Olympic Movement within their respective countries consistent with the Olympic Charter and are required to adopt and implement the WADC.²² Each NOC "is obliged to participate in the Games of the Olympiad by sending athletes."²³ An NOC "has exclusive authority regarding the representation of its country at the Olympic Games" and selects its athletes based on the recommendations of its recognized NF for the particular sport.²⁴

An NF²⁵ is the national governing authority for a particular sport that is a member of the corresponding IF and is recognized by the country's NOC.²⁶ NFs must comply with the Olympic Charter and their respective IF's rules as

¹⁸ See generally James A.R. Nafziger, *European and North American Models of Sports Organization*, in HANDBOOK ON INTERNATIONAL SPORTS LAW 90–93 (James A.R. Nafziger & Stephen F. Ross eds., 2011); LARS HALGREEN, *EUROPEAN SPORTS LAW: A COMPARATIVE ANALYSIS OF THE EUROPEAN AND AMERICAN MODELS OF SPORT* (2004).

¹⁹ OLYMPIC CHARTER, *supra* note 5, R. 25, at 53.

²⁰ *Id.* See WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE (entered into force Jan. 1, 2009) [hereinafter WADC], available at https://wada-main-prod.s3.amazonaws.com/resources/files/wada_anti-doping_code_2009_en_0.pdf.

²¹ OLYMPIC CHARTER, *supra* note 5, R.25, at 53.

²² *Id.* R. 27, at 57–58.

²³ *Id.* R. 27(3), at 58.

²⁴ MITTEN, DAVIS, SMITH & DURU, *supra* note 2, at 260.

²⁵ In the U.S., National Governing Body (NGB) is the commonly used terminology.

²⁶ MITTEN, DAVIS, SMITH & DURU, *supra* note 2, at 260–61.

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well as “exercise a specific, real and on-going sports activity.”²⁷ The NFs serve a function at the national level similar to that of the IFs at the international level of athletic competition.

The Olympic Charter provides that “the practice of sport is a human right”²⁸ and requires all NOCs to ensure that no athlete “has been excluded for racial, religious or political reasons or by reason of other forms of discrimination.”²⁹ However, no athlete “is entitled as of right to participate in the Olympic Games” and his or her “entry is subject to acceptance by the IOC, which may at its discretion, at any time, refuse any entry, without indication of grounds.”³⁰ To be eligible to participate in the Olympic Games, a competing athlete must satisfy several conditions, including being a national of the country of the NOC that is entering him³¹ and complying with the eligibility requirements of the Olympic Charter and IF for the subject sport.³² All athletes must “respect the spirit of fair play and non-violence, and behave accordingly” on the sports field as well as fully comply with the WADC.³³

Historically, courts have been reluctant to use general national laws (i.e., statutes not specifically applicable to sports) protecting individual civil liberties to externally regulate Olympic sports competition within their respective countries’ boundaries or to interfere with valid decision and rulemaking authority, even if the challenged conduct of the IOC subjects it to the court’s jurisdiction. As one scholar has observed, “[t]he IOC increasingly acts [as] a global legislator in international sport, setting common standards.”³⁴ Courts generally defer to the IOC’s private plenary authority rather than judicially invalidating its rules, even if they allegedly violate athletes’ civil liberties as defined under their national laws. For example, in *Martin v. International Olympic Committee*,³⁵ the Ninth Circuit rejected plaintiffs’ claims that not including the same 5,000 and 10,000-meter track

²⁷ OLYMPIC CHARTER, *supra* note 5, R. 29, at 63.

²⁸ *Id.* at 11.

²⁹ *Id.* R. 44(4), at 80.

³⁰ *Id.* R. 44(3), at 79.

³¹ *Id.* R. 41, at 78.

³² *Id.* R. 40, at 77.

³³ *Id.*

³⁴ Ken Foster, *Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport’s Jurisprudence*, in *THE COURT OF ARBITRATION FOR SPORT 1984–2004*, 420, 438 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds., 2006).

³⁵ 740 F.2d 670, 673 (9th Cir. 1984).

events for women that existed for men in the 1984 Los Angeles Olympic Games constituted illegal gender discrimination. The court explained: “[W]e find persuasive the argument that a court should be wary of applying a state statute to alter the content of the Olympic Games. The Olympic Games are organized and conducted under the terms of an international agreement—the Olympic Charter.”³⁶

Consistent with *Martin*, the British Columbia Court of Appeal rejected a similar gender discrimination claim under Canadian law in connection with the 2010 Vancouver Olympic Games. In *Sagen v. Vancouver Organizing Committee for the 2010 Olympic & Paralympic Winter Games*,³⁷ the court ruled that the IOC's decision not to include women's ski jumping as an event in the Vancouver Games (while including men's ski jumping events) did not violate the Canadian Charter of Rights and Freedoms.

III. OVERVIEW OF CAS ARBITRATION SYSTEM AND ITS LEGAL RECOGNITION

The Olympic Charter states that “any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively” to the CAS.³⁸ As a condition of participating in the Olympic Games, athletes

³⁶ *Id.* at 677. Adopting a similar deferential approach, U.S. courts have rejected state discrimination law claims by foreign athletes seeking to march in Olympic Games opening ceremonies held in the United States under flags of countries not recognized by the IOC. *See, e.g., Spindulys v. Los Angeles Olympic Organizing Comm.*, 175 Cal. App. 3d 206, 220 Cal. Rptr. 565 (Cal. App. 1985); *Ren-Guey v. Lake Placid 1980 Olympic Games*, 72 A.D.2d 439, 424 N.Y.S.2d 533, *aff'd*, 49 N.Y.2d 771, 429 N.Y.S.2d 473 (1980).

³⁷ *Sagen v. Vancouver Org. Comm. For the 2010 Olympic & Paralympic Winter Games*, 98 B.C.L.R.4th 141 (Can. B.C.). The Supreme Court of Canada refused appellants' leave to appeal. *Sagen v. Vancouver Org. Comm. for the 2010 Olympic & Paralympic Winter Games*, 2009 Carswell BC 3468 (Can. S.C.C.) (WL).

³⁸ OLYMPIC CHARTER, *supra* note 5, R. 61(2), at 105. More broadly, it also provides that any disputes regarding the IOC decisions or its application or interpretation of the Olympic Charter are to be submitted to the CAS for resolution. *Id.* R 61(1), at 105. However, national courts or arbitration systems generally are used to resolve purely domestic disputes between athletes and their respective NOCs and/or NFs regarding their eligibility or qualifications to be selected for the country's Olympic team. *See, e.g., Arbitration CAS ad hoc Division (O.G. Sydney 2000) 007, Sieracki v IOC*, award of 21 September 2000 in CAS Awards—Sydney 2000 at 81 (recognizing withdrawal of U.S. athlete's appeal because underlying dispute with USA Wrestling and USOC resolved by American Arbitration Association arbitration award, the validity of which was confirmed by U.S. court).

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are required to submit any disputes in connection therewith to the CAS for final resolution.³⁹ Outside of the Olympic Games, virtually all IFs have agreed to CAS jurisdiction and their rules generally require their respective NFs and athletes to submit all disputes with the IF to CAS arbitration.⁴⁰ All disputes arising out of the application, interpretation, or enforcement of the WADC (e.g., international athlete doping violations and sanctions) also are resolved by CAS arbitration.⁴¹

The CAS's jurisdiction and authority as an arbitration tribunal is based on agreement of the parties;⁴² its origin and association with the Olympic Movement have facilitated its recognition and acceptance as the world's "supreme court for sport." Courts generally will enforce a written arbitration agreement requiring that the parties submit a dispute to CAS for resolution as well as IOC or IF rules requiring arbitration before the CAS as a condition of participating in an Olympic or international athletic competition, which bars an athlete from litigating the merits of the subject dispute in a judicial forum.⁴³

The CAS "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 it "ensures fairness and integrity in sport through sound legal control and the administration of diverse laws and philosophies."⁴⁴ Its creation recognizes the need for a unitary international legal system that protects the integrity of Olympic and

³⁹ See OLYMPIC CHARTER, *supra* note 5, R. 40, at 77; see also *id.* R. 61, at 105.

⁴⁰ Cricket currently is the only major international sport that has not done so.

⁴¹ WADC, *supra* note 20, art. 13.2.1.

⁴² CAS, CODE OF SPORTS-RELATED ARBITRATION 8 (2013) [hereinafter CODE], R27, available at [http://www.tascas.org/d2wfiles/document/4962/5048/0/Code20201320corrections20finales20\(en\).pdf](http://www.tascas.org/d2wfiles/document/4962/5048/0/Code20201320corrections20finales20(en).pdf). See *supra* notes 39–41 and accompanying text.

⁴³ *N. v. Federation Equestre Internationale* (Swiss Federal Tribunal 1996), in DIGEST OF CAS AWARDS 1986–1998 585 (Reeb, ed. 1998); *Raguz v. Sullivan*, 2000 NSW LEXIS 265 (Sup. Ct. NSW, Ct. of Appeal 2000); see also *infra* notes 79 and accompanying text. *But see Slaney v IAAF*, 244 F.3d 580, 591 (7th Cir. 2001) (observing that valid written agreement to arbitrate before a foreign sports arbitral tribunal is enforceable in the U.S. under an international treaty, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but "[w]hether Slaney's written agreement to follow the rules of the USATF [U.S. NGB for track and field] would satisfy the requirement of an agreement in writing for purposes of enforcing an arbitration agreement with the IAAF [IF for track and field] is a question we need not resolve").

⁴⁴ Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes*, 35 VAL. U. L. REV. 379, 381 (2001).

international athletics competition, while also safeguarding athletes' legitimate rights and adhering to fundamental principles of natural justice.⁴⁵

In 1994, the International Council of Arbitration and Sport (ICAS), a group of 20 distinguished jurists or international lawyers with a background in sports or arbitration,⁴⁶ was created pursuant to a multi-party agreement between the IOC, the Association of Summer Olympic International Federations, the Association of International Winter Sports Federations, and the Association of National Olympic Committees.⁴⁷ The ICAS oversees the CAS, manages its funds, and appoints its member arbitrators (functions that previously were done by the IOC),⁴⁸ as well as promulgates the Code of Sports-Related Arbitration (Code),⁴⁹ which governs the organization, operations, and procedures of the CAS. The purpose of ICAS "is to facilitate the resolution of sports-related disputes through arbitration or mediation and

⁴⁵ Tricia Kavanagh, *The Doping Cases and the Need for the International Court of Arbitration for Sport (CAS)*, 22 UNIV. NEW S. WALES L.J. 721, 723 (1999).

⁴⁶ Most current or former ICAS members "are substantial people in the world of international law," including "cabinet level officials of France, Syria, and Egypt; the president as well as former current judges of the International Court of Justice at the Hague; the president of the Supreme Court of India and a member of Switzerland's [highest court]; two United States federal appellate judges; two presidents of the ICC Court of Arbitration (which is the premier international arbitration body); the president of the Constitutional Court for Bosnia-Herzegovina; [and] the president of the U.S.-Iran claims tribunal at the Hague." Michael Lenard, *The Future of Sports Dispute Resolution*, 10 PEPP. DISP. RESOL. L.J. 173, 176 (2009).

⁴⁷ The ICAS was established in response to dicta in a case decided by the Swiss Federal Tribunal, Switzerland's highest court that expressed concern about the CAS's independence from the IOC. In *G. v. Federation Equestre Internationale* (Swiss Federal Tribunal 1993), in DIGEST OF CAS AWARDS 1986-1998 561 (Matthieu Reeb, ed. 1998), a horse rider challenged the validity of a CAS award affirming the International Equestrian Federation's finding of a doping violation and imposition of a disciplinary sanction. He contended that the CAS was not sufficiently independent and impartial to be considered a valid arbitral authority whose decisions should be given binding legal effect. Finding that "the CAS is a true arbitral tribunal independent of the parties, which freely exercises complete juridical control over the decisions of the associations which are brought before it," the Swiss court upheld the validity of the CAS award and ruled that "the CAS offers the guarantees of independence upon which Swiss law makes conditional the valid exclusion of ordinary judicial recourse." *Id.* at 568-69. Observing that the IOC established the CAS's rules, appointed its members, and paid its operating costs, the court limited its holding to "proceedings conducted before the CAS in which the IOC does not appear as a party." *Id.* at 569.

