

ELIGIBILITY TO PARTICIPATE IN THE OLYMPICS:
WAYS TO IMPROVE HOW DISPUTES ARE RESOLVED AT GAMES TIME

by

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ABSTRACT

Eligibility disputes at the Olympic Games are ultimately resolved by the Ad Hoc Division ("AHD") of the Court of Arbitration for Sport. This paper critically examines the AHD both from within and without.

The first part of this thesis describes eligibility disputes at Games time, and how they are resolved. The paper begins with a brief look at the history of athlete participation in the Olympic Games. It then deals with the concept of eligibility, and sets out the rules which govern same for the Olympics. These rules are set by a number of separate but related entities, namely the International Olympic Committee, the International Federations, the National Olympic Committees, and, finally, the World Anti-Doping Agency. The roles of each of these bodies are examined in order to provide the context in which disputes are resolved.

This paper then surveys the parameters in which the AHD operates which have been set over the years by domestic courts with an Anglo-American tradition. The performance of the AHD is then critically examined with a view to making recommendations for its improvement.

The second part of this thesis surveys the ways eligibility disputes are resolved in the major north American professional sports leagues and the NCAA, with a view to suggesting improvements in the AHD process.

This thesis concludes by offering recommendations to the AHD process in two areas: operational and structural. Several operational improvements are suggested, the main ones of which are that all parties affected by a dispute be offered an opportunity to participate in before the AHD, and parties be given the opportunity to appoint the Panel. The structural change suggested is that athletes be given formal input into the administration of the Games, with the Athletes' Commission being the obvious body which could form the basis for a bargaining unit. It is suggested that questions surrounding the legitimacy of AHD will remain while ever athletes have no formal say in its composition or operation.

TABLE OF CONTENTS

Abstract	ii
Table of contents	iii
List of abbreviations	v
Acknowledgments	vi
CHAPTER I Introduction	1
PART ONE Olympic Eligibility Disputes: What are they, and how are they dealt with at Games time?	3
CHAPTER II The Olympic Games	3
1. Historical context	3
a. Summer Games	3
b. Winter Games	4
2. The IOC today	4
3. The Olympic Movement	5
CHAPTER III Eligibility	6
1. The concept of eligibility	6
2. Who decides	6
a. The Olympic Charter	7
b. The role of the IFS and NOCs	11
3. Types of disputes	12
CHAPTER IV Olympic Administration	12
1. Background	12
a. Sport For All Commission	13
b. Athletes' Commission	13
c. Ethics Commission	17
d. Summary	20
2. The IFs and the NOCs	20
a. The International Sports Federations	20
b. The National Olympic Committees	21
3. WADA	22
a. Doping - recent history	22
b. The creation of WADA	28
c. WADA in general	32
d. WADA and national governments - the Canadian response	40
e. WADA and the Olympics	43
CHAPTER V Resolving Sporting Disputes and the Courts	51
1. Principle of non-intervention	51

a.	England and Wales	52
b.	Canada	52
c.	The United States	57
d.	Generally	59
CHAPTER VI	CAS and the AHD	62
1.	Introduction	62
2.	Permanent tribunal(s)	65
3.	Ad hoc tribunal	70
4.	Case law - an overview	76
5.	Commentary	82
a.	Compulsory agreement	82
b.	Due process rights	85
c.	Right to be heard for all affected parties	88
d.	Law to be applied	92
e.	Flexibility	97
f.	Speed	99
g.	Dueling jurisdictions	101
h.	Independence	102
i.	Comparison to the domestic courts	106
j.	Finality / enforcement of the decision	107
6.	Conclusion	109
PART TWO	How do other sports organizations do it?	111
CHAPTER VII	Major North American Sports	112
1.	Generally	112
2.	Drugs	113
3.	Major League Baseball	114
4.	National Basketball Association	119
5.	The National Football League	125
6.	The National Hockey League	127
7.	Commentary	129
CHAPTER VIII	The NCAA	134
1.	Generally	134
2.	Eligibility	135
3.	History of due process rights	136
4.	The current system	138
5.	Drugs	145
6.	Commentary	146
CHAPTER IX	Room for improvement?	148
1.	Operational	149
2.	Structural	150
Selected Bibliography	153

LIST OF ABBREVIATIONS

AHD	Ad Hoc Division of the CAS
CAS	Court of Arbitration for Sport
CBA	Collective Bargaining Agreement
CCES	Canadian Centre for Ethics in Sport
Games	Olympic Games
IAAF	International Amateur Athletics Federation
ICAS	International Council of Arbitration for Sport
IF	International Federation
IOC	International Olympic Committee
MLB	Major League Baseball
MNAPS	Major north American professional sports
NBA	National Basketball Association
NCAA	National Collegiate Athletic Association
NFL	National Football League
NHL	National Hockey League
NOC	National Olympic Committee
PA	Players Association
WADA	World Anti-Doping Agency

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ELIGIBILITY TO PARTICIPATE IN THE OLYMPICS:
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*Participation in the Games is what counts the most for the majority of competitors: to have the honour of representing their country, to rub shoulders with elite athletes and to have the opportunity to give their best. This is all part of the spirit of the Olympic Games!*¹ [emphasis in original].

I. INTRODUCTION

At the 115th IOC Session in Prague on July 2, 2003, the Canadian city of Vancouver was elected Host City of the XXI Olympic Winter games in 2010.² Vancouver and the mountain resort of Whistler will welcome the world's winter sport athletes between February 12 and February 26, 2010.

Between now and the opening ceremonies in 2010, the International Olympic Committee will take its show to Athens (2004 Summer Games), Turin (2006 Winter Games), and Beijing (2008 Summer Games). Just as there have been in the past, there will undoubtedly be disputes arising either during or around these events which will catapult the names of a number of athletes on to the front pages, whether they like it or not. The vast majority of these disputes will centre around questions relating to the "eligibility" of the athlete: eligibility to make their country's team, to compete, and / or to retain their medal(s).

¹ Olympic Museum and Studies Centre, *The Modern Olympic Games*, (Lausanne, 2002), p. 11

² Vancouver's bid triumphed over seven other initial applications from Andorra la Vella (Andorra), Bern (Switzerland), Harbin (China), Jaca (Spain), PyeongChang (Korea), Salzburg (Austria), and Sarajevo (Bosnia-Herzegovina). Vancouver defeated PyeongChang in the final round of voting 56 to 53 [see *Olympic Review Bulletin*, July 2003]

At each instalment of the Olympic Games, an arbitration tribunal is set up in the locale to deal with any sporting disputes which may arise during the Games. These tribunals are *ad hoc* versions of the permanent tribunals under the authority of the Court of Arbitration for Sport (the "CAS"). History has shown that many of the disputes handled by such tribunals concern athlete eligibility.

This thesis examines the methods employed by the Olympic Movement to regulate to the eligibility of athletes to compete in the Olympic Games, with an eye focused on how, if at all, these methods can be improved from a perspective of fairness to the athletes. The emphasis will be on resolving disputes at Games time. This thesis has two main parts: the first part defines eligibility disputes, and sets out the current procedures available for resolving them at Games time.³ The second part surveys how other sports-centred organizations resolve disputes. It is concluded by some suggestions for the improvement of the current Olympic dispute resolution system.

Although concern for the rights of athletes is a relatively new phenomenon,⁴ when assessing the current CAS-based system, it is worth remembering the words of the Albert Venn Dicey and his description of the "rule of law":

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law and by the law alone; a man may with us be punished for a breach of the law, but he can be punished for nothing else.

It means again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea

³ This thesis does not address an athlete's right to participate in sport when that athlete has a physical abnormality that exposes him or her to a risk of injury or death. For a detailed discussion of this particular topic, please see M.J. Mitten, "Enhanced Risk of Harm to One's Self as a Justification for Exclusion from Athletics," (1998) 8:18 Marq. Sports L.J., 190

⁴ For a snapshot of the rights of athletes in Canada in the early 1980s, see the publication: B. Kidd & M. Eberts, *Athletes' Rights in Canada*, (Toronto: The Government of Ontario, 1982)

of any exception of officials or others from the duty of obedience to the law which governs other citizens⁵

PART ONE ***OLYMPIC ELIGIBILITY DISPUTES: WHAT ARE THEY, AND HOW
ARE THEY DEALT WITH AT GAMES TIME?***

Before examining Olympic eligibility disputes, there is a need for a brief look at the historical context provided by past participation and the organization of the Games themselves.