⁴⁸ The IOC, IFs, and NOCs continue to fund the operations of ICAS and the CAS, but they do not govern or administer either organization.

⁴⁹ CODE, *supra* note 42.

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to safeguard the independence of CAS and the rights of the parties.”⁵⁰ Members of the ICAS cannot serve as CAS arbitrators or represent a party in a case before the CAS.⁵¹

The Code broadly provides that the mission of the CAS is to constitute arbitration panels having “the responsibility of resolving disputes arising in the context of sport” in accordance with its procedural rules.⁵² However, it will not resolve any and all sports-related issues. The CAS generally considers disputes involving a sport’s rules of the game and referee field of play decisions to be non-justiciable to avoid interfering with the autonomy of Olympic and international sports governing bodies to determine or resolve these issues.⁵³

At the site of each Olympic Games, the CAS operates an ad hoc Division, which consists of a pool of CAS arbitrators specifically chosen by the ICAS,⁵⁴ to provide for expedited resolution of all disputes that arise during the Games or during a period of ten days preceding the Opening Ceremony,⁵⁵ including those between an athlete and the IOC or an IF.⁵⁶

⁵⁰ *Id.* at S2.

⁵¹ *Id.* at S5.

⁵² *Id.* at S12. In addition to the ad hoc Division and appeals arbitrations procedures, the CAS also has an ordinary arbitration procedure that is used to resolve sports-related disputes between the parties relating to matters such as sponsorship contracts, television rights to sports events, and contracts between athletes and their agents. *Id.*

⁵³ James A.R. Nafziger, *Defining the Scope and Structure of International Sports Law: Four Conceptual Issues*, INT’L SPORTS L.J. 14, 18 (2011).

⁵⁴ Usually fifteen arbitrators are selected for the Summer Olympic Games and nine arbitrators for the Winter Olympic Games.

⁵⁵ See generally GABRIELLE KAUFMANN-KOHLER, *ARBITRATION AT THE OLYMPICS: ISSUES OF FAST-TRACK DISPUTE RESOLUTION AND SPORTS LAW* (2001); Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515, 517 (2001).

⁵⁶ The first CAS ad hoc Division panel operated at the 1996 Summer Olympic Games in Atlanta. ICAS member Michael Lenard notes that there were two reasons for establishing the CAS ad hoc Division:

The first reason was because of the Butch Reynolds case in 1992. Anyone who is interested in athletes’ rights knows that story. Butch Reynolds won a court case in the United States in order to compete in the Barcelona Olympic Games and the IAAF (the track and field IF) said, “So what? We do not live in the United States. Come and sue us in Barcelona two days before the Games start and see if we will let you in.” Because of the structure of sport, the IOC could not overrule the IAAF. That scenario posed a large problem for athletes’ rights. It became a key reason for, and the hallmark of future, Ad-hoc Panels’

Disputes are resolved by a panel of three arbitrators appointed by a member of the ICAS who serves as president of the CAS ad hoc Division. The applicable substantive law is the Olympic Charter and the general principles and rules of law that the arbitration panel deems appropriate.⁵⁷ A written arbitration award generally must be rendered within 24 hours of the filing of a request for CAS adjudication.⁵⁸

Outside of the Olympic Games, the CAS appeals arbitration procedure is used to resolve appeals from final decisions of the IOC or an IF, including athlete doping, discipline, and other eligibility issues.⁵⁹ These proceedings usually are before a three-person panel chosen from a closed list of approximately 300 arbitrators;⁶⁰ each party selects one arbitrator, and the president of the CAS appeals arbitration procedure (who is an ICAS member) appoints the third arbitrator who serves as the panel's chair.⁶¹ The applicable substantive laws generally are the relevant sport governing body rules (e.g., IOC or IF rules) and the law of the country in which the governing body is domiciled,⁶² although the CAS panel has authority to resolve the dispute according to the "rules of law" it deems appropriate.⁶³

purpose: "Never leave an athlete knocking at the gate of the Olympic Village." The other reason for the Ad-hoc Panel was the fear that, without an alternative, athletes would run into federal court in Atlanta, and the rulings would disrupt the Games. Lenard, *supra* note 46, at 177.

⁵⁷ ARBITRATION RULES FOR THE OLYMPIC GAMES, art. 17 (2012), available at http://www.tascas.org/d2wfiles/document/422/5048/0/RULES20OG20FOR20LONDON20201220_ENG.pdf.

⁵⁸ *Id.* at art. 18.

⁵⁹ CODE, *supra* note 42, at R. 47.

⁶⁰ See *infra* notes 113–114 and accompanying text.

⁶¹ CODE, *supra* note 42, at R. 53–54.

⁶² *Id.* at R. 58. See, e.g., Pistorius v. IAAF, Court of Arbitration for Sport, 2008/A/1480, (award of 16 May 2008) (applying IF's rules and the law of the country in which the IF is based (Monaco), but not the Convention on the Rights of Persons with Disabilities and its Optional Protocol because Monaco has not signed or ratified this international treaty at the time of the parties' dispute); Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 LOY. U. CHI. L.J. 1203, 1251 (2006) ("While the primary source of supplementary law used by panels is Swiss domestic law, largely due to the fact that many IFs are headquartered in Switzerland, panels have also drawn upon the domestic law of the United Kingdom, general principles of law, civil law traditions, and concepts from international human rights.") (citations omitted).

⁶³ As one CAS panel observed:

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The CAS panel must issue a written award that resolves the dispute within three months after receiving the case file.⁶⁴

Regardless of its geographical location, the “seat” of all CAS arbitration proceedings is always deemed to be Lausanne, Switzerland.⁶⁵ This ensures uniform procedural rules for all CAS arbitrations, which provides a stable legal framework and facilitates efficient dispute resolution in locations convenient for the parties.⁶⁶ All parties in any CAS arbitration proceeding may be represented by counsel.⁶⁷ The Code does not establish any formal rules of evidence, although it authorizes a CAS panel to limit or disallow witness testimony on the grounds of relevance,⁶⁸ thus providing the panel with significant discretion regarding the admissibility of evidence.

The Panel is of the opinion that all sporting institutions, and in particular all international federations, must abide by general principles of law. Due to the transnational nature of sporting competitions, the effects of the conduct and deeds of international federations are felt in a sporting community throughout various countries. Therefore, the substantive and procedural rules to be respected by international federations cannot be reduced only to its own statutes and regulations and to the laws of the country where the federation is incorporated or of the country where its headquarters are. Sports law has developed and consolidated along the years, particularly through the arbitral settlement of disputes, a set of unwritten legal principles – a sort of *lex mercatoria* for sports or, so to speak, a [*lex sportiva*] – to which national and international sports federations must conform, regardless of the presence of such principles within their own statutes and regulations or within any applicable national law, provided that they do not conflict with any national «public policy» («*ordre public*») provision applicable to a given case. Certainly, general principles of law drawn from a comparative or common denominator reading of various domestic legal systems and, in particular, the prohibition of arbitrary or unreasonable rules and measures can be deemed to be part of such [*lex sportiva*].

AEK Athens and SK Slavia Prague / Union of European Football Associations (UEFA), Arbitration CAS 98/200 (award of 20 August 1999), at ¶156.

⁶⁴ CODE, *supra* note 42, R. 59.

⁶⁵ *Id.* at R28; ARBITRATION RULES FOR THE OLYMPIC GAMES, *supra* note 58, at art. 7. There also are CAS offices in New York City and Sydney, Australia.

⁶⁶ Raguz v. Sullivan, 2000 NSW LEXIS 265, *47–49 (Sup. Ct. NSW, Ct. of Appeal 2000).

⁶⁷ CODE, *supra* note 42, R. 30.

⁶⁸ *Id.* at R. 44.2 & R. 57.

In both CAS ad hoc Division and appeals arbitration proceedings, the arbitration panel provides *de novo* review of the challenged IOC or IF rule or decision.⁶⁹ This standard of review means the CAS panel is not “limited in any way in its review of both the facts and law”⁷⁰ relevant to the dispute. Thus, the parties may introduce new evidence and make additional legal arguments in the CAS proceeding that were not considered by the IOC or IF internal decision-making bodies. The scope of CAS *de novo* review is broader than the very narrow “arbitrary and capricious” or “rational basis” standards that national courts generally apply when reviewing sport governing body rules and decisions.⁷¹

The CAS panel adjudicates the dispute by majority decision and issues a written award setting forth the reasons for its decision. All CAS ad hoc Division and most appeals arbitration awards are published.⁷² The CAS

⁶⁹ Article R. 57 states: “The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.” *Id.* at R. 57. *See also* ARBITRATION RULES FOR THE OLYMPIC GAMES, *supra* note 57, art. 16 (“The Panel shall have full power to establish the facts on which the application is based.”); *id.* at art. 17 (“The Panel shall rule on the dispute pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate.”).

⁷⁰ *D’Arcy v. Australian Olympic Committee*, Arbitration CAS 2008/A/1574, ¶ 42 (award of 11 June 2008). Rather, “it is the duty of the [appeal panel] to make its independent determination of whether the Appellant’s contentions are correct, not to limit itself to assessing the correctness of the award or decision from which the appeal was brought.” *Id.* at ¶ 54. Pursuant to Rule 57 of the Code, a CAS panel “not only has the power to establish whether the decision of the first instance was or was not lawful, but to issue an independent and free standing decision.” Despina Mavromati & Pauline Pellaux, *Article R57 of the CAS Code: A Purely Procedural Provision?*, in *COURT OF ARBITRATION FOR SPORT, CAS SEMINAR MONTRIEUX 2011* at 57, 59 (2012). It must apply (but not rewrite) the existing rules and law to the facts and respect the wide discretion that a private sport governing body has to make and enforce its rules. However, “Article R57 does not mean that the Panel will disregard the assessment made by the first-instance adjudicating body without having specific reasons to do so.” *Id.* at 60. Therefore, “[w]hen the applicable provision provides a certain margin of appreciation, CAS panels may freely use it and substitute their appreciation to the previous instance’s one without deeming that it was manifestly erroneous, while some times they will be more deferential; both attitudes are in line with the CAS Code.” *Id.* at 60–61.

⁷¹ *D’Arcy*, *supra* note 70, at ¶¶ 30, 42. *See generally* Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 130–31 (2008).

⁷² CODE, *supra* note 42, R. 59. The parties may agree that a CAS appeals arbitration award will be confidential.

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Secretary General (Matthieu Reeb), who oversees administration of the CAS, has published separate volumes of ad hoc Division awards for each Olympic Games⁷³ and a three-volume Digest of CAS Awards, which includes selected appeals arbitration awards (some of which are edited) rendered from 1986–2003.⁷⁴ CAS awards after 2003 are posted on the CAS website, but not all awards are readily available and accessible.⁷⁵

Both CAS ad hoc Division and appeals arbitration awards provide final and binding resolution of the parties' dispute, subject to judicial review by the Swiss Federal Tribunal (SFT), Switzerland's highest court.⁷⁶ In *Cañas v. ATP Tour*,⁷⁷ the SFT refused to enforce an IF's contractual waiver, which required an athlete to agree not to judicially appeal a CAS award as a condition of allowing him to participate in its organized or sponsored events. The court initially determined that an athlete's agreement to arbitrate a dispute before the CAS is enforceable because it "promotes the swift settlement of [sports] disputes . . . by specialized arbitral tribunals that offer sufficient guarantees of independence and impartiality."⁷⁸ It then noted the importance of ensuring that athletes are not forced to waive their right to appeal a CAS award to the SFT, which is "the supreme judicial authority of the state in which the arbitral tribunal is domiciled"⁷⁹. This is because "the

⁷³ E.g., CAS, CAS AWARDS—SYDNEY 2000 (2000); CAS, CAS AWARDS—SALT LAKE CITY 2002 & ATHENS 2004 (2004); CAS, CAS AWARDS—TURIN & MELBOURNE 2006 (2006); CAS, CAS AWARDS—BEIJING 2008 (2008).

⁷⁴ CAS, DIGEST OF CAS AWARDS: 1986–1998 (Matthieu Reeb ed., 1998); CAS, DIGEST OF CAS AWARDS II: 1998–2000 (Matthieu Reeb ed., 2002); CAS, DIGEST OF CAS AWARDS III: 2001–2003 (Matthieu Reeb ed., 2004).

⁷⁵ *Case Law Documents*, CAS, <http://jurisprudence.tascas.org/sites/CaseLaw/Shared%20Documents/Forms/By%20Year.aspx> (last visited Sept. 27, 2013).

⁷⁶ *20 Questions About the CAS*, CAS, <http://www.tascas.org/en/20questions.asp/4-3-231-1010-4-1-1/5-0-1010-13-0-0/> (last visited Nov. 11, 2013).

⁷⁷ *Cañas v. ATP Tour*, Tribunal federal [TF] [Federal Supreme Court] Mar. 22, 2007 4P.172/2006 (SWITZ.).

⁷⁸ *Id.* at 4.3.2.3. *But see* Jan Lukomski, *Arbitration Clauses in Sports Governing Bodies' Statutes: Consent or Constraint? Analysis From the Perspective of Article 6(1) of the European Convention on Human Rights*, 13 INT'L SPORTS L.J. 60 (2013) ("Even if arbitration clauses are valid from the point of view of Swiss legal system, which was confirmed by Swiss Federal Supreme Court, it does not necessarily mean they are in compliance with provisions of the European Convention . . . in my view they are not" because their enforcement denies athletes the right to a fair trial before a court of law).

⁷⁹ *Cañas v. ATP Tour*, Tribunal federal [TF] [Federal Supreme Court] Mar. 22, 2007 4P.172/2006 (SWITZ.).

continuing possibility of a[n] [judicial] appeal acts as a counterbalance”⁸⁰ to the requirements of the IOC and IFs that Olympic and international sport athletes must agree to submit disputes to the CAS as a condition of participation in their athletic events.

Article 190(2) of the Swiss Federal Code on Private International Law of December 18, 1987 specifies only very limited procedural and substantive grounds for judicially challenging a CAS award before the SFT.⁸¹ Procedural grounds for vacating an award include: an irregularity in the composition of the arbitration panel (e.g., lack of independence or impartiality); an erroneous assertion of jurisdiction; a failure to comply with the scope of an arbitration agreement by not ruling on a submitted claim or ruling on extraneous matters; or a violation of the parties’ rights to be heard or to be treated equally.⁸² The sole basis for challenging the substantive merits of a CAS award is its incompatibility with Swiss public policy, a defense that the SFT has construed very narrowly. According to the SFT, the public policy defense “must be understood as a universal rather than national concept, intended to penalize incompatibility with the fundamental legal or moral principles acknowledged in all civilized states.”⁸³ It has 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

⁸⁰ *Id.* Given the very limited scope of SFT review of CAS awards, this “counterbalance” provides athletes with primarily procedural rights in connection with a CAS arbitration proceeding rather than any right to appellate review of the merits of a CAS award. See *infra* notes 177–179 and accompanying text.

⁸¹ SWITZERLAND'S FEDERAL CODE ON PRIVATE INTERNATIONAL LAW, CAS (1987), available at <http://www.tas-cas.org/en/arbitrage.asp/4-3-292-1023-4-1-1/5-0-1023-3-0-0/>. The website of the Swiss law firm ZPG Avocats (<http://www.praetor.ch/>) provides an English translation of all SFT cases reviewing CAS awards from January 2008 to the present, which enables these cases to be downloaded without charge. See *Swiss International Arbitration Decisions*, <http://www.swissarbitrationdecisions.com/> (last visited Nov. 11, 2013). See generally Charles Poncet, *When Is a “Swiss” “award” Appealable?*, 2012 PARIS J. INT’L ARB. 135 (2012) (providing overview of SFT process for reviewing CAS awards).

⁸² See generally Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 PEPP. DISP. RESOL. L.J. 51, 55–58 (2009).

⁸³ N., J., Y., W. v. FINA, 5P.83/1999 (1999) (Switz.), in CAS, DIGEST OF CAS AWARDS II: 1998–2000 at 775, 779 (Matthieu Reeb ed., 2002).

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proceedings.”⁸⁴ The SFT has vacated very few CAS arbitration awards on public policy grounds.⁸⁵

The CAS is recognized under the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations.⁸⁶ CAS arbitration awards are enforceable in the 148 countries that are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), an international treaty.⁸⁷ As a foreign arbitration award in all countries except Switzerland, a CAS award is subject to judicial review in national courts of countries, including the U.S., that are parties to the New York Convention.⁸⁸ Pursuant to Article V(2)(b) of the New York Convention, a national court may refuse to recognize and enforce a CAS arbitration award if doing so “would be

⁸⁴ *Id.* at 779. See also *Azerbaijan Field Hockey Fed'n. v. Fédération Internationale de Hockey*, 4A_424/2008 at 7 (Switz.) (“The Swiss Federal Tribunal does not review whether or not the Arbitral Tribunal rightly applied the law on which its decision rests.”).

⁸⁵ In *Matuzalem v. FIFA*, 4A_558/ Tribunal federal [TF] [Federal Supreme Court] (2012) (Switz.), the SFT stated that the CAS’s “substantive adjudication of a dispute violates public policy only when it disregards some fundamental legal principles and consequently becomes completely inconsistent with the important, generally recognized values, which according to dominant opinions in Switzerland should be the basis of any legal order.” *Id.* at ¶ 4.1. It explained that an arbitral award would be “annulled only when its result contradicts public policy and not merely its reasons.” *Id.* at ¶ 4.1. Applying this principle, the SFT vacated a CAS award upholding a Federation Internationale de Football Association (FIFA) disciplinary sanction prohibiting a soccer player from playing professionally worldwide until he paid damages of 11,858,934 euros for breaching his contract with his former club. The court ruled that the challenged CAS award violated an individual’s right to economic freedom protected by the Swiss civil code, which “belongs to the important generally recognized order of values, which according to dominant opinion in Switzerland should be the basis of any legal order.” *Id.* at ¶ 4.3.1. It concluded that the FIFA disciplinary sanction curtails the athlete’s economic freedom “to such an extent that the foundations of his economic existence are jeopardized” and is “an obvious and grave violation” of the civil code, which is “contrary to public policy.” *Id.* at ¶ 4.3.2. To date, *Matuzalem* represents the only case in which the SFT has vacated a CAS award on substantive grounds.

⁸⁶ Ian S. Blackshaw, *Introductory Remarks* to BLACKSHAW ET AL., *supra* note 34, at 4 (“CAS rulings are legally effective and can be enforced internationally.”).

⁸⁷ *New York Convention Countries*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> (last visited Nov. 13, 2013).

⁸⁸ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter *New York Convention*], 9 U.S.C. § 201 et seq.

contrary to the public policy of that country.”⁸⁹ Similar to the SFT, U.S. courts have construed this defense very narrowly and enforced the one CAS award that has been judicially reviewed to date.⁹⁰

IV. GENERAL REQUISITES OF A PRIVATE LEGAL SYSTEM FOR RESOLVING SPORTS DISPUTES THAT JUSTIFY JUDICIAL DEFERENCE AND SOVEREIGN RECOGNITION

All dispute resolution systems, whether governmental or private, should aspire to provide procedural fairness and substantive justice.⁹¹ Procedural fairness means adequate notice of rules to individuals who may be affected (as well as potential consequences for violations), along with an adequate opportunity for them to present their case to an unbiased decision maker if violations are alleged or disputes arise.⁹² Substantive justice (i.e., just results in individual cases) are a product of procedural fairness combined with a good faith and rational decision based on the information presented by the

⁸⁹ *Id.* at art. V(2)(b).

⁹⁰ In *Gatlin v. U.S. Anti-Doping Agency, Inc.*, 2008 WL 2567657 (N.D. Fla. 2008), a federal district court ruled that a CAS arbitration award rejecting an athlete’s claim that his prior doping violation for taking prescribed medication violated the Americans with Disabilities Act, which the court characterized as “arbitrary and capricious,” did not violate the New York Convention’s public policy exception and justify its refusal to recognize the award. See generally Mitten, *supra* note 82, at 62–66; Mitten & Opie, *supra* note 1, at 301–302.

⁹¹ See, e.g., TOM R. TYLER, WHY PEOPLE OBEY THE LAW 273–74, 278 (2d ed. 2006); Amy Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*, 25 POL. BEHAV. 119, 135 (2003); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103, 132 (1988); Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 LAW & SOC’Y REV. 809, 827 (1994).

⁹² See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982); *Mathews v. Elridge*, 424 U.S. 319 (1976). See also Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which Switzerland is a contracting party, that creates an individual right to a “fair trial” requiring “a fair and public hearing [including a public judgment] within a reasonable time by an independent and impartial tribunal established by law, which decides on civil rights and obligations.” Ulrich Haas, *Role and Application of Art. 6 of the European Convention on Human Rights (ECHR) in CAS Procedures*, in CAS, CAS SEMINAR MONTREUX 2011, 74, 74 (2012).

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parties, which follows applicable precedent and does not discriminate against those affected (i.e., like cases produce like results).⁹³

The IOC and IFs have plenary authority to adopt rules that determine athletes' eligibility to compete, impose disciplinary sanctions, and take other action that may adversely affect athletes' interests. Because they generally require that all disputes be resolved by final and binding CAS arbitration, it is essential that a private legal system for resolving Olympic and international sports disputes provides "sports justice," particularly to the athletes directly affected by their rules and decisions. Professor Roger Abrams defines "sports justice" as "the product of the authoritative procedures used in the business of sports to resolve disputes and controversies," which he suggests should result in "objective, impartial, unbiased, equitable, fair, [and] dispassionate" decisions.⁹⁴

Professor James Nafziger notes that "[a] core principle, perhaps *the* core principle to inform not only the *lex sportiva*, but also the larger body of international sports law, is *fairness*."⁹⁵ This encompasses both procedural and substantive fairness. The former implicates "due process or natural justice" concerns, specifically "the rule against bias and the right to a fair hearing," which requires "prior notice of a decision, consultation and written representation, adequate notice of applicable sanctions, an oral hearing, a right to call and cross-examine witnesses, an opportunity for legal representation, and a reasoned decision."⁹⁶ Recognizing that a "definition of substantive fairness, in the sense of distributive justice, is more elusive" and

⁹³ As one commentator notes: "It is of the very essence of any system of law, of course, that its rules are consistent, accessible and predictable. Lawyers must be able to advise their clients with a degree of confidence as to what those rules actually are. It is only with such predictability that the core objectives of swift and inexpensive justice can be achieved. Without legal certainty, every case, no matter how small and apparently straightforward, will descend into an expensive legal debate." James Segan, *Does the Court of Arbitration for Sport Need a Grand Chamber*, SPORTS L. BULL. (Apr. 19, 2013), available at <http://sportslawbulletin.org/2013/04/19/does-the-court-of-arbitration-for-sport-need-a-grand-chamber/>.

⁹⁴ ROGER I. ABRAMS, SPORTS JUSTICE: THE LAW AND BUSINESS OF SPORTS 14 (2010). See also Josephine R. Potuto & Jerry R. Parkinson, *If It Ain't Broke, Don't Fix It: An Examination of The NCAA Division I Infractions Committee's Composition and Decision-Making Process*, 89 NEB. L. REV. 437, 453 (2011) ("There can be no disagreement that independence and neutrality are critical to effective functioning of any adjudicative body" that resolves sports disputes).

⁹⁵ James A. R. Nafziger, *International Sports Law*, in HANDBOOK ON INTERNATIONAL SPORTS LAW 3, 17 (James A. R. Nafziger & Stephen F. Ross eds., 2011).

⁹⁶ *Id.* at 19–20.

that “many issues of fairness cannot be pigeon-holed as either ‘procedural’ or ‘substantive,’” he suggests that its defining characteristics include “impartiality, equity, good faith, and coherence in the sense of consistency and uniformity.”⁹⁷

To provide procedural fairness and substantive justice,⁹⁸ a private legal system for resolving Olympic and international sports disputes must have, at a minimum, the following components: 1) an open forum accessible to all aggrieved parties, particularly athletes whose eligibility to participate in sports competitions is or may be adversely affected, who have the right to legal counsel; 2) independent and impartial adjudicators; 3) a full and fair opportunity for all parties to be heard; 4) timely, reasoned, and final decisions; and 5) the development of a clearly articulated uniform body of law (which provides equal and unbiased treatment of those similarly situated) resulting in the consistent, predictable application of Olympic sport governing body regulations and rules of law.