II. THE OLYMPIC GAMES

1. Historical context

a. Summer Games

The debut of the modern Olympic Games was in 1896 in Athens. Only men were allowed to compete. Women were allowed to compete in Paris in 1900, but only in tennis and golf, though even such limited participation did not please Baron Pierre de Coubertin, the founder of the modern Olympic Games.⁶

After a gradual progression in participation over the decades, women comprised over 40% of the athletes at the 2000 Games in Sydney.⁷

⁵ A.V. Dicey, *The Law of the Constitution* (London: MacMillan, 1961), pp. 202-203

⁶ *Supra*, note 1, p. 3

⁷ *Supra*, note 1, p. 4. However, the IOC's promotion of women's interests does not there stop. In 1995, the IOC set as an objective for NOC's and IF's that at least 10% of all-decision-making positions be held by women by December 31, 2000, and that this increase to 20% by the end of 2005 [see

b. Winter Games

Baron de Coubertin's revival of the Olympic games saw only summer sports included. In 1924, 258 athletes from 16 countries participated in the International Winter Sports Week. Two years later, this week was retroactively named the first Olympic Winter Games.⁸

At the 2002 Salt Lake City Games, athletes took part in 78 events in seven sports (biathlon, bobsleigh, curling, ice hockey, luge, skating, and skiing).⁹

2. The IOC today

The International Olympic Committee ("IOC") is an international non-governmental, non-profit organization which serves as an umbrella organization of the Olympic Movement, which it created. The IOC's primary responsibility is to "supervise the organization of the summer and winter Olympic Games".¹⁰

The organs of the IOC are three in number: the Session, the Executive Board, and the President.¹¹

www.olympic.org/uk/organisation/missions/equality_uk.asp (last visited August 14, 2004)]

⁸ *Supra*, note 1, p. 4

⁹ *Supra*, note 1, p. 14

¹⁰ The Olympic Charter, Chapter 2, and www.olympic.org/uk/organisation/ioc/index_uk.asp (last visited August 14, 2004)

¹¹ *Ibid*, Chapter 2, Part 21

The Session is a general meeting of the IOC, which is held at least once a year, and is the supreme organ of the IOC. The Session may delegate powers to the Executive Board.¹² The Executive Board consists of the President, four Vice-Presidents and ten other members.¹³

3. The Olympic Movement

The Olympic Movement comprises all those who agree to be governed by the IOC and the Olympic Charter, namely the international sports federations (the “IFs”), the national Olympic committees (the “NOCs”), the organizing committees (the “OCs”), athletes, judges, referees, associations, clubs, and all other institutions recognised by the IOC.¹⁴ According to the IOC:

The goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport practiced without discrimination of any kind, in a spirit of friendship, solidarity and fair play.¹⁵

In addition, the IOC lists two of the defining goals of the Olympic Movement as “the fight against doping” and “promoting sports ethics and fair play”.¹⁶

According to the Olympic Charter: “The practice of sport is a human right. Every individual must have the possibility of practising sport in accordance with his or her needs.”¹⁷ However, with rights come responsibilities - one of the mandatory rituals at the opening ceremony is the

¹² *Ibid*, Chapter 2, Part 22

¹³ *Ibid*, Chapter 2, Part 23

¹⁴ www.olympic.org/uk/organisation/movement/index_uk.asp (last visited August 14, 2004). Also see *Ibid*, Chapter 1, Part 3, para. 1

¹⁵ *Supra*, note 10, Fundamental Principles, para. 6, and www.olympic.org/uk/organisation/movement/index_uk.asp (last visited August 14, 2004)

¹⁶ www.olympic.org/uk/organisation/movement/index_uk.asp (last visited August 14, 2004). Also see *supra*, note 10, Chapter 1, Part 2, paras. 6 and 8

¹⁷ *Supra*, note 10, Fundamental Principles, para. 8

symbolic swearing of an oath respecting the "rules" by both an athlete and an official from the host country.¹⁸

III. ELIGIBILITY

1. The concept of eligibility

According to Webster's Third New International Dictionary, the word "eligible" means, *inter alia*: "fitted or qualified to be chosen or used: entitled to something."¹⁹

In the context of the Olympic Games, the concept of eligibility centres around whether or not an athlete can compete in their chosen sport / discipline / event. For many athletes, the pinnacle of their career is simply competing in the Olympic Games. Accordingly, the news to an athlete that they may not be able to compete for any reason in the Olympics can be devastating. It is therefore not surprising that an athlete faced with not being able to compete, for whatever reason, will seek to challenge any proposed bars. And so an eligibility dispute is born.

Of course, for an athlete to dispute an eligibility decision, there must, *ipso facto*, have been a decision concerning their eligibility made. The identity of the decision-makers is of vital importance. Accordingly, it is important to understand the progression of eligibility disputes, and which body has the jurisdiction to what.

2. Who decides

Every athlete's road to the Olympic Games is a long one. The key to selection for their country's team is not in their own hands. All any athlete can do is perform well enough to be considered

¹⁸ *Supra*, note 1, p. 4

¹⁹ (Springfield, Mass.: Merriam-Webster, 1986), p. 736

by those who make such choices. So, who decides which athletes will wear the national colors, and which athletes will remain at home?

a. The Olympic Charter

The most basic rules governing eligibility for the Olympic Games are set out at Chapter 5 ("The Olympic Games"), Part II ("Participation in the Olympic Games") of the Olympic Charter:

45 Eligibility Code

To be eligible for participation in the Olympic Games a competitor, coach, trainer or official must comply with the Olympic Charter as well as with the rules of the IF concerned as approved by the IOC, and the competitor, coach or trainer must be entered by his NOC. The above-noted persons must notably:

- respect the spirit of fair play and non violence, and behave accordingly on the sportsfield; and
- respect and comply in all aspects with the World Anti-Doping Code.

The respective roles of the International Federations (the "IF"s) and the National Olympic Committees (the "NOC"s) are set out in the By-law to Rule 45:

- 1 Each IF establishes its sport's own eligibility criteria in accordance with the Olympic Charter. Such criteria must be submitted to the IOC Executive Board for approval.
- 2 The application of the eligibility criteria lies with the IFs, their affiliated national federations and the NOCs in the fields of their respective responsibilities.
- 3 Except as permitted by the IOC Executive Board, no competitor, coach, trainer or official who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games.
- 4 The entry or participation of a competitor in the Olympic Games shall not be conditional on any financial consideration.

Rule 46 deals with the issue of nationality:²⁰

²⁰ By-law to Rule 46 provides:

- 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

- 1 Any competitor in the Olympic Games must be a national of the country of the NOC which is entering him.
- 2 All disputes relating to the determination of the country which a competitor may represent in the Olympic Games shall be resolved by the IOC Executive Board.

Rule 47 deals with age limits:

There may be no age limit for competitors in the Olympic Games other than as prescribed for health reasons in the competition rules of an IF.

Rule 49 deals with entries to the Olympic Games, and underlines the roles of the NOCs and IFs:

- 1 Only NOCs recognized by the IOC may enter competitors in the Olympic Games. The right of final acceptance of entries rests with the IOC Executive Board.
- 2 An NOC shall only exercise such attributions upon the recommendations for entries given by national federations. If the NOC approves thereof, it shall transmit such entries to the OCOG. The OCOG must acknowledge their receipt. NOCs must investigate the validity of the entries proposed by the national federations and ensure that no one has been excluded for racial, religious or political reasons or by reason of other forms of

championships recognized 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 recognized 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.
- 3 If an associated State, province or overseas department, a country or colony acquires independence, if a country becomes incorporated within another country by reason of a change of border, or if a new NOC is recognized by the IOC, a competitor may continue to represent the country to which he belongs or belonged. However, he may, if he prefers, choose to represent his country or be entered in the Olympic Games by his new NOC if one exists. This particular choice may be made only once.
- 4 In all cases not expressly addressed in this Bye-law, in particular in those cases in which a competitor would be in a position to represent a country other than that of which he is a national, or to have a choice as to the country which he intends to represent, the IOC Executive Board may take all decisions of a general or individual nature, and in particular issue specific requirements relating to nationality, citizenship, domicile or residence of the competitors, including the duration of any waiting period.

discrimination.

- 3 The NOCs shall send to the Olympic Games only those competitors adequately prepared for high level international competition. Through its IF, a national federation may appeal to the IOC Executive Board against a decision by a NOC on the matter of entries.

Paragraph 5 of the By-law to Rule 49 mandates²¹, *inter alia*, that all athletes must sign an entry form which:

- 5.1 ... must include the text of the eligibility conditions and the following declaration to be signed by the competitors:

"Understanding that as a competitor in the Olympic Games I am participating in an event which has ongoing international and historical significance, and in consideration of the acceptance of my participation therein, I agree to be filmed, televised, photographed, identified and otherwise recorded during the Olympic Games under the conditions and for the purposes now or hereafter authorized by the International Olympic Committee"

²¹ The remainder of the by-law to Rule 49 reads:

- 1 The procedures and the deadlines for the entries of competitors for sports competitions at the Olympic Games are contained in the "Entries for Sports Competitions and Accreditation Guide", adopted by the IOC Executive Board.
- 2 All entries must be printed on a special form approved by the IOC Executive Board and sent in such number of copies as determined by the OCOG.
- 3 As a condition precedent to participation in the Olympic Games, every competitor shall comply with all provisions contained in the Olympic Charter and the rules of the IF governing his sport. Such competitor must be duly qualified by such IF. The NOC which enters the competitor ensures under its own responsibility that such competitor is fully aware of and complies with the Olympic Charter and the World Anti-Doping Code.
- 4 Should there be no national federation for a particular sport in a country which has a recognized NOC, the latter may enter competitors individually in such sport in the Olympic Games subject to the approval of the IOC Executive Board and the IF governing such sport.
- ...
- 6 No entry shall be valid unless the above provisions have been observed.
- 7 The withdrawal of a duly entered delegation, team or individual shall, if effected without the consent of the IOC Executive Board, constitute an infringement of the Olympic Charter and shall be the subject of disciplinary action.
- 8 In the absence of a decision to the contrary taken by the Executive Board and written into the Host City Contract, the number of athletes competing in the Games of the Olympiad shall be limited to ten thousand (10'000) and the numbers of officials shall be limited to five thousand (5'000).

("IOC") in relation to the promotion of the Olympic Games and Olympic Movement.

I also agree to comply with the Olympic Charter currently in force and, in particular, with the provisions of the Olympic Charter regarding the World Anti-Doping Code (Rule 48), the mass media (Rule 59 and its Bye-law), concerning the allowable trademark identification on clothing and equipment worn or used at the Olympic Games (Paragraph 1 of the Bye-law to Rule 61), and arbitration before the Court of Arbitration for Sport (Rule 74). The relevant provisions and rules have been brought to my attention by my National Olympic Committee and/or my National Sports Federation."

It is also noted, at paragraph 5.2 that:

The relevant NOC shall also sign such form to confirm and guarantee that all the relevant rules have been brought to the notice of the competitor and that the NOC has been authorized by the National Sports Federation concerned to sign this entry form on its behalf.

Rule 50 provides:

Infringement of the Olympic Charter

The IOC Executive Board may take measures and sanctions against any person or organisation who infringes the Olympic Charter.

Part V ("Arbitration") of Chapter 5 of the Olympic Charter provides:

74 Arbitration

Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration.

Accordingly, an athlete wishing to compete in the Olympic Games must not only satisfy the criteria laid down by their IF and NOC and sanctioned by the IOC, but they must also agree to be bound by a set of rules governing their conduct after selection. In summary, an Olympic athlete must:

- comply with the Olympic Charter;
- respect the spirit of fair play and non-violence;
- respect and comply with the World Anti-Doping Code;
- not allow their participation to be conditional on any financial consideration;
- be a national of their NOC's country, subject to an exception for those with dual nationality;
- be entered by their NOC, via a recommendation by their national federation; and
- agree to arbitration before the Court of Arbitration for Sport.

b. The role of the IFs and NOCs

As set out above, the IFs and NOCs play a central role in determining the eligibility of Olympic athletes. Generally, in order to be eligible, performance-wise, to compete in the Olympics an athlete must meet the selection criteria laid down by the IF as applied by the athlete's National Federation ("NF"). The athlete will then be nominated by his/her NF for a place on the Olympic team. This nomination is submitted to the NOC. Typically, the NOC then rubber-stamps the nomination, and the athlete is rewarded with a place on his/her country's team. Accordingly, it is the athlete's NOC who ultimately selects the athlete for the Olympics.

With respect to the Olympic Games, the athlete's NOC controls the athlete before, during, and after the Games. By way of illustration, Section Thirteen of the Canadian Olympic Committee ("COC") General By-law (A By-Law relating generally to the organization and the transaction of the affairs of the Canadian Olympic Committee) provides:

ORGANIZATION OF AND PARTICIPATION IN OLYMPIC GAMES AND PAN AMERICAN GAMES

....

13.05 Each athlete who is entered in the Olympic Games by the COC shall have executed an Athlete Agreement containing such terms as the COC may determine, and without restricting the generality of the foregoing, containing an undertaking on the part of the athlete to comply with the Olympic Charter, the IOC Medical Code, and the Olympic Movement Anti-Doping Code. The COC shall ensure that all such entries comply with the COC Team Selection Policy, are duly

qualified for entry by the athlete's NSF and International Sport Federation, and comply with the Olympic Charter.

13.06 The COC shall ensure that the provisions of the Olympic Charter are respected in relation to:

...
(d) all other matters set forth in the Olympic Charter.

3. Types of disputes

Most disputes concerning eligibility can be grouped into four categories: 1) nationality, 2) selection, 3) non-doping general discipline, and 4) doping. The first three are typically dealt with using the rules of the particular NOC and IF, whereas the latter is now largely dealt with by reference to the World Anti-Doping Code, which is administered by the World Anti-Doping Agency ("WADA"). As the WADA-based system comprises a set of rules that is separate and identifiable, Olympic doping disputes are singled out for attention in this thesis.²²

IV. OLYMPIC ADMINISTRATION

1. Background

Before a discussion of the ad hoc division of the CAS ("AHD") can take place, one must understand both its role in the Olympic administration, and the importance of other Olympic-related entities which either do or can have an impact on athlete participation, namely a selection of IOC-affiliated Commissions, the IFs and NOCs, and WADA.

As stated, in summary, the Olympic Movement is governed by the Olympic Charter. Under the Olympic Charter, the IOC is the supreme authority over the remaining members of the Olympic

²² See Chapter IV.3 herein

Movement.²³ As such, tremendous power is exercised by the IOC in its role as guardian of Olympism.

The President of the IOC is empowered to set up permanent or ad hoc commissions and working groups “whenever it appears necessary”.²⁴ It is worth considering three of such creations in the context of athlete participation in the Games.

a. Sport For All Commission

The IOC’s Sport for All Commission promotes the Sport for All movement. This movement promotes “the Olympic ideal that sport is a human right for all individuals regardless of race, social class and sex. The movement encourages sports activities that can be exercised by people of all ages, both sexes and different social and economic conditions”.²⁵

b. Athletes’ Commission

The Athletes’ Commission²⁶ was created on October 27, 1981 as a link between athletes and the IOC. It comprises active and retired athletes, meets at least once a year, and regularly meets with the IOC Executive Board, to which it makes recommendations. It also forms working groups which work with Organising Committees to make sure that athletes’ needs are met.²⁷ However, unlike its counterparts in the north American major professional sports of baseball, basketball, NFL football, and hockey,²⁸ the Athletes’ Commission is not a bargaining unit, and so plays no

²³ *Supra*, note 10, Fundamental Principles 5 and 9, and Chapter 1, R. 1.1

²⁴ *Supra*, note 10, Chapter 2, R. 24.5

²⁵ www.olympic.org/uk/organisation/commissions/sportforall/index_uk.asp (last visited August 14, 2004)

²⁶ Canada’s Charmaine Crooks is a current member of the Athletes’ Commission. Canada’s Ljiljana Ljubisic is a representative of the International Paralympic Committee.