V. ANALYSIS OF CAS ARBITRATION IN LIGHT OF PROCEDURAL FAIRNESS AND SUBSTANTIVE JUSTICE CONCERNS

This Section considers whether the CAS arbitration system has sufficient indicia of procedural fairness (i.e., an impartial, unbiased, and dispassionate adjudicative process) and substantive justice (i.e., objective and equitable results) to justify substantial judicial deference and sovereign recognition of its awards, particularly those that resolve disputes between the IOC or an IF and an athlete.

⁹⁷ *Id.* at 20.

⁹⁸ “Empirical research reveals that decisionmaking and dispute resolution procedures [including arbitration] are most likely to be effective if they are perceived as procedurally fair. If parties perceive a dispute resolution or decisionmaking process as procedurally fair, they are more likely to perceive the outcome as substantively fair even if it is adverse to them, comply with that outcome, and perceive the institution that provides or sponsors the process as legitimate... Four process characteristics reliably predict parties’ perceptions of fairness: the opportunity for parties to express themselves and their positions (‘voice’), demonstration of sincere consideration of these expressions by a trustworthy decisionmaker (‘being heard’), even-handed treatment and the neutrality of the forum, and dignified, respectful treatment. Parties assess decisionmakers’ trustworthiness in order to determine whether they ‘can trust that in the long run the [decisionmaking] authority with whom they are dealing will work to serve their interests.’” Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 Harv. Negot. L. Rev. 71, 95–98 (2013).

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A. *Open Forum Accessible to Athletes Represented by Counsel*

The CAS arbitration system provides an open forum fully accessible to all aggrieved parties,⁹⁹ including athletes whose eligibility to participate in Olympic or other international sports competitions is adversely affected by IOC or IF rules or decisions. The CAS ad hoc Division ensures “‘fair, fast, and free resolution of an athlete’s eligibility to compete in the Olympic Games.”¹⁰⁰ All parties in the CAS ad hoc Division and appeals arbitration have the right to be represented by legal counsel of their choice.¹⁰¹ Volunteer lawyers may be available to represent athletes without charge in CAS ad hoc Division proceedings, although their availability generally is dependent on the willingness, language skills, and expertise of the local bar.

Pursuant to Article S6(9) of the Code, ICAS has created “a legal aid fund to facilitate access to CAS arbitration for individuals without sufficient financial means”¹⁰² and established guidelines for its operation.¹⁰³ CAS appeals arbitration proceedings in which athletes are challenging IF rules or decisions against them (which include doping sanctions) are free of charge except for a filing fee of CHF 1,000 (approximately \$1,000), which may be waived if the athlete qualifies for legal aid; the arbitrators’ costs and fees are borne administratively by the CAS.¹⁰⁴ Unless they qualify for legal aid, athletes must pay their own attorneys’ fees and expenses. If an athlete is the prevailing party, the CAS panel resolving the dispute has the discretion to

⁹⁹ The Code establishes procedures for third parties whose interests may be affected to be joined or to intervene in a CAS arbitration proceeding, and it authorizes a CAS panel to permit non-parties to file amicus briefs. CODE, *supra* note 43, at R. 41.2, R. 41.3, & R. 41.4. For example, because it was a particularly significant case that would determine the eligibility of athletes who previously had been suspended more than six months to participate in the London Olympic Games, interested non-parties were permitted to submit amicus briefs in CAS 2011/O/2422, USOC v. IOC, award of 4 October 2011. Nine amicus briefs were filed by various organizations, including WADA, several anti-doping agencies, two NOCs, and two athlete groups. *Id.* at 6.

¹⁰⁰ Mitten & Davis, *supra* note 71, at 79.

¹⁰¹ CODE, *supra* note 42, at R30.

¹⁰² *Id.* S6(9).

¹⁰³ See CAS, GUIDELINES ON LEGAL AID BEFORE THE COURT OF ARBITRATION FOR SPORT (2013), available at http://www.tas-cas.org/d2wfiles/document/7099/5048/0/Legal20Aid20Rules20ENG20_clean_FINAL.pdf [hereinafter GUIDELINES ON LEGAL AID].

¹⁰⁴ CODE, *supra* note 42, S6(5.2).

order the IF to pay a contribution towards his legal fees and other expenses (although the converse also is true).¹⁰⁵

B. Independent and Impartial Arbitrators

The CAS arbitration system currently appears to have adequate safeguards necessary to ensure that sports disputes will be resolved by independent and impartial arbitrators. In 1993, in *G. v. Federation Equestre Internationale (Gundel)*,¹⁰⁶ the SFT ruled that “the CAS is a true arbitral tribunal independent of the parties,” which “offers the guarantees of independence upon which Swiss law makes conditional the valid exclusion of ordinary judicial recourse.” Subsequently, in *A. and B. v. IOC and FIS (Lazutina)*,¹⁰⁷ a 2003 case, the SFT rejected the plaintiffs’ contention that the CAS is not impartial when it decides a dispute between an athlete and the IOC. It ruled that the CAS, whose operations have been overseen by the ICAS since 1994, is sufficiently independent from the IOC for its arbitration decisions “to be considered true awards, equivalent to the judgments of State courts.”¹⁰⁸ It concluded: “As a body which reviews the facts and the law

¹⁰⁵ *Id.* S6(5.3).

¹⁰⁶ *G v. Federation Equestre International, in DIGEST OF CAS AWARDS 1986–1998, supra* note 74, at 561, 568–69. To date, there has been only one CAS award challenged by an American athlete in a U.S. court pursuant to the New York Convention treaty, and it did not involve a claim that the CAS arbitration system was not sufficiently independent and impartial for a U.S. court to recognize and enforce its awards. See *Gatlin v. U.S. Anti-Doping Agency, Inc.*, 2008 WL 2567657 (N.D. Fla. June 24, 2008). Although the CAS’s “closed list” of arbitrators system has been upheld by the SFT, it is being challenged in pending litigation before the European Court of Human Rights on the ground it is not sufficiently independent to comply with Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which establishes an individual’s right to a “fair trial.” Antonio Rigozzi, Erika Hasler, & Brianna Quinn, *The 2011, 2012, and 2013 Revisions to the Code of Sports-related Arbitration*, JUSLETTER, June 3, 2013, at 3.

¹⁰⁷ *A. and B. v. IOC and FIS, in Digest of CAS Awards III 2001-2003, supra* note 74, at 674.

¹⁰⁸ *Id.* at 689. The SFT relied on the ICAS’s independence and autonomy to support its holding. It observed that ICAS “can amend its own Statutes (Art. S25 of the Code), does not take orders from the IOC and is not obliged to abide by the IOC’s decisions.” *Id.* at 684. It noted that the ICAS is an independent body “responsible for drawing up the list of [CAS] arbitrators.” *Id.* at 686. Although the IOC funds one-third of the annual costs of the operations of the ICAS and CAS, it does not fund the operational costs of CAS ad hoc Divisions, and the ICAS manages its funds and approves the CAS’s budget. *Id.* at 687. Observing that “State courts in countries governed by the rule of law are often required to

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with full powers of investigation and complete freedom to issue a new decision in place of the body that gave the previous ruling, the CAS is more akin to a judicial authority independent of the parties.”¹⁰⁹

The Code provides that ICAS, in establishing the roster of CAS arbitrators, shall select persons with “legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language [English or French], whose names and qualifications are brought to [its] attention . . . including by the IOC, the IFs and the NOCs.”¹¹⁰ When appointing arbitrators, ICAS is required to “consider continental representation and the different juridical cultures.”¹¹¹ CAS arbitrators must be independent, objective and impartial in rendering their decisions, maintain confidentiality, and agree not to represent any parties in proceedings before the CAS.¹¹² As of November 1, 2013, there are 283 CAS arbitrators from 72 countries, including 30 from the U.S., who have been appointed by ICAS for four-year renewable terms.¹¹³

The Code does not limit a party’s discretion and freedom to select any arbitrator in the pool of CAS arbitrators, but some commentators have expressed concerns about the independence of CAS arbitrators because “in practice, the pool of arbitrators selected by parties is relatively small” and

rule on disputes involving the State itself, without their judges’ independence being questioned on the ground they are financially linked to the State,” the SFT concluded “there is not necessarily any relationship of cause and effect between the way a judicial body is financed and its level of independence.” *Id.* at 688.

¹⁰⁹ *Id.* at 686.

¹¹⁰ CODE, *supra* note 42, S14. ICAS formerly appointed CAS arbitrators largely from a pool of nominees initially proposed by the IOC, IFs, and NOCs. Although these organizations still may nominate prospective arbitrators, the Code now permits any person who wants to be considered for appointment to the CAS to self-nominate by filling out a form on the CAS website. *Id.* S14. This process broadens the pool of prospective CAS arbitrators beyond those nominated by Olympic sports governing bodies. Lenard, *supra* note 46, at 179 (Current ICAS member advocates “there should be closed lists. People should not pick just the arbitrators that they want to ‘represent’ them. There is an important body of sports knowledge cases, even in non-doping, that arbitrators must know.”).

¹¹¹ CODE, *supra* note 42, S16.

¹¹² *Id.* S18 & S19. Although CAS arbitrators previously were permitted to represent parties in CAS arbitrations, the Code now prohibits them from doing so. *Id.* S18.

¹¹³ The Code requires there to be a minimum of 150 CAS arbitrators. *Id.* S13. See CAS, LIST OF CAS ARBITRATORS PER NATIONALITY (2013), available at http://www.tas-cas.org/d2wfiles/document/452/5048/0/Liste20des20arbitres20par20nationalit%C3%A920octobre202013_.pdf.

“largely homogenous in age, gender, and nationality.”¹¹⁴ The Code requires that a chosen arbitrator “shall be and remain impartial and independent of the parties and shall immediately disclose any circumstances which may affect his independence with respect to any of the parties.”¹¹⁵ It permits a party to challenge an arbitrator’s appointment “if the circumstances give rise to legitimate doubts over his independence or over his impartiality,” and requires the ICAS to provide a reasoned determination of any challenges.¹¹⁶

In *Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano (Belmonte)*,¹¹⁷ the SFT held that “[s]imilarly to a state judge, an arbitrator must present sufficient guarantees of independence and impartiality” and that “[b]reaching that rule leads to irregular composition [of a CAS panel] pursuant to Art. 190(2)(a) PILA.”¹¹⁸ It concluded that “the independence and the impartiality demanded from the members of an arbitral tribunal extend to the party appointed arbitrators as well as to the chairman of the arbitral tribunal.”¹¹⁹ However, the SFT acknowledged that “absolute independence by all arbitrators is an ideal which will correspond to reality only rarely,”¹²⁰ observing that there is a closed list of CAS arbitrators who must have legal training and recognized expertise regarding sport and the existing historical associations and contacts many CAS arbitrators have with Olympic sports organizations, administrators, and counsel as well as others associated with the Olympic Movement. Thus, it ruled that “an arbitrator may not be challenged merely because he was chosen by one of the parties to the dispute”¹²¹ and there is “no justification for a special treatment of CAS arbitrators, namely to be particularly strict in reviewing their independence

¹¹⁴ Maureen A. Weston, *Doping Control, Mandatory Arbitration, and Process Dangers for Athletes in Professional Sports*, 10 PEPP. DISP. RESOL. L. J. 5, 20 & n.81 (2009).

¹¹⁵ CODE, *supra* note 42, at R. 33.

¹¹⁶ *Id.* at R34.

¹¹⁷ *Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano*, 4A_234/2010 (1st Civ. Ct. 2010).

¹¹⁸ *Id.* at 9.

¹¹⁹ *Id.* at 12–13.

¹²⁰ *Id.* at 13.