²⁷ www.olympic.org/uk/organisation/commissions/athletes/index_uk.asp (last visited August 14, 2004)

²⁸ See Chapter VII

formal role in advancing the interests of athletes. Rather, it is more of a lobby group. It is argued later in this thesis that the role of the Athletes' Commission should be formalized to add legitimacy to the dispute resolution system.

Rule 24.5 of the IOC Olympic Charter states that:

An Athletes' Commission shall be constituted, the majority of whose members shall be elected by athletes participating in the Olympic Games. The election shall be held on the occasion of the Games of the Olympiad and the Olympic Winter Games, in accordance with regulations adopted by the IOC Executive Board in consultation with the Athletes' Commission, and communicated to the IFS and NOCs one year prior to the Olympic Games at which such election is to be held.

Although the Athletes' Commission is over 20 years old, it has arguably only just started to come into its own. The 21st Century has brought increased attention to both the Commission and athletes in general. Since 2000, we have seen the very first International Athletes' Forum²⁹, and the launch of a Commission Newsletter.³⁰ The IOC has also issued guidelines with respect to the creation of Athletes' Commissions within NOCs.³¹ These guidelines list three objectives for any such commissions:

1. to consider questions related to athletes and to provide advice to the NOC;
2. to represent the rights and interest of athletes and to make related recommendations; and
3. to maintain a contact with the IOC Athletes' Commission.

²⁹ This took place between October 19-20, 2002 in Lausanne [see International Athletes' Forum, Final Recommendations, at http://www.olympic.org/uk/utilities/reports/level2_uk.asp?HEAD2=4&HEAD1=1 (last visited August 14, 2004)]

³⁰ See Athletes Bulletin: Issue 1, July 2003, and Issue 2, February 2004 at http://www.olympic.org/uk/utilities/reports/level2_uk.asp?HEAD2=4&HEAD1=1 (last visited August 14, 2004)

³¹ IOC Guidelines Relative to the Creation of an Athletes' Commission Within an NOC at http://www.olympic.org/uk/utilities/reports/level2_uk.asp?HEAD2=4&HEAD1=1 (last visited August 14, 2004)

In July 2001, the Athletes' Commission approved a document defining its objectives and operations.³² Under its Terms of Reference, the Athletes' Commission's "Objectives" are, *inter alia*:

The Athletes' Commission is a consultative body of the IOC and a link between the active Olympic athletes and the IOC.

It ensures that the athletes' points of view are taken into account in IOC decisions.

It ensures respect of the rights of the athletes within the Olympic Movement and draws up recommendations to that effect.

It puts forward nominations for representatives to sit on other IOC commissions or associated bodies and thus express the athletes' points of view.³³

That said, the Athletes' Commission should not be taken to be operationally independent from the IOC³⁴:

The IOC provides the Commission with an annual operating budget; expenses are subject to IOC approval. In addition, secretarial assistance is provided by the IOC.³⁵

The Athletes' Commission has recently turned its mind to four main issues:

³² IOC Athletes' Commission Terms of Reference at http://www.olympic.org/uk/utilities/reports/level2_uk.asp?HEAD2=4&HEAD1=1 (last visited August 14, 2004)

³³ Additional objectives are:

It proposes to establish working groups responsible for liaison with Organising Committees for the Olympic Games, to help them to respond better to the needs of the athletes. These groups work in close collaboration with the Coordination Commission for the Games.

During the Olympic Games, the IOC Athletes' Commission is present in the Olympic Village and is at the athletes' disposal.

The Athletes' Commission forwards its recommendations/proposals to the IOC Executive Board subject to the approval, after discussion within the Athletes' Commission, of the majority of the members present.

³⁴ This is in stark contrast to the absolute independence of the players' associations (the NBAPA, the MLBPA, the NFLPA, and the NHLPA) in the major professional north American sports

³⁵ *Supra*, note 32

1. Representation of athletes;
2. Doping;
3. Women in sport; and
4. Environment.³⁶

Notable by its absence is any reference to due process and natural justice.³⁷ Indeed, the Athletes' Commission is:

Against doping of all forms — physical, moral, ethical — we are fighting for:

- The harmonisation of Anti-Doping rules at an international level.
- The implementation of out-of-competition tests.
- Sincere cooperation between all parties concerned, both sporting and governmental.
- The application of strict sanctions.³⁸

That said, in its January 21, 2002 presentation, the Athletes Commission also stated, *inter alia*:

The best athletes should have the chance to take part in the Olympic Games of which they are key players. No NOC, no legal or natural person, public or private, governmental or non-governmental should prevent an athlete participating in the Games.³⁹

As stated, the International Athletes' Forum took place on October 19 and 20, 2002 in Lausanne, Switzerland. Its "Final Recommendations" concerned "the fight against doping", "self-marketing for athletes during and after their sporting career", and "integration of professional athletes in the Olympic Movement". With respect to doping, the Forum recommended that "athletes should assume total responsibility for the intake of any substance, including food

³⁶ www.olympic.org/uk/organisation/commissions/athletes/activity_uk.asp and The Athletes' Commission, *The Athletes Within the Olympic Movement*, January 21, 2002 at http://www.olympic.org/uk/utilities/reports/level2_uk.asp?HEAD2=4&HEAD1=1 (last visited August 14, 2004)

³⁷ Of the 13 candidates for election at the Salt Lake City Games in 2002, five specifically listed doping as a priority. None made any mention of justice issues [see IOC Athletes' Commission, *Vote!*, 2002]

³⁸ *Supra*, note 36

³⁹ The Athletes' Commission, *The Athletes Within the Olympic Movement*, January 21, 2002

supplements, that may result in a positive sample". Indeed, the Athletes' Commission has recommended that doping be a strict liability offence.⁴⁰ The only reference to ethics was with respect to the conduct of athlete agents.⁴¹

In short, the concept of fairness admittedly does not appear a priority for the athletes themselves, beyond ensuring the snaring of 'cheats'. Indeed, a British athlete recently exclaimed: "If people are taking illegal substances that wins them medals, I hope they drop dead before they're 40 because of what they've taken away from athletes who have tried to achieve success without cheating."⁴²

As one can readily see, there are competing interests which even the athletes themselves recognize. On the one hand, the best athletes must be given an opportunity to compete, but, on the other, the cheats must be excluded. This is perhaps to be expected. Much as the general public wishes to see criminals punished, it is not surprising that athletes wish to see cheats similarly dealt with. However, much as those who are accused of crimes are entitled to basic rights, those who are accused of cheating surely must be entitled to some protection. And there is no doubt that there are protections afforded accused athletes by the CAS. The central question that this thesis seeks to answer is: "can the CAS-based system be enhanced to ensure fair treatment for all athletes?"

c. *Ethics Commission*

The Ethics Commission was created in 1999 by the IOC's Executive Board. According to the IOC, it has three roles:⁴³

⁴⁰ International Athletes' Forum, *Final Recommendations*, (Lausanne, 2002)

⁴¹ *Ibid*

⁴² www.sheffieldtoday.net/ViewArticle.aspx?SectionID=59&ArticleID=802455 (last visited July 6, 2004)

⁴³ www.olympic.org/uk/organisation/commissions/ethics/index_uk.asp (last visited August 14, 2004).