¹²¹ *Id.*

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and impartiality.”¹²² According to the SFT, this requires a case-by-case determination rather than “immutable rules.”¹²³

C. Full and Fair Opportunity to Be Heard

In *Belmonte*, the SFT ruled that, to be judicially recognized, a CAS arbitration proceeding must provide each party with the following specific rights:

to express its views on the essential facts for the judgment, to present its legal arguments, to propose evidence on pertinent facts and to participate in the hearing of the arbitral tribunal . . . have the possibility to present their arguments . . . have an opportunity to express its views on its opponent’s arguments, [and] to review and discuss its evidence and to challenge it with its own evidence.¹²⁴

The de novo nature of a CAS arbitration panel’s review in ad hoc Division and appeals arbitration proceedings provides a full and fair opportunity for all parties to be heard and to raise any relevant factual and

¹²² *Id.* at 14.

¹²³ *Id.* at 15. In this case, the court concluded that the Italian Olympic Committee’s appointment of a Swiss law professor (who had previously participated in the revision of the WADC and been appointed as an independent observer by WADA in connection with the Athens Olympic Games) as an arbitrator in a doping case in which WADA subsequently became a party did constitute the irregular composition of a CAS panel. See generally Mitten, *supra* note 82, at 55–58.

¹²⁴ *Belmonte*, 4A_234/2010 at 22. Some legal scholars assert that CAS doping proceedings should have more procedural protections to ensure athletes have a full and fair opportunity to be heard. Because “[d]oping adjudications are imbued with many of the elements of a civil and quasi-criminal proceeding, without corresponding process protections,” Professor Maureen Weston advocates that CAS procedural rules should be amended to provide athletes with discovery rights and provide for appointment of independent scientific experts to address the validity of positive test results. Weston, *supra* note 114, at 46–48. Professor Michael Straubel contends that “[d]oping cases are accusatory and quasi-criminal in nature and therefore fundamentally different from the typical contract dispute decided by arbitration CAS” and suggests “CAS should consider developing a second chamber, with separate procedures and arbitrators, to hear doping cases.” Straubel, *supra* note 62, at 1271–72; see also Haas, *supra* note 92 (discussing whether Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which creates an individual right to a “fair trial” with certain procedural safeguards, applies to CAS arbitration proceedings).

legal issues. Thus, CAS de novo review generally enables any procedural flaws occurring during an Olympic or international sports governing body's prior disposition of the matter to be cured.¹²⁵ For example, if the IOC or an IF fails to provide an athlete with a hearing before taking adverse action against him, this deficiency is remedied via a CAS arbitration proceeding.

D. *Timely, Reasoned, and Final Decisions*

The Code requires that CAS awards must be rendered quickly, which ensures that an athlete's dispute with the IOC or an IF is resolved in a timely manner, thereby minimizing any adverse effects if the athlete's appeal is successful.¹²⁶ A CAS ad hoc Division award generally must be made within 24-hours of the filing of a request for CAS adjudication.¹²⁷ A CAS appeals arbitration generally must be resolved within three months.¹²⁸

A CAS award must provide reasons for the resolution of each claim or defense raised by the parties in order to be judicially recognized. In *Canas v. ATP Tour*,¹²⁹ the SFT vacated a CAS award because it failed to provide reasons for rejecting arguments that his doping sanction violated United States and European Union laws and remanded it to the CAS panel for further consideration. The SFT ruled that CAS arbitrators are required to discuss all of the parties' arguments in their legal analysis of the relevant issues in dispute, including claims that applicable national, transnational, or international laws have been violated. The panel must explain "even briefly" their reasons "so that the petitioner could be satisfied upon a perusal of the award that the arbitrators had considered all of his arguments which had objective relevance, even if it was to dismiss them ultimately."¹³⁰

Recognizing that "[f]inality as well as fairness is a desirable objective of all litigation and arbitration," the CAS has adopted the doctrine of *res judicata*, which precludes a CAS panel from subsequently considering "an

¹²⁵ Mavromati & Pellaux, *supra* note 70, at 58.

¹²⁶ CODE, *supra* note 42, at R. 59.

¹²⁷ ARBITRATION RULES FOR THE OLYMPIC GAMES, *supra* note 57, at art. 18.

¹²⁸ CODE, *supra* note 42, at R. 59.

¹²⁹ *Canas v. ATP Tour*, 4P.172/2006 at 5.3.

¹³⁰ *Id.* The CAS panel subsequently remedied this deficiency by modifying its award to provide brief reasons for concluding that the athlete's doping sanction did not violate United States and European Union laws. Revised Award, CAS 2005/A/951, *Canas v. ATP*, award of 23 May 2007, at 18.

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appeal against its own decision from a party to such decision.”¹³¹ As one CAS panel concluded “in the absence of consent, it should not revisit prior decisions, where essentially the same parties are involved.”¹³² Because all CAS proceedings are governed by Swiss law, appeals of CAS awards must be made to the SFT, which provides extremely limited review of the merits of an arbitration award. Therefore, virtually all CAS awards effectively provide a final and binding resolution of the parties’ dispute.¹³³

E. Clearly Articulated Uniform Body of Law With Consistent, Predictable Application

Although CAS ad hoc Division and appeals arbitration awards are binding only on the parties, CAS panels frequently cite and rely on prior awards addressing the same or similar issues.¹³⁴ As one CAS panel observed: “In CAS jurisprudence there is no principle of binding precedent, or stare decisis. However, a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel. Whether that is considered a matter of comity, or an attempt to build a

¹³¹ See, e.g., Arbitration CAS ad hoc Division (O.G. Sydney 2000) 009, In the Matter Angel Perez, award of September 25, 2000, in CAS, CAS AWARDS—SYDNEY 2000 at 91, 98–99 (2000) (refusing to consider Cuban NOC’s challenge to prior CAS award determining that athlete met Olympic Charter’s sport nationality requirement and is eligible to compete for U.S. in Sydney Olympic Games).

¹³² Arbitration CAS ad hoc Division (O.G. Sydney 2000) 008, Arturo Miranda, Canadian Olympic Ass’n, and Canadian Amateur Diving Ass’n v IOC, award of September 24, 2000, in CAS, CAS AWARDS—SYDNEY 2000 at 83, 88 (2000) (noting that “it may well have dismissed” on res judicata grounds an athlete’s challenge to IOC decision declaring him ineligible to compete in Sydney Olympics, which was previously rejected in another CAS proceeding brought on his behalf by Canadian Olympic Association, if IOC had objected to CAS consideration of his new claims).

¹³³ See *supra* notes 81–85 and accompanying text.

¹³⁴ Professor Gabrielle Kaufmann-Kohler has noted: “[S]tatistics and history show a strong reliance on other sports law cases. A survey of all the cases published by the Court of Arbitration for Sports (CAS) from the first CAS case in 1986 to 2003 shows that only one award in six cited prior cases. A review of the cases since 2003 shows a drastic change; nearly every award contains one or more references to earlier CAS awards.” Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT’L 357, 365 (2007). Matthieu Reeb, the CAS secretary general, publishes digests of CAS Ad Hoc Division and appeals arbitration awards, and there is an index and database of CAS awards on the CAS website <http://www.tas-cas.org>.

coherent corpus of law, matters not.”¹³⁵ As Professor Nafziger has observed: CAS awards “provide guidance in later cases, strongly influence later awards, and often function as precedent,” which reinforce and help elaborate “established rules and principles of international sports law.”¹³⁶

To determine whether the CAS arbitration system results in the development of a clearly articulated uniform body of law and its predictable application in a consistent manner, the following issues will be analyzed: 1) the role of CAS “precedent” in determining doping violations and sanctions (a substantial part of the CAS docket requiring interpretation and application of the WADC to the same or similar athlete conduct);¹³⁷ 2) the role of CAS “precedent” in determining an athlete’s “sport nationality” for purposes of

¹³⁵ International Assn. of Athletics Federations v. USA Track & Field and Jerome Young, Arbitration CAS 2004/A/628, award of June 28, 2004, ¶ 19. See also Anderson, et al. v. IOC, Arbitration CAS 2008/A/1545, award of July 16, 2010, at ¶ 55 (“although a CAS panel in principle might end up deciding differently from a previous panel, it must accord to previous CAS awards a substantial precedential value and it is up to the party advocating a jurisprudential change to submit persuasive arguments and evidence to that effect.”); D’Arcy v. Australian Olympic Committee, Arbitration CAS 2008/A/1574 at ¶ 56, Award of 11 June 2008 (“Of course, we are not bound by any previous determinations or awards of other panels of CAS. Arbitration awards are binding only by contractual force on the parties and do not create precedents. However, where those awards relate to the interpretation, scope or content of the CAS Code, considerations of certainty and consistency suggest that subsequent panels should not take a different approach to that adopted by earlier panels unless satisfied that the approach or view of the earlier panel is an erroneous one or is inapplicable because of different circumstances or different contractual language.”). By comparison, a federal appellate court panel “cannot overrule a prior decision of another panel” within the same circuit. *Union of Needletrades, Indus. & Textile Employees, AFL-CIO, CLC v. U.S. I.N.S.*, 336 F.3d 200, 210 (2d Cir. 2003). A Second Circuit panel observed that it is “bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court.” *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). See also *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 695 (2d Cir. 2013).

¹³⁶ JAMES A.R. NAFZIGER, INTERNATIONAL SPORTS LAW 48–61 (2d ed. 2004); see also Ian Blackshaw, *Towards a “Lex Sportiva,”* 2011 INT’L SPORTS L. J. 140, 141 (“Although CAS arbitrators are not generally obliged to follow earlier decisions and obey the sacred Common Law principle of ‘stare decisis’ (binding legal precedent), in the interests of comity and legal certainty, they usually do so. As a result of this practice, a very useful body of sports law is steadily being built up.”).

¹³⁷ See *What Kinds of Dispute Can Be Submitted to the CAS?*, CAS, <http://www.tas-cas.org/en/20questions.asp/4-3-217-1010-4-1-1/5-0-1010-13-0-0/> (last visited Nov. 13, 2013); see also *What Law Do the Arbitrators Apply?* (2013), <http://www.tas-cas.org/en/20questions.asp/4-3-226-1010-4-1-1/5-0-1010-13-0-0/>; see *Case Law Documents*, *supra* note 75 (providing a database of all CAS decisions).

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his or her eligibility to participate in the Olympics or other international sports competitions; and 3) the very narrow scope of national court review of CAS awards also is considered.

1. *Doping Violations and Sanctions*

The CAS has exclusive jurisdiction and authority to finally resolve all disputes between the IOC, IFs, NOCs, NFs, WADA, and athletes regarding the application, interpretation, or enforcement of the WADC.¹³⁸ The WADC is the “fundamental and universal document upon which the World Anti-Doping Program in sport is based, and its purpose “is to advance the anti-doping effort through universal harmonization of core anti-doping elements.”¹³⁹ In resolving doping cases, CAS arbitrators are required to interpret and apply the provisions of the WADC, the Code’s procedural rules,¹⁴⁰ and any applicable national laws.¹⁴¹ Although a comprehensive

¹³⁸ To comply with these international agreements as well as the Ted Stevens Olympic and Amateur Sports Act’s requirement that domestic Olympic sport eligibility disputes be resolved by AAA arbitration, see 36 U.S.C. § 220509, United States Anti-doping Agency (USADA) prosecutions of U. S. Olympic sport athletes for doping violations are adjudicated by a three-person panel of North American CAS/AAA arbitrators (which is essentially a national doping tribunal). An athlete who is dissatisfied with the panel’s arbitration award has the right to a *de novo* CAS appeals arbitration proceeding (as do USADA, the IF for the sport in which the athlete participates, and WADA). AM. ARB. ASS’N, SUPPLEMENTARY PROCEDURES FOR THE ARBITRATION OF OLYMPIC SPORT DOPING DISPUTES, in USADA, PROTOCOL FOR OLYMPIC AND PARALYMPIC MOVEMENT TESTING R-45 (2009). See *Armstrong v. Tygart*, 886 F. Supp. 2d 572, 586 (W.D. Tex. 2012) (procedural rules governing North American CAS/AAA doping arbitrations “are sufficiently robust to satisfy the requirements of due process”). *But see* Straubel, *supra* note 62, at 1223–72 (expressing concerns about the fairness of these procedural rules to athletes).

¹³⁹ WADC, *supra* note 20, at 10.