Under Statute B of the IOC Ethics Commission, the Terms of Reference are six in number

1. It draws up and constantly updates a framework of ethical principles, including especially a Code of Ethics based on the values and principles enshrined in the Olympic Charter. These principles must be respected by the IOC and its members, by the cities wishing to organise the Olympic Games, by the Organising Committees of the Olympic Games (OCOGs), by the National Olympic Committees (NOCs) as well as by the "participants"⁴⁴ in the Olympic Games;
2. it plays a monitoring role; as such, it ensures that ethical principles are respected; it conducts investigations into breaches of ethics submitted to it, and, when needed, makes recommendations to the Executive Board;
3. it has a mission of prevention and advising the Olympic parties on the application of the ethical principles and rules.

In 2001, to ensure the Ethics Commission's independence as well as to provide assistance for same, the "Foundation for Universal Olympic Ethics" was created. According to the IOC, the Foundation "allows the Ethics Commission to ensure the strict application of the IOC Code of Ethics and to promote ethical principles throughout all the entities of the Olympic Movement (IOC, NOC's and ISF's) and within sport in general".⁴⁵

All the Olympic parties (the IOC and its members, the cities wishing to organise the Olympic Games, the OCOGs, and the NOCs) and the "participants"⁴⁶ are bound by the Code of Ethics.⁴⁷

Rule 25 of the Olympic Charter deals with "IOC Ethics Commission Measures and Sanctions". With respect to sanctions for ethical breaches by individual athletes or teams, Rule 25 2.2 provides:

2.2 In the context of the Olympic Games:

2.2.1 with regard to individual competitors and teams: temporary or permanent ineligibility or exclusion from the Olympic Games, disqualification or withdrawal of accreditation; in the case of disqualification or exclusion, the medals and diplomas obtained in relation to the applicable

⁴⁴ "Participants" are defined in the "Implementing Provision of the IOC Code of Ethics Relating to the Definition of the "Participants" in the Olympic Games" as: a) individual and team competitors, b) officials, leaders and other members of any delegation, c) judges and jury members, and d) all other accredited people

⁴⁵ www.olympic.org/uk/organisation/commissions/ethics/index_uk.asp (last visited August 14, 2004)

⁴⁶ *Supra*, note 44

⁴⁷ IOC Code of Ethics, Preamble

infringement of the Olympic Charter shall be returned to the IOC. In addition, at the discretion of the IOC Executive Board, a competitor or a team may lose the benefit of any ranking obtained in relation to other events at the Olympic Games at which he or it was disqualified or excluded; in such case the medals and diplomas won by him or it shall be returned to the IOC (Executive Board);

2.2.2 with regard to officials, managers and other members of any delegation as well as referees and members of the jury: temporary or permanent ineligibility or exclusion from the Olympic Games (Executive Board);

2.2.3 with regard to all other accredited persons: withdrawal of accreditation (Executive Board).

2.2.4 The IOC Executive Board may delegate its powers to a disciplinary commission.

2.2.5 No decision taken in the context of the Olympic Games can be challenged after a period of three years from the day of the closing ceremony of such Games.

Rule 25 3-6 reads:

3 Before applying any measure or sanction, the competent IOC organ may issue a warning.

4 Any individual, team or any other individual or legal entity has the right to be heard by the IOC organ competent to apply a measure or sanction to such individual, team or legal entity. The right to be heard in the sense of this provision includes the right to be acquainted with the charges and the right to appear personally or to submit a defence in writing.

5 Any measure or sanction decided by the Session, the Executive Board or the disciplinary commission referred to above shall be notified in writing to the party concerned.

6 All measures or sanctions shall be effective forthwith unless the competent organ decides otherwise.

The IOC Code of Ethics has seven parts: A (dignity), B (integrity), C (resources), D (candidatures), E (relations with states), F (confidentiality), and G (implementation).

A 3 deals specifically with doping: "... All doping practices at all levels are strictly prohibited. The provisions against doping in the Olympic Movement Anti-Doping Code (or in the World Anti-Doping Code as soon as it is force) shall be scrupulously observed."

d. Summary

In summary, the governance and administration of Olympic eligibility and discipline is multi-layered and multi-faceted. However, it is clear that the IOC exerts significant control over not just the Olympic Charter, but also the various Commissions which can impact eligibility decisions and the resolution of eligibility disputes. The IOC directly controls the Sport for All Commission, which, basically, promotes participation, and illustrates the IOC's position that athletic competition should be open to everyone. However, the IOC also directly controls the implementation of the work of the Ethics Commission, which can play a significant role in restricting participation in the Games. With respect to the Athletes' Commission, although it is operationally independent from the IOC, one cannot escape the origin of its funding.

In a nutshell, from a conceptual standpoint, the inescapable conclusion is that the IOC has a stranglehold on all matters concerning participation in the Olympic Games. However, from a practical standpoint, as stated, all eligibility disputes at Games time are heard by the AHD, and although the IOC Charter is important, the AHD is bound to apply other rules, most notably those of the IFs and NOCs. It is to these latter two entities we briefly now turn.

2. The IFs and the NOCs

a. The International Sports Federations⁴⁸

According to the IOC, the IF's "are responsible for the integrity of their sport on the international level". The IF's also "monitor the everyday administration of their sports and guarantee the regular organization of competitions as well as respect for the rules of fair play". Accordingly, the IFs have

⁴⁸ Chapter 3 of the Olympic Charter deals with IFs

their own rules in this regard. Importantly, IF's "seeking IOC recognition must ensure that their status, practice and activities conform with the Olympic Charter".⁴⁹

*b. The National Olympic Committees*⁵⁰

According to the IOC, the NOC's "propagate the fundamental principles of Olympism at a national level within the framework of sports activity". They are also "committed to the development of athletes and support the development of sport for all programs and high performance sport in their countries". Importantly, "only a NOC is able to select and send teams and competitors for participation in the Olympic Games". There are currently 202 NOC's.⁵¹

Given that only a NOC can select a team to send to compete in the Olympic Games, all selection disputes, by their very nature, involve a NOC.⁵²

Notably, in the American case of *Defrantz v. United States Olympic Committee*,⁵³ the Court ruled that an athlete had no enforceable right to compete in the Olympic Games. The Court concluded:

"Plaintiffs have been unable to draw our attention to any court decision which finds that the rights allegedly violated here enjoy constitutional protection, and we can find none. Plaintiffs would expand the constitutionally protected scope of liberty and self-expression to include the denial of an amateur athlete's right to compete in an Olympic contest and that denial was the result of a decision by a supervisory athletic organization acting well within the limits of its authority."

⁴⁹ www.olympic.org/uk/organisation/if/index_uk.asp (last visited August 14, 2004). Indeed, the initial refusal of FIFA to adopt the IOC's World Anti Doping Code (administered by the IOC-sponsored WADA - the World Anti-Doping Agency) threatened soccer's inclusion in the 2004 Athens program [see <http://soccernet.espn.go.com/headlinenews?id=301288&cc=5901> (last visited August 14, 2004)]

⁵⁰ Chapter 4 of the Olympic Charter deals with NOCs

⁵¹ www.olympic.org/uk/organisation/noc/index_uk.asp (last visited August 14, 2004)

⁵² The Canadian Olympic Committee is the NOC in Canada

⁵³ United States District Court, District of Columbia, 1980, 492 F Supp. 1181

3. WADA

It is clear why some athletes use banned performance-enhancing substances. Data from East Germany indicates that "over a four year period of steroid use, a female athlete can improve her performance by as much as four to five meters in the shot put, four to five seconds in the 400 meter run, and seven to ten seconds in the 800 meter run."⁵⁴ In short, drugs work. But they also have the capacity to damage and their use is universally accepted as cheating. Accordingly, the sporting world, as a whole, is united in its goal of drug-free sport. WADA plays a role in this battle.

Given WADA's importance to doping-centred eligibility disputes, it is necessary to spend some time examining not only WADA as it operates today, but also its origins, so as to understand its legitimacy. However, this thesis does not purport to offer any specific comment on WADA as an Anti-Doping program. Rather, WADA is considered for the role it plays in eligibility disputes before the AHD.

a. Doping - recent history

To put the doping challenges that the modern Olympic Games faces into historical perspective, it is worth noting that doping is by no means a new phenomenon. Indeed, ancient Greek athletes likely used various substances to improve their performances.

It is perhaps helpful to put the drug testing of athletes in a modern historical context. Objective drug tests were first used in 1965, against three cyclists at the Tour of Britain. The first drug testing at the Olympic Games took as recently as 1968. The United States Olympic Committee began their formal drug testing program less than 20 years ago, in 1985. A year later, the NCAA implemented dope testing rules of its own.⁵⁵

⁵⁴ E.H. Jurith and M.W. Beddoes, "Articles: The United States' and International Response to the Problem of Doping in Sports" (2002) 12 Fordham Intell. Prop. Media & Ent. L.J. 461, p. 469

⁵⁵ D. Marrazzo, "Athletes and Drug Testing: Why Do We Care if Athletes Inhale?" (1997) 8 Marq Sports L.J. 75, p. 79

In the 1970's and 1980's, the East German government not only failed to prevent doping, but actively encouraged its use by its athletes to aid their performance. East German State Plan 14.25 saw the administration of steroids to all state-sponsored athletes.⁵⁶

Such were the effects of years of drug abuse that many ex-East German athletes experienced health problems in later life. Perhaps the most dramatic and well known impact of the government's policy was felt by female shot putter, Heidi Krieger, who found her body had changed to such an extent that she finally underwent a sex change operation. Heidi became Andreas.⁵⁷

The British investigative journalist Andrew Jennings has written extensively on matters Olympic. According to Jennings: "The inside story of doping control at the 1984 Olympics is at odds with the public facts. At the end of the games the IOC could have revealed that many more athletes had tested positive than the twelve it admitted to. Vital documents identifying the cheats were mysteriously shredded. Why, if the IOC is so keen on good clean sport, didn't they tell us? Could it, by any chance, be because they didn't want to spoil the salesman's pitch?"⁵⁸

According to Jennings, a member of the testing team at the 1984 Games claimed that the testing lab was ordered closed from "on high" three or four days before the end of the games. Jennings has also noted the story of Prince De Merode, the Chairman of the Medical Commission at the 1984 Games. According to Jennings, De Merode explained that the identities of a number of athletes who had tested positive would never be known because their samples had been removed from a locked cabinet in De Merode's hotel room, along with other documents that had been shredded.⁵⁹

⁵⁶ *Supra*, note 54, p. 464

⁵⁷ *Supra*, note 54, p. 465

⁵⁸ A. Jennings, *The New Lords of the Rings*, 1st ed. (London, 1996), p. 237

⁵⁹ *Ibid*, pp. 240-241

Neither the IOC nor Primo Nebiolo (President of the IAAF) investigated the scandal unearthed by Ben Johnson's disqualification from the 1988 Seoul Games. The Canadian Government did, resulting in the Dubin Inquiry, conducted by Judge Charles Dubin. It is worth noting Jennings' summary of some of Dubin's most scathing remarks:

'Despite knowing the fallacy of in competition testing, as they have for many years,' wrote Dubin, 'the medical commissions of sports organizations such as the IAAF and the IOC have taken no steps to make the fallacy more widely known. They have given the impression that their competitions are fair and that the laboratories cannot be fooled.' His verdict on the world's most moral sports organization? 'This concern for appearance, not substance, has been a continuing theme in the evidence'.

And of course Johnson wasn't the only cheat in Seoul. 'The general public has long been led to assume that if only one athlete tested positive, the others were not also using drugs,' said the judge. 'We now know, as the IOC and the IAAF have known for many years, that this assumption is false. The athletes caught at Seoul were not the only drug users. They were the only detected ones.'⁶⁰

At the Barcelona Games in 1992, according to Jennings, one in ten of the competitors were "serious steroid abusers". Jennings noted: "It's become a regular refrain: a few athletes are caught and then, months after the games, the scientists always come up with more positives. Sports administrators bury them".⁶¹

A decade after the Los Angeles Games, in October 1994, Juan Antonio Samaranch, then IOC President, declared that Chinese sport was "very clean". This was on the eve of the Hiroshima Asian Games where, shortly after the Asian Games ended, Samaranch observed that "all the tests were negative". These comments were closely followed by the generalization: "We think doping is really declining and there are very few problems in the main competitions".⁶²

⁶⁰ *Ibid*, p. 245. Jennings also noted that at least 50 athletes in Seoul had been taking steroids and as many as 20 had tested positive but were not disqualified

⁶¹ *Ibid*, p. 247

⁶² *Ibid*, pp. 232-233

Later in 1994, on November 16, the *Chicago Tribune* claimed that Yang Aihua, the women's world 400 metre freestyle champion, had tested positive in Hiroshima. Aihua was not alone. Another ten Chinese athletes had tested positive. All other athletes had been taking the same steroid, dihydrotestosterone. Ironically, Aihua, earlier in 1994, cried: "We have an Anti-Doping policy which forbids drugs and punishes those who break the law. The reasons for the success of our team are our very good coaches and our training methods, which are the best in the world". According to Jennings, the lack of focus on what Professor Manfred Donike, who had supervised the testing in Hiroshima, had called systematic doping by the Chinese officials, was merely another example of Samaranch's "campaign to minimize the extent of doping in sports".⁶³

Indeed, perhaps the best illustration of a governing body's inability to tackle doping is provided by the efforts of the international governing body of swimming ("FINA") in regard to the Chinese women's swim team. In 1990, three Chinese swimmers tested positive for steroids at the Chinese National Championships. To put this in context, in that one year, China had succeeded in matching a number of positive steroid tests up to that point in the history of swimming.⁶⁴

Between 1991 and 1993, no positive dope tests for Chinese swimmers were reported to FINA. That is not to say that there were no positive tests. Indeed, there were seven such positive tests, and these were reported directly to the IOC. The IOC never released this information and it was only discovered in 1995 by accident, by a FINA delegation in China.⁶⁵

As a response to the skepticism expressed by a significant number of its constituents with respect to its handling of the doping problem in Chinese women's swimming, FINA convened an

⁶³ *Ibid*, pp. 233-234

⁶⁴ D. Galluzzi, "The Doping Crisis in International Athletic Competition: Lessons from the Chinese Doping Scandal in Women's Swimming" (2000) 10 Seton Hall J Sport L 66, p. 77

⁶⁵ *Ibid*, pp. 77-78. It is worth noting that in 1993, when the Chinese doping scandal was in full view, China nominated the IOC president, Juan Antonio Samaranch, for the Nobel Peace Prize (at. 98). In addition, not long after then FINA president Larfaoui sent the 1995 delegation to China, he was made a member of the IOC by president Samaranch (at p. 98)

extraordinary general meeting in November 1995. One of the steps taken by the FINA general congress was to implement the four strikes rule: if four of a national governing body's swimmers test positive for doping in a twelve month period, that nation would be suspended for two years. In 1996, four Chinese athletes tested positive at the same competition. However, these positive tests were hidden by FINA for over a year. In addition, despite the four strikes rule being in place, FINA did not suspend the Chinese team, reportedly because China had "voluntarily" reported the violation. It is worth noting that there were no such exceptions built into the four strikes rule. Many of FINA's members were not pleased.⁶⁶

The widespread skepticism amongst the non-Chinese swimming community continued until 1997. As a result of FINA inaction when faced with the remarkable achievements of the Chinese at the Chinese National Games in September, the Chief Executive of the World Swim Coaches Association, John Leonard, called for the creation of a new, drug free, form of competition if FINA could not put its health in order.⁶⁷

At FINA's World Championship in Perth, Australia, in January 1998, Australian customs agents intercepted 13 vials of a banned human growth hormone in the luggage of Chinese swimmer, Yuan Yuan. Despite the lingering controversy regarding Chinese swimming, FINA and the IOC viewed the customs seizure as an isolated incident. Indeed, Dr. Patrick Schamash, director of the IOC's medical commission, said of the seizure: "It is just one individual found with [human] growth hormones."⁶⁸ In the result, the athlete was suspended from swimming for four years while her coach was suspended for 15 years.