¹⁴⁰ According to one commentator, who does not reference any particular CAS awards:

[S]ome CAS arbitrators consider-quite wrongly-that they can ignore the rules in doping cases and decide cases on the basis of fairness alone, justifying this point of view on the basis that in appeal cases they can deal with the case *de novo*, pursuant to Article R57 of the CAS Code . . . and also relying on the fact that the CAS has become the “Supreme Court of World Sport.” In effect, such CAS Panel members are claiming to be free to rewrite the applicable legal rules in the interests of what they consider fairness in the circumstances of the particular case. This is a dangerous course of action and not conducive

review and analysis of the hundreds of CAS doping awards is outside the scope of this Article, some illustrative examples and published scholarship establish that CAS panels generally cite and follow prior CAS awards (or at least rely on them for guidance) in resolving several issues arising in connection with doping disputes.

CAS panels have consistently followed *USA Shooting & Quigley v. International Shooting Union*,¹⁴² a 1995 case upholding strict liability for doping offenses if clear notice of this standard is provided to athletes.¹⁴³ This standard subsequently was codified by the WADC.¹⁴⁴

An empirical analysis of twenty-three CAS doping awards for the sport of track and field from 2000–2010 revealed that seventeen awards contain at least one citation to a prior CAS award, and that the panel either followed or distinguished these previous awards on four

to legal certainty. Or put another way, is contrary to a so-called “rule of sports law.”

Blackshaw, *supra* note 136, at 141–42.

¹⁴¹ Pursuant to the Code’s choice of law rules, CAS doping panels generally apply Swiss law because WADA, as well as the IOC and most IFs (whose anti-doping rules must be consistent with the WADC), are based in Switzerland. Annie Bersagel, *Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field*, 12 PEPP. DISP. RESOL. L. J. 189, 193, n. 30 (2012) (“Forty-seven international sports federations are based in Switzerland, compared to five in Monaco, the next most popular federation host country.”). *See, e.g.*, *Int’l Cycling Federation v. Jan Ullrich & Swiss Olympic*, CAS 2010/A/2083 ¶ 4, award of 9 February 2012 (explaining that Swiss arbitration legislation applies because the parties are domiciled in Switzerland); Straubel, *supra* note 60, at 1254 (“Swiss law, because it has a rich history of dealing with sports law issues and because it has been widely and consistently used by many CAS panels, is as good if not better than any other country’s law.”). In doping cases, CAS panels often find other national, transnational, and international laws to be either inapplicable or not violated. *See, e.g.*, *Gatlin v. USADA*, CAS 2008/A/1461 and *IAAF v USA Track & Field and Gatlin*, CAS 2008/A/1462, award of 10 September 2008 at 11 (use of athlete’s 2001 doping offense to enhance his sanction for 2006 doping offense does not violate Americans With Disabilities Act); *Revised Award, CAS 2005/A/951, Canas v. ATP*, award of 23 May 2007, at 18 (athlete’s doping sanction does not violate European Union law, even if it applies). *See also* Mitten & Opie, *supra* note 1, at 300 (observing that “CAS panels generally have refused to rule that athlete doping rules and sanctions violate the national laws of an athlete’s home country.”).

¹⁴² *USA Shooting & Quigley v. International Shooting Union*, CAS 94/129, award of 23 May 1995, in C A S, DIGEST OF CAS AWARDS: 1986–1998 at 187 (Matthieu Reeb ed., 1998).

¹⁴³ Kaufmann-Kohler, *supra* note 134, at 365–366.

¹⁴⁴ WADC, *supra* note 20, art. 2.1.1 & cmt.

separate issues: “(1) use of a particular testing method or procedure as evidence of a doping violation; (2) substance of parties’ right to be heard; (3) rules of evidence; and (4) general principles of equity.”¹⁴⁵ In addition, CAS panels have followed prior cases in applying the equitable doctrine of *lex mitior*,¹⁴⁶ pursuant to which “if newly applicable sanctions are less severe than those in effect at the time of the offense, the new sanctions must be applied.”¹⁴⁷

Professor Nafziger observes that “CAS has been at its best when, for example, it has taken fully into account its past awards and those of national tribunals to evaluate the fairness, on a comparative basis of equality, of a proposed [doping] sanction against an athlete.”¹⁴⁸ In *Chagnaud v. FINA*,¹⁴⁹ the CAS ruled that sports governing bodies “should make allowance for an appreciation of the subjective elements in each case” in order to determine “a just and equitable sanction.” Rather than a fixed minimum sanction for all doping offenses (e.g., a two-year suspension), the CAS panel expressed its preference for “a sliding scale of suspension periods depending on the degree of fault of the athlete.”¹⁵⁰ This principle of proportionality was incorporated into

¹⁴⁵ Bersagel, *supra* note 141, at 201. Acknowledging that “[n]o CAS panel has gone so far as to explicitly recognize a principle of stare decisis,” she concludes that “panels’ frequent citations to previous CAS awards suggests a de facto doctrine of stare decisis may already be in operation. ... Alternatively, what appears to be a doctrine of stare decisis from the perspective of a common law scholar may be more accurately described as a doctrine of *jurisprudence constante*, in which the CAS generally follows the weight of past precedent, but remains free to depart from previous awards in the interests of justice.” *Id.* at 195–196. She notes that her “study provides no support for the theory that an arbitrator’s background determines a panel’s approach to precedent” because “the percentage of awards that cited previous arbitral awards was actually slightly higher for [the three exclusively] civil law panels [of jurists] than for [the five exclusively] common law panels [of jurists]. For mixed panels, twelve of fourteen cited to past precedents.” *Id.* at 203–04.

¹⁴⁶ See, e.g., *USADA v. Brunemann*, Am. Arb. Ass’n/N. Am. CAS Panel, AAA No. 77-190-E-00447-08 JENF at 20–21 (Jan. 26, 2009) (observing that “[t]his doctrine is well established in *lex sportiva* through many cases arising in several different sports” and citing numerous CAS awards applying it in doping cases).

¹⁴⁷ *Id.* at 20. See also Ullrich CAS 2010/A/2083, ¶ 54 (applying a UCI rule that allows for application of *lex mitior*).

¹⁴⁸ NAFZIGER, *supra* note 95, at 28.

¹⁴⁹ *Arbitration Chagnaud v. FINA*, CAS 95/141, ¶ 16, Award of April 22, 1996, in DIGEST OF CAS AWARDS 1986–1998, *supra* note 42, at 215, 220–21.

¹⁵⁰ *Id.* at ¶ 19.

the WADC, which provides that the presumptive 2-year suspension for a first doping offense (and lifetime suspension for a second offense)¹⁵¹ may be reduced based on the athlete's level of fault (i.e., no fault or negligence, or significant fault or negligence).¹⁵²

Professor Kaufmann-Kohler observes:

[S]ince the adoption of the [WADC], CAS panels ruling on non-significant fault have systematically considered other awards. Characteristically, the second award rendered under the [WADC] referred to the first one, distinguished it, and concluded that 'in *the absence any pertinent precedent*, the Panel is of the opinion that the application of 'No Significant Fault or Negligence' is to be assessed on the basis of the particularities of the individual case at hand.' Ever since, CAS panels consistently have adopted the same reasoning. Inevitably, the analysis of the growing number of precedents has become more elaborate. In one of the latest awards, the panel referred to no less than 11 previous precedents before reaching its conclusion.¹⁵³

Two recent, related pairs of CAS awards considering essentially similar legal issues provide illustrative examples of CAS panels' prevailing practice of generally following prior awards.

In *USOC v. IOC & IAAF*,¹⁵⁴ a CAS panel held that the U.S. 1,600-meter relay team could retain the gold medal it won during the 2000 Sydney Games, although Jerome Young, who had competed in a

¹⁵¹ WADC, *supra* note 20, art. 10.2.

¹⁵² *Id.* art. 10.5. If the athlete satisfies the difficult burden of proving no fault or negligence, he is not suspended for any period of time. *Id.* art. 10.5.1. If the athlete proves no significant fault or negligence, the standard suspension may be reduced by up to one-half of its presumptive length. *Id.* art. 10.5.2. In some instances, CAS awards have applied the Chagnaud proportionality principle to reduce an athlete's sanction by more than the maximum length prescribed by the WADC. *See, e.g.,* *Puerta v. Int'l Tennis Fed'n*, CAS 2006/A/1025, award of 12 July 2006. *See generally* Daniel Gandert, *The Battle Before the Games: The British Olympic Association Attempts to Keep Its Lifetime Ban for Athletes with Doping Offenses*, 32 *NW.J. INT'L LAW & BUS.* 53A (2012).

¹⁵³ Kaufmann-Kohler, *supra* note 134, at 366.

¹⁵⁴ *USOC v. IOC*, CAS 2004/A/725, award of July 20, 2005.

preliminary round as a member of the team, subsequently was found guilty of a 1999 doping offense that rendered him ineligible to compete in the Sydney Games. The panel found that the IAAF's rules in effect in 2000 concerned only the disqualification, ineligibility, and annulment of an individual athlete's performance results for a doping offense; it was not until their amendment in 2004–2005 that the rules expressly required disqualification of the results of any relay team for which an ineligible athlete competed.¹⁵⁵ In support of its ruling, the panel concluded that “clarity and predictability are required so that the entire sport community are informed of the normative system in which they live, work and compete, which requires at the very least that they be able to understand the meaning of rules and the circumstances in which those rules apply.”¹⁵⁶ Based on *USOC v. IOC & IAAF*, in *Anderson, et al. v. IOC*,¹⁵⁷ another CAS panel ruled that U.S. women's teams that won gold medals in the 4 × 100 meters and 4 × 400 meters relay events in the 2000 Sydney Games should not be disqualified, which enabled seven team members to keep the medals they had won. Although Marion Jones ran in both medal-winning final relays and subsequently admitted to a doping offense during the Games resulting in her individual disqualification and return of medals, this panel agreed with “the convincing analysis of the CAS 2004/A/725 panel [*USOC v. IOC & IAAF*] and sees no reason to reach a different conclusion” regarding the applicable IAAF rule in effect in 2000.¹⁵⁸

Similarly, in *British Olympic Association (BOA) v. World Anti-Doping Agency*,¹⁵⁹ a CAS panel adopted the reasoning of *USOC v. IOC*,¹⁶⁰ a prior CAS award by the same three-person panel¹⁶¹ that invalidated the IOC's “Osaka Rule” (which prohibited an athlete

¹⁵⁵ *Id.* at ¶ 14.

¹⁵⁶ *Id.* at ¶ 20.

¹⁵⁷ *Anderson v. IOC*, CAS 2008/A/1545, award of July 16, 2010.

¹⁵⁸ *Id.* at ¶ 61.

¹⁵⁹ *BOA v. WADA*, CAS 2011/A/2658, award of 30 April 2012.

¹⁶⁰ *USOC v. IOC*, CAS 2011/O/2422, award of 4 October 2011.

¹⁶¹ Rule 50 of the Code provides: “When two or more cases clearly involve the same issues, the President of the Appeals Arbitration Division may invite the parties to agree to refer these cases to the same Panel; failing any agreement between the parties, the President of the Division shall decide [the appropriateness of having the same panel resolve the cases].” CODE, *supra* note 42, R50.

sanctioned with a suspension of more than six months from participating in the next Olympic Games) because this was a disciplinary sanction not permitted by the WADC. Concluding that a British Olympic Association bylaw providing that an athlete found guilty of a doping offense is ineligible for selection to the British Olympic team also is inconsistent with the exclusive disciplinary sanctions established by the WADC, the *BOA* panel expressly accepted and relied on the *USOC* panel's interpretation of what constitutes a sanction for a doping violation.¹⁶²

On the other hand, there are some instances in which different CAS panels have reached conflicting conclusions regarding interpretation of the same WADC provision. This results in inconsistent resolution of the same legal issues and inhibits the development of a uniform body of international doping jurisprudence. For example, the *Oliveira v. USADA*¹⁶³ CAS panel was the first one to consider the meaning of the language “*corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sports performance,*” which is one of the predicate requirements an athlete must prove to justify a suspension of less than two years for use of a banned “specified substance” under Article 10.4 of the 2009 WADC. Finding “the express language of this clause is ambiguous and susceptible to more than one interpretation,”¹⁶⁴ the panel concluded it required the athlete “only to prove her ingestion of [the specified substance] was not intended to enhance her sport performance.”¹⁶⁵

¹⁶² As described in the *USOC Award*, ... Article 10.2 of the WADA Code prescribes a “period of ineligibility” to be imposed for a doping offense. The Panel there found that the IOC Regulation was a sanction because it made an athlete ineligible to participate and, thus, compete in the next Olympic Games ... Similarly, the effect of the Bye-Law in rendering the athlete found guilty of a doping offence to be ineligible to be selected to Team GB is immediate, automatic and for life ... The difference in the wording of the Bye-Law and the IOC Regulation is inconsequential ... The fact of the matter is that, by operation of the Bye-Law, an athlete is unable to participate in the Olympics. Accordingly, this Panel finds that the Bye-Law renders an athlete ineligible to compete—a sanction like those provided for under the WADA Code. CAS 2011/A/2658, at ¶¶ 8.22–8.25.