Although FINA tested all competitors for banned substances at the Perth World Championships and FINA and the IOC attempted to take credit for such an Anti-Doping position, it should be noted that the Western Australian Government funded the testing. In addition, the Chinese team initially

⁶⁶ *Ibid*, pp. 81-82

⁶⁷ *Ibid*, pp. 82-83

⁶⁸ *Ibid*, p. 84.

refused to be tested. That said, after the Chinese had eventually agreed to be tested, four Chinese swimmers tested positive. The swimmers were suspended for two years, despite, again, the presence of the four strikes rules.⁶⁹

The reason FINA gave for not applying the four strikes rule was because the athletes had tested positive for a masking agent rather than a steroid. However, as before, there was no such distinction built into the four strikes rule. Galluzzi observed that: "the Bureau's liberal interpretation of their mandate into the ruling infuriated members of the swimming community even further."⁷⁰

On January 11, 1998, the WSCA again called on FINA to properly deal with the doping issue and the Chinese team. FINA responded by sending a delegation to China on February 16, 1998. On February 19, 1998, FINA issued a statement in which it absolved the Chinese Swimming Association of any organized doping efforts, but pointed out that the CSA had little control over provincial swimming and over individual coaches.⁷¹ Perhaps unsurprisingly, the word "whitewash" has been used to describe FINA's efforts in this regard.⁷²

As Wong has noted: "While some believe that IOC drug sentences have been unduly harsh, many believe that the IOC has a conflict of interest in any drug testing program. The IOC, while wanting to ensure fair competition, also must be concerned with the impact a positive doping test could have on the Olympic image, resulting in the loss of corporate sponsorship and fans."⁷³

Wong continued: "In fact, there is increasing evidence to suggest that the IOC and some sport federations, far from being the stalwart defenders of the purity of athleticism, are soft on drugs. At

⁶⁹ *Ibid*, p. 85

⁷⁰ *Ibid* 6, p. 86

⁷¹ *Ibid*, pp. 86-88

⁷² *Ibid*, p. 88

⁷³ G. Wong, *Essentials of Sports Law*, 3rd ed., (Westport: Prager, 2002), at pp. 300-301

the 1998 Winter Olympic Games, for example, the IOC discarded two positive test results, claiming that the games had already ended. At the 1996 Summer Games in Atlanta, several athletes tested positive for Probenecid, a masking agent for steroids that is banned by the IOC. The IOC, however, took no action. Only two athletes tested positive for steroids. However, Donald Catlin, the clinical pharmacologist who oversaw the Atlanta Olympic drug testing, said that other positive samples went unreported.”⁷⁴

In short, the recent past has not seen the sporting community, with the IOC at the forefront, deal with the doping issue in what most would regard as an acceptable way.

b. The creation of WADA

Shortly after ascending to the presidency to the IOC, Jacques Rogge referred to doping as “the number one danger for sport”,⁷⁵ such was the importance of the issue. Before one can assess WADA’s role is the regulation of doping, and the context which it provides for doping disputes before the AHD, one must look at its birth.

As one commentator has correctly observed: “The history of doping control has largely been a story of prospective jurisdictional struggle between the IOC, the IF’s and the NGB. For the most part, the IOC has prevailed in the struggle, and the IF’s have prevailed over the NGB. But those victories have not always been easily won.”⁷⁶

In an effort to resolve such turf-wars, in February 1999, in Lausanne, the IOC hosted a congress on doping. It was there that the U.S. Government’s Director of National Drug Control Policy,

⁷⁴ *Ibid*, at p. 301

⁷⁵ Rogge: *Drugs Here to Stay*, BBC Sport (July 19, 2001), at http://news.bbc.co.uk/sport/hi/english/in_depth/2001/olympic_votes/newsid_1447000/1447173.stm (last visited August 14, 2004)

⁷⁶ M.S. Straubel, “Doping Due Process: A Critique of the Doping Control Process in International Sport” (2002) 106 Dickinson L. Rev 523, p. 533

colloquially referred to as “Drugs Czar”, Barry McCaffrey gave the IOC a piece of his mind. According to Jennings: “When McCaffrey’s turn came at the lectern he told his hosts that they could not succeed in the fight against drugs unless they had ‘credibility, legitimacy and transparency’. How would they achieve that? McCaffrey told them ‘I quite clearly call for the IOC to consider institutional reform: open books and financial records, open recorded votes, a code of conduct that is published and enforced, and probably most importantly an elected membership that is accountable and responsive’”. These comments were echoed by the British Sports Minister, Tony Banks.⁷⁷

The result of the congress was that Canadian Dick Pound was tasked with building a world Anti-Doping agency. Jennings described Pound’s early moves: “The Americans, the Australians, the Canadians and most of Europe watched as Dick went through the motions. Two months after the Lausanne declaration, Dick brought together a bunch of institutions with little experience in sports. The Council of Europe sat down with Interpol, the World Health Organization and the United Nations Committee on Drug Control. The IOC was in charge and brought along some of their family, old friends from the Arab states, Africa and the National Olympic Committees, most of which rely on IOC handouts. Some athletes came along too. As the year went on they held formal meetings, all of which they said were ‘positive and constructive’. Canada’s internationally respected Anti-Doping official, Dr. Andrew Pipe, was asked in the summer what had happened since February’s conference. ‘I have heard nothing since’ he replied.”⁷⁸

Shortly after a meeting between McCaffrey and Pound in Washington, wherein McCaffrey backed by athletes and American officials, had said that IOC efforts to tackle doping were “more public relation’s ploy than public policy solution”, Pound announced that the World Anti-Doping Agency - WADA, was imminent. With respect to WADA, McCaffrey opined that it “won’t in fact be independent, probably won’t achieve the results and won’t have credibility with the world’s athletes”.⁷⁹

⁷⁷ A. Jennings, *The Great Olympic Swindle*, (London: Simon & Schuster U.K. Limited, 2000), p. 295

⁷⁸ *Ibid*, pp. 296-297

⁷⁹ *Ibid*, pp. 298-299

On November 4, 1999, representatives of the IOC met with representatives of the U.S. Government. The Americans pointed out that the power in WADA was vested in the IOC, at the expense of the U.S. and other countries. The IOC was left with the prospect of the United States not supporting WADA in its proposed state.⁸⁰

On November 10, 1999, the IOC announced that WADA had been established. Two days later, McCaffrey wrote to Samaranch "to begin the process of improving WADA". The letter, containing a list of 17 points to be addressed, was sent as McCaffrey was on his way to attend a 26 nation doping summit, hosted by the Australian Government. Labelled "not a friend of the Olympic Movement", McCaffrey was banned from visiting any of Sydney's Olympic venues. Acting outside the Olympic Movement, McCaffrey joined with representatives from the governments of Great Britain, Canada, China, Finland, France, Holland, New Zealand, Norway, Poland, Portugal, South Africa and Sweden and set up their own three day sports summit, branding themselves as the "Sydney Consultative Group on Anti-Doping".⁸¹ What came to be known as the "Sydney Communique" supported the formation of a WADA to:

- "promote and coordinate the fight against doping";
- "reinforce the ethical basis for Anti-Doping and protect the health of athletes";
- "establish and maintain a list of prohibited substances";
- "coordinate no notice, out of competition testing";
- "develop analytical standards";
- "promote harmonized sanctions";
- "develop educational programs"; and
- "promote and coordinate peer reviewed research".⁸²

⁸⁰ *Ibid*, pp. 299-302

⁸¹ *Ibid*, pp. 303-304

⁸² International Drugs in Sport Summit (November 17-19, 1999), available at http://www.ausport.gov.au/fulltext/1999/feddep/drugsinsport/section_4/news/communique17nov.htm (last visited August 14, 2004). The Sydney Communique also recommended that "particular attention should be paid to address concerns regarding the WADA's regional, gender and athlete representation, and governance" It is worth noting that all such recommendations have largely been included in WADA's Charter - indeed, there are four representatives from the Athletes' Commission on the Foundation Board, on which they have voting rights

One of the points McCaffrey raised was the propriety of Dick Pound negotiating television and sponsorship contracts with billions of dollars⁸³ while at the same time presiding over WADA which, if successful, would unearth scandals which could potentially damage the Olympic brand.⁸⁴