¹⁶³ *Oliveira v. USADA*, CAS 2010/A/2107, award of 6 December 2010.

¹⁶⁴ *Id.* at ¶ 9.13.

¹⁶⁵ *Id.* at ¶ 9.17.

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Another CAS panel followed *Oliveira's* construction of this provision,¹⁶⁶ but two other CAS panels disagreed and determined this provision requires the athlete to prove no intent to enhance sport performance through the use of the product containing the specified substance.¹⁶⁷

2. Sport Nationality Requirements

To maintain the integrity of Olympics and other international sports competitions, the IOC and IFs have rules that define an athlete's current sport nationality (which is limited to one country), provide that he or she is eligible to compete only for that country, and establish requirements for changing one's sport nationality.¹⁶⁸ Disputes regarding an athlete's sport nationality may arise when an athlete with dual nationality now desires to compete for a country different from

¹⁶⁶ *Querimaj v IWF*, CAS 2012/A/2822, award of September 12, 2012.

¹⁶⁷ *Foggo v NRL*, CAS A2/2011, award of May 2011; *ITF v Kutrovsky*, CAS 2012/A/2804, award of October 3, 2012.

¹⁶⁸ Rule 41 of the Olympic Charter, which is titled "Nationality of Competitors," states:

1. Any competitor in the Olympic Games must be a national of the country of the NOC which is entering such competitor. 2. All matters relating to the determination of the country which a competitor may represent in the Olympic Games shall be resolved by the IOC Executive Board. Bye-laws 1 and 2 to Rule 41 provide as follows: "1. A competitor who is a national of two or more countries at the same time may represent either one of them, as he may elect. However, after having represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognised by the relevant IF, he may not represent another country unless he meets the conditions set forth in paragraph 2 below that apply to persons who have changed their nationality or acquired a new nationality. 2. A competitor who has represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognised by the relevant IF, and who has changed his nationality or acquired a new nationality, may participate in the Olympic Games to represent his new country provided that at least three years have passed since the competitor last represented his former country. This period may be reduced or even cancelled, with the agreement of the NOCs and IF concerned, by the IOC Executive Board, which takes into account the circumstances of each case.

OLYMPIC CHARTER, *supra* note 5, at 78.

the one he or she previously competed for during the Olympics or another international sports competition.

Applying “general principles of law,” CAS panels have recognized that international sports governing bodies have a valid need to establish rules defining the sport nationality of athletes with dual nationality, (which necessarily must be only one country at a given time) and a reasonable waiting period (e.g., three years) that must elapse before an athlete changing his or her sport nationality is eligible to compete for another country in Olympic or international competitions.¹⁶⁹ The CAS will enforce clear sport nationality rules that further the legitimate interests of the IOC or IF, even if a rule imposes hardship upon particular athletes in individual cases or “operates in such a fashion as to cause the overall duration of an emigrating athlete’s future Olympic eligibility to depend on the particular naturalization regime of the country in which he or she chooses to relocate.”¹⁷⁰ Consistent with the traditional, limited role of common law courts historically, the CAS will not “judicially” legislate new

¹⁶⁹ Arbitration CAS 92/80, B. v. FIBA, award of March 25, 1993, in DIGEST OF CAS AWARDS 1986–1998, *supra* note 75, at 297, 302, 304–05. When interpreting and applying sport nationality rules, the CAS must consider applicable national laws (or at times international law) in determining an athlete’s sport nationality, which generally requires the athlete to be a legally recognized national of the same country. *See, e.g.*, Arbitration CAS ad hoc Division (O.G. Sydney 2000) 001, USOC & USA Canoe/Kayak v. IOC (*Perez I*), award of September 13, 2000, in CAS, CAS AWARDS—SYDNEY 2000 at 13, 21 (2000) (concluding that athlete did not acquire U.S. nationality before September 1997 even though not naturalized until 1999 on any grounds “defined in Olympic Charter, or under international law, or indeed under U.S. law”); Arbitration CAS ad hoc Division (O.G. Sydney 2000) 005, Angel Perez v. IOC (*Perez II*), award of September 19, 2000, in CAS, CAS AWARDS—SYDNEY 2000 at 53, 21 (2000) (ruling that athlete became “stateless” under international law in 1993 and changed from Cuban to U.S. nationality in the same year, making him eligible to compete in 2000 Olympics for U.S.).

¹⁷⁰ *Perez I*, (O.G. Sydney 2000) 001, at 21. *See also* Arbitration CAS Ad hoc Division (O.G. Beijing) 2008/006, Moldova Nat’l Olympic Comm. v. IOC, award of August 9, 2008 in CAS, CAS AWARDS—BEIJING 2008 (2008) at 300, 301–302 (“this Panel has no authority to waive any part thereof” of the Olympic Charter’s nationality rule). *See generally* Mitten & Davis, *supra* note 71, at 82–85 (summarizing CAS jurisprudence regarding validity of IOC and IF athlete eligibility rules, including sport nationality rules).

nationality rules despite the foregoing potential adverse consequences.¹⁷¹

As they do in resolving doping disputes, CAS panels cite prior CAS awards in similar sport nationality cases and generally follow them to ensure equal legal treatment of all athletes.¹⁷² In *Christel Simms v. Federation Internationale de Natation (FINA)*,¹⁷³ the CAS panel relied on a prior CAS award adopting the doctrine of “estoppel by representation” in determining that an athlete had validly changed her sport nationality and was eligible to compete for the Philippine team at the Beijing Olympics. Because FINA (the IF for swimming) had provided written confirmation that she could swim for the Philippines and she had done so during the April 2008 FINA World Championships in reliance upon this communication, FINA was estopped from subsequently asserting she was ineligible to swim for the Philippine team at the Beijing Olympics. The panel concluded that “[t]o exclude her from competing under these circumstances will be unfair and contrary to the rule of estoppel.”¹⁷⁴

Similarly, in *Nabokov & Russian Olympic Committee & Russian Ice Hockey Federation v. International Ice Hockey Federation*

¹⁷¹ *Perez I*, (O.G. Sydney 2000) 001, at 21 (“The Panel is unwilling to engage in an act of legislation.”). This view is consistent with the admonition that U.S. courts have given to arbitrators that resolve domestic sports disputes. *Lindland v. U.S. Wrestling Ass’n, Inc.*, 227 F.3d 1000, 1004 (7th Cir. 2000) (“Arbitrators are not ombudsmen; they are authorized to resolve disputes under contracts and rules, not to declare how the world should work in the large.”).

¹⁷² In some cases resolving a dispute concerning an athlete’s sport nationality, CAS panels have implicitly recognized the precedent established by prior awards by distinguishing them. *See, e.g.*, *Arbitration CAS ad hoc Division (O.G. Sydney 2000) 008, Arturo Miranda, Canadian Olympic Ass’n, and Canadian Amateur Diving Ass’n v. IOC (Miranda II)*, award of September 24, 2000, in *CAS, CAS AWARDS—SYDNEY 2000* at 83, 89 (2000) (concluding that “statelessness” rule of *Perez II*, which involved a Cuban defector, is inapplicable; this case is “fundamentally different” because athlete is simply a non-resident Cuban, not a defector); *Spanish Basketball Fed’n v. FIBA, Arbitration CAS 98/209*, award of January 6, 1999 in *CAS, DIGEST OF CAS AWARDS II: 1998–2000* at 500, 501–02 (Matthieu Reeb ed., 2002) (observing that current “circumstances need distinguishing from a previous CAS Case OG 98/004-005”).

¹⁷³ *Arbitration CAS Ad hoc Division (O.G. Beijing) 2008/002*, order of August 1, 2008, in *CAS, CAS AWARDS—BEIJING 2008 (2008)* at 270, 274.

¹⁷⁴ *Id.* at 274.

(IIHF),¹⁷⁵ the CAS panel cited two prior CAS awards and observed that “[p]revious CAS Panels have already expressed their view that they will interpret the applicable rules in a way ‘which seeks to discern the intention of the rule maker, and not to frustrate it.’” Construing and applying the IIHF’s sport nationality rule, the panel determined that an athlete who had played for the Kazakh ice hockey team during the 1994 World Championships when he was nineteen years old was ineligible to play for the Russian team during the 2002 Olympics.¹⁷⁶ It explained:

The Panel therefore has to acknowledge that the rule has always been interpreted as providing a possibility of representing two countries but only for players who were under the age of eighteen when they represented their first country. Since the Panel finds this to be a valid interpretation of the rule and since it has been interpreted in that way ever since it was implemented, the Panel will not interpret it differently. This is in the interest of fairness to all other players whose eligibility for playing for another country has previously been denied because of this particular interpretation of Bylaw 204 (1) c.¹⁷⁷

3. *Very Narrow Judicial Review of Merits of CAS Awards*

National courts, including the SFT and U.S. courts, generally will recognize and enforce a CAS ad hoc Division or appeals arbitration award, the substantive merits of which will be invalidated only if it violates the forum country’s public policy under a very narrow standard of judicial review.¹⁷⁸ Like the SFT, U.S. courts have adopted a similar international standard in judicially reviewing CAS awards.¹⁷⁹ As two legal scholars have observed: “Because one of the primary objectives of establishing a private legal regime to resolve international sports disputes is to create a uniform body of *lex sportiva* that is predictable and evenly applied worldwide, it is problematic if

¹⁷⁵ RIHF v. IIHF, CAS 2001/A/357, ¶ 8, award of January 31, 2002, in CAS, DIGEST OF CAS AWARDS III: 2001–2003 (Matthieu Reeb ed., 2004).

¹⁷⁶ *Id.* at ¶ 27.

¹⁷⁷ *Id.* at ¶ 9.

¹⁷⁸ See *supra* notes 81–90 and accompanying text.

¹⁷⁹ *Id.*

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CAS awards are not judicially reviewed pursuant to a generally accepted international standard.”¹⁸⁰

This very narrow scope of judicial substantive review of the merits of CAS awards enables the development of a consistent body of Olympic and international sports jurisprudence by the CAS, which generally is globally recognized and enforced by national courts in the 148 countries that are signatories to the New York Convention. It also facilitates the predictable interpretation and application of IOC and IF rules (as well as the WADC) to resolve sports disputes by the CAS arbitration system.

VI. CONCLUSIONS AND RECOMMENDATIONS

Because Olympic and other international sports competitions occur worldwide and are based on consensual relationships among global entities and athletes throughout the world, universally accepted rules and a unitary dispute resolution system are necessary for their effective internal governance and external regulation. A CAS panel’s use of *de novo* review in *ad hoc* Division and appeals arbitration proceedings generally provides broader scrutiny of IOC and IF rules and decisions, which is more favorable to Olympic and international sport athletes than the very deferential arbitrary and capricious standard of review that national courts typically provide when reviewing the rules and internal decisions of private sports governance bodies outside the context of collectively bargained employment agreements.¹⁸¹ Moreover, “U.S. domestic sports law generally does not provide [Olympic and international sport] athletes with greater legal rights than the developing body of *lex sportiva*.”¹⁸²

Based on the above analysis, the level of procedural fairness afforded to Olympic and international sport athletes by the CAS arbitration system and the need for a uniform body of international *lex*

¹⁸⁰ Mitten & Opie, *supra* note 1, at 306.