In the beginning of December 1999, Pound met with McCaffrey and agreed to the proposals that comprised the Sydney Consultative Group on Anti-Doping's declaration. That said, even though the group of national governments had succeeded in influencing WADA's guiding principles, it could do little about Samaranch adding two more IOC members and five more officials from other members of the Olympic movement to WADA, resulting in WADA comprising 16 IOC-controlled seats to six held by outsiders. However, the Sydney group was not to be deterred as Jennings noted:

McCaffrey, Australia's Justice Minister Amanda Vanstone and Canada's Sports Minister Denis Coderre traveled to Lausanne in early January 2000 to eyeball Samaranch on behalf of the Sydney group. Samaranch prepared for megaphone diplomacy, seating himself at one end of a long, long table, and the general far, far away at the opposite end. The rest were placed with Samaranch's usual regard for protocol, miniature national flags and place markers. Someone suggested they all gather around one end of the table. Offences against protocol rank higher than doping at the IOC, but Samaranch had to give in. Then he took more humiliation. Canada's Coderre warned that if he didn't deal with doping, that would be the end of the Olympic movement. 'We told him that it was a case of either you're a part of the solution or part of the problem,' Coderre said later.

After more than three decades of the IOC betraying the public trust and failing sport, someone else had to start cleaning house: it was the public servants just doing their job, the customs officers in Perth who pricked the Chinese bubble, the gendarmes who arrested souped up cyclists, and civil servants in two dozen countries. Ordinary people who take their kids to soccer practice, cheer them on in the sack race, and swell with pride when they do well, want drug free sport, and for years the IOC had failed them. The people's servants made a start of pushing the IOC aside.⁸⁵

⁸³ It has been noted that doping harms the consumer's perception of the Olympics. Indeed, in 2000 major sponsors such as IBM, UPS and Kodak had a common desire for the IOC to tackle doping "head on", see B. Horowitz, "Drug Scandal Shines Spotlight on Image", *USA Today*, September 28, 2000 [from *Sports in America*, edited by Lynn M. Messina (Simon & Schuster, 2001)].

⁸⁴ *Supra*, note 77, p. 305

⁸⁵ *Ibid*, p. 306

In a 1999 Newsweek article,⁸⁶ former multiple Olympic champion Carl Lewis⁸⁷ put forth his position on drug testing:

Reliable drug testing is one of the most urgent issues facing the Olympics, because it only takes one cheating athlete to tarnish an entire competition. It can be an extraordinary distraction to settle into the starting blocks or to prepare to launch oneself into the pool wondering if the person in the next lane might beat you because of something he or she ingested or injected. If athletes had the deciding say in drug testing, we would no longer be debating the merits of an independent drug testing lab, as the IOC is now doing. We would already have a more open, reliable and accountable system, including an independent lab that eliminates anyone with a vested interest in the process. (The IOC might have an incentive to cover up certain revelations so as not to detract from the games.)

c. *WADA in general*

According to the body itself, and making no mention of its controversial beginnings, WADA “was created in November 1999 through a shared initiative of sport and governments, and with a vision for a world that values and encourages a doping-free culture”.⁸⁸

In addition:

Today WADA works to promote and coordinate the fight against doping at the international and national levels through education, advocacy, research and leadership.

WADA leads and coordinates a global research program and has committed millions of dollars to researching prohibited substances and methods.

WADA is presently facilitating the availability of appropriate Anti-Doping educational

⁸⁶ C. Lewis, “The Athletes are the Games”, *Newsweek*, February 15, 1999 [from *Sports in America*, edited by Lynn M. Messina (Simon & Schuster, 2001)]

⁸⁷ Lewis has recently admitted to testing positive at the US Olympic trials prior to his gold medal in Seoul in 1988, but he claims to have only taken a herbal cold remedy: www.thesun.co.uk/article/0,,3-2004351571,00.html (last visited July 31, 2004)

⁸⁸ WADA, *Athlete Guide 2004* (WADA, 2004), p. 4

material aimed at athletes of all countries and of all ages.

WADA's coordinating role also includes implementing an independent, out-of competition testing program. WADA's program complements those tests already being carried out by international federations (IFS) and national Anti-Doping organizations (NADOs).⁸⁹

WADA is a private foundation constituted under Swiss law. It operates under a constitution within the Swiss legal system, though it is headquartered in Montreal, Canada.

The World Anti-Doping Code⁹⁰, which was approved by sports organizations and governments in 2003, came into force on January 1, 2004, and plays a key role in the World Anti-Doping Program (the "Program"). The Program comprises the Code, International Standards, and Models of Best Practice. The *raison d'être* of the Code is to ensure that the rules and regulations with respect to doping apply equally to all athletes, in all sports, in all countries.⁹¹ The Code is "intended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed upon Anti-Doping principles are implemented".⁹²

According to Part One of the Code:

Anti-Doping rules, like competition rules, are sport rules governing the conditions under which sport is played. Athletes accept these rules as a condition of participation. Anti-Doping rules are not intended to be subject to or limited by the requirements and legal standards applicable to criminal proceedings or employment matters. The policies and minimum standards set forth in the Code represent the consensus of a broad

⁸⁹ *Ibid*, p. 4

⁹⁰ According to the Introduction to the Code: "The Code is the fundamental and universal document upon which the World Anti-Doping Program in sport is based" (see World Anti-Doping Code, Introduction, p. 1 at http://www.wada-ama.org/docs/web/standards_harmonization/code/code_v3.pdf (last visited August 14, 2004))

⁹¹ *Supra*, note 88, p. 5. For a list of the bodies which have accepted the World Anti-Doping Code, see <http://www.wada-ama.org/en/t2.asp?p=42149> (last visited August 14, 2004)

⁹² *Supra*, note 90, Introduction, p. 1

spectrum of stakeholders with an interest in fair sport and should be respected by all courts and adjudicating bodies.⁹³

Article 2 stipulates that doping is a strict liability offence:

- 2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an Anti-Doping violation under Article 2.1.

According to WADA, the strict liability rule together with the possibility of modified sanctions based on specific criteria "provides a reasonable balance between effective enforcement for the benefit of all "clean" athletes and fairness in the exceptional circumstance where a prohibited substance entered an athlete's system through no fault of negligence on the athlete's part".⁹⁴

Article 3 deals with burdens and standards of proof. In essence, the Anti-Doping organization has the burden to establish an infraction. The standard is "the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made". This standard falls somewhere between beyond reasonable doubt and the balance of probabilities. However, the standard on an athlete is always the balance of probabilities.⁹⁵ WADA has commented that "this standard of proof ... is comparable to the standard which is applied in most countries to cases involving professional misconduct".⁹⁶

⁹³ *Ibid*, Part One Introduction, p. 7

⁹⁴ *Ibid*, pp. 8-9. In addition, the strict liability provision has been said to conform with human rights standards, see G. Kaufmann-Kohler and G. Malinverni, "Legal opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law" (26 February 2003) at http://www.wada-ama.org/docs/web/standards_harmonization/code/comments/3rd/other/kaufmann-kohler-full.pdf (last visited August 14, 2004)

⁹⁵ *Supra*, note 90, see Article 3.1

⁹⁶ *Ibid*, p. 12

WADA maintains what is known as the "Prohibited List".⁹⁷ This List is "an International Standard indicating which substances and methods are prohibited in-competition and/or out-of-competition".⁹⁸ WADA publishes a new version of the List at least once a year. The new version is made available at least three months before it goes into effect.

WADA also provides for a therapeutic use exemption ("TUE").⁹⁹ The TUE is for athletes who need to use a certain medicine to treat a specific medical complaint. In order to obtain a TUE, an athlete must apply *before taking the medication* to his/her IF or national Anti-Doping organization ("NADO").¹⁰⁰ According to WADA: "The TUE will be taken into consideration if the substance is detected in your sample and it will protect you from sanctions if the medical justification is confirmed."¹⁰¹

The TUE is issued for a specified period of time, and is only valid if the athlete follows the prescription with respect