¹⁸¹ *See, e.g., D’Arcy v. Australian Olympic Comm., Arbitration CAS 2008/A11574, Award of 11 June 2008* (observing that a CAS panel’s duty to independently determine the merits of an athlete’s claims and defenses pursuant to the CAS Code is broader than a court’s rational basis review of an Olympic sports governing body’s disciplinary action against an athlete). *See also supra* notes 69–71.

¹⁸² Mitten & Opie, *supra* note 1, at 300.

sportiva appear to justify requiring them to submit disputes with the IOC and IFs to the CAS for final and binding resolution along with very limited judicial review of CAS awards and their recognition and enforcement by national courts.¹⁸³ It is very difficult to objectively measure the extent to which the CAS arbitration system produces substantive justice (i.e., just results in individual cases), which has an inherent degree of subjectivity. However, its procedural fairness increases the likelihood of substantive justice, or at least tends to alleviate any potential concerns about a lack of systematic substantive justice. Perceptions of the fairness of outcomes in individual cases, a prerequisite for the necessary “buy-in” by the parties to a sports dispute as well as national governments and their respective judicial systems, are directly related to the general level of confidence in the fairness of the procedures by which CAS resolves these disputes. Professor Nafziger accurately observes that the CAS has established the “gold standard in resolving sports-related disputes” by “ensuring fairness in terms of even-handedness, impartiality, acting in good faith, and coherence.”¹⁸⁴

As Professor Ken Foster, an English sports law scholar, explains:

The conclusion derived from describing *lex sportiva* as a private system of transnational law is that such a pluralistic notion of law allows us to see private arbitration as a non-state arrangement not created by governments but existing as a self-reflexive legal order,

¹⁸³ *Michels v. U.S. Olympic Comm.*, 741 F.2d 155, 159 (7th Cir. 1984) (Posner, J., concurring) (“[T]here can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games.”).

¹⁸⁴ NAFZIGER, *supra* note 95, at 27–28. *See also* Allan Erbsen, *The Substance and Illusion of Lex Sportiva*, in *THE COURT OF ARBITRATION FOR SPORT 1984–2004*, *supra* note 32, at 454 (“CAS’s jurisprudence fills what until recently was a disturbing legal vacuum in international sports. Before the creation of CAS, the rights and obligations of athletes and officials were ill-defined and were enforceable—if at all—only through costly and lengthy litigation in national courts or in arbitration before tribunals staffed by the same sports federations whose actions the tribunals were asked to judge. Legal claims were thus difficult to frame, difficult to pursue, and for political outsiders, difficult to win. Since the creation of CAS, rights and obligations have become more clearly defined and understood, adjudication is more accessible, and arbitrators are more independent.”).

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which is juridified in its own practice. This juridification, with institutionalized forms of rule creation and a forum for dispute settlement that respects substantive and procedural justice, is the ultimate reason why national courts will respect its exclusive jurisdiction.¹⁸⁵

On the other hand, legitimate public policy questions may be raised about whether such a limited scope of judicial review of CAS arbitration awards effectively protects athletes' rights and interests, given that IOC and IF rules require athletes to submit to CAS jurisdiction as a condition of participating in Olympic and international sports competitions and to forego their right to judicial resolution of the merits of a dispute. This is even more problematic if a CAS panel makes factual or legal errors, which are not subject to correction by a national court. However, no public legal system is error free; even courts make mistakes. On balance, a consistent body of CAS jurisprudence that is uniformly applied to all the world's Olympic athletes with limited disruption by national courts probably is better than the risk of a potentially conflicting body of international sports law unduly influenced by nationalistic interests through broader judicial review.

The CAS arbitration system "demonstrates how civil and common law legal systems can function effectively together within an international tribunal to resolve a wide variety of complex, time-sensitive disputes between parties of different nationalities," which produces "globally respected adjudications" of Olympic and international sports disputes.¹⁸⁶ Although the CAS is a private arbitral tribunal rather than a "court" established by agreement of sovereign countries, it is a form of international legal pluralism that is developing into, and functioning as a, de facto common law legal system.¹⁸⁷ As

¹⁸⁵ Ken Foster, *Global Administrative Law: The Next Step For Global Sports Law?*, University of Westminster School of Law Research Paper No. 12-10, available at <http://ssrn.com/abstract=2057750>.

¹⁸⁶ Mitten & Opie, *supra* note 1, at 288.

¹⁸⁷ See *supra* Section E. In contrast to court proceedings whereby judges usually are randomly assigned to cases, the parties can select the person(s) who will arbitrate their dispute. Kate Kennedy, *Manifest Disregard in Arbitration Awards: A Manifestation of*

this unique, specialized form of international arbitration continues to evolve, certain reforms that are not part of more traditional arbitration systems appear necessary and should be considered to enhance the level of procedural fairness and substantive justice afforded to athletes, who generally are required to submit disputes to CAS arbitration as a condition of participating in Olympic and other international sports competitions.

Some legal scholars assert that the existence of legal aid for athletes is “of crucial importance to sustain the legitimacy of the CAS system”¹⁸⁸ because “the obligation to submit sports disputes to arbitration deprives athletes from the benefit of any legal aid as may be available to them before the (otherwise) competent national courts.”¹⁸⁹ They contend that an athlete “without sufficient financial resources could rescind the arbitration agreement on the ground that it does not afford him access to justice.”¹⁹⁰ Although this is a strong statement with uncertain legal validity, it is important to ensure that athletes have effective access to CAS arbitration. In an effort to achieve this objective, the ICAS has established a legal aid fund for athletes, and guidelines for them to be eligible for financial assistance and the appointment of pro bono legal counsel in CAS proceedings.¹⁹¹ This is

Appeals Versus a Disregard for Just Resolutions, 16 J.L. & Pol’y 417, 420 (2007); ANDREA KUPFER SCHNEIDER ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 458–59 (2d ed. 2011). Discovery generally is limited in arbitration proceedings, and there are no strict rules limiting the evidence that arbitrators can consider. David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 452 (2011); Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 522–23 (2009). Judicial review of the merits of arbitration awards is much narrower than appellate court review of trial court decisions because courts do not provide broad substantive review of arbitration awards to correct mistakes of fact or law. Kennedy, *supra*, at 421–22. An arbitration award will be vacated on substantive grounds only if it violates public policy, or if the arbitrator acted arbitrarily and capriciously or manifestly disregarded the law. Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 245–46 (1999); SCHNEIDER ET AL., *supra*, at 462–63.

¹⁸⁸ Rigozzi, Hasler, & Quinn, *supra* note 106, at 17.

¹⁸⁹ *Id.* at 17, n. 129.

¹⁹⁰ *Id.*

¹⁹¹ A natural person, such as an individual athlete without sufficient financial means to defend his rights before the CAS, must prove “his income and assets are not sufficient to allow him to cover the costs of proceedings, without drawing on that part of his assets

a laudable recent development, but more resources from sources other than ICAS may be needed to ensure that all Olympic and international sport athletes are adequately represented by knowledgeable counsel, particularly in CAS cases requiring specialized legal expertise.¹⁹²

Although all CAS ad hoc Division awards and most appeals arbitration awards are published, it is important to ensure their ready availability to arbitrators, athletes, sports governing bodies, attorneys, and academics to facilitate “predictable and equitable decision making” by the CAS.¹⁹³ As one commentator has observed, “CAS panels are extremely reluctant to depart from precedent, [i]n the interest of fairness to the parties, it is therefore critical that the CAS publish all non-confidential awards, and refrain from allowing parties to rely on confidential awards.”¹⁹⁴

In addition, ICAS should examine and evaluate whether its existing internal procedures are sufficient to effectively minimize the possibility of conflicting interpretation and application of the WADC,

necessary to support him and his family.” GUIDELINES ON LEGAL AID, *supra* note 103, art. 5. The athlete must provide “supporting documents, e.g., tax returns, contract of employment, statement of salary, lease” and “set out, in a summary fashion, the grounds of his appeal/defence to establish that his appeal/defence has a legal basis.” *Id.* art. 9. The ICAS President provides a reasoned decision regarding a request for legal aid, which is not subject to any appeal. *Id.* art. 10. The request “will be refused if it is obvious that the applicant’s claim or grounds of defence have no legal basis” or are frivolous or vexatious.” *Id.* art. 5. The ICAS President may grant the following forms of legal aid to an athlete: not requiring payment of the costs of the CAS procedure or an advance of costs; permitting him to choose pro bono counsel from a list established by ICAS; and/or granting a lump sum to cover his own travel and accommodation costs and those of his pro bono counsel as well as his witnesses, experts and interpreters in connection with a CAS hearing. *Id.* art. 5.

¹⁹² Because athletes accused of doping violations need access to competent legal counsel to accurately evaluate the validity of charges and to effectively defend themselves, Professor Maureen Weston proposes that Olympic sports organizations establish and fund a group of athlete advocates with specialized training to advise and represent athletes in doping matters. Weston, *supra* note 114, at 49.

¹⁹³ Richard McLaren, *The Court of Arbitration for Sport*, in HANDBOOK ON INTERNATIONAL SPORTS LAW 32, 62–63 (James A. R. Nafziger & Stephen F. Ross eds., 2011). See also Lenard, *supra* note 46, at 180 (recognizing that ICAS “must ensure greater and equal accessibility to CAS opinions and precedent”); Mitten, *supra* note 82 at 60 (suggesting that “lack of general public access to all CAS appeals awards violates the principles of good faith and equal treatment,” which is required by Swiss law and public policy).

¹⁹⁴ Bersagel, *supra* note 141, at 205.

Olympic Charter, and IF rules by different CAS panels. Currently, the President of the CAS ad hoc Division (who is an ICAS member) is required to review an ad hoc Division award before it is signed and issued by the arbitrators and “without affecting the Panel’s freedom of decision may also draw [their] attention to points of substance.”¹⁹⁵ Similarly, the CAS Secretary General reviews appeals arbitration awards and “may also draw the attention of the Panel to fundamental issues of principle.”¹⁹⁶ Legal scholars have proposed that ICAS consider establishing a closed list of CAS panel presidents¹⁹⁷ or alternative reforms such as single supreme appellate panel within CAS¹⁹⁸ to facilitate the development of a consistent body of international *lex sportiva*. This is an important objective, but it is important to ensure that any internal reform does not compromise the timely and final resolution of Olympic and international sports disputes by CAS ad hoc Division and appeals arbitration proceedings, which is an essential component of the existing CAS system of international legal pluralism, which generally provides an appropriate level of procedural fairness and substantive justice to athletes in its existing form.

¹⁹⁵ ARBITRATION RULES FOR THE OLYMPIC GAMES, *supra* note 57, art. 19.

¹⁹⁶ OLYMPIC CHARTER, *supra* note 5, R. 46.

¹⁹⁷ Rigozzi, Hasler, & Quinn, *supra* note 106, at 17 and 17, n.31 (observing that the CAS may establish a special list of persons from its pool of arbitrators who would act as the president of CAS panels; “having a closed list of *Presidents* would promote consistency, and ensure that at least the key person in the Panel has the required expertise and professionalism to ensure both speed and the quality of the award without having to limit the parties’ freedom in their choice of the arbitrator.”).

¹⁹⁸ Segan, *supra* note 93 (“When a case is lodged with CAS which raises a point of general importance—the identification of which would be a matter for the President – then the case would be relinquished to a five-arbitrator Grand Chamber for a binding decision on the point. The rules of CAS would be amended so that future panels were obliged to follow decisions of the Grand Chamber unless satisfied that a ruling was clearly and obviously wrong.”); Straubel, *supra* note 62, at 1272 (for CAS doping cases, “a mechanism, such as a single supervisory panel, should be created to reconcile conflicting precedent to ensure equal treatment and remove some of the arbitrariness of panel decisions.”); Maureen A. Weston, *Simply a Dress Rehearsal? U.S. Olympic Sports Arbitration and De Novo Review at the Court of Arbitration for Sport*, 38 GA. J. INT’L & COMP. L. 97, 128 (2009) (“For CAS to be a true ‘Supreme Court for Sport,’ it should institute a formal appellate body akin to a U.S. Supreme Court with discretionary review, to rule on conflicting interpretations of *lex sportiva* rendered by CAS panels.”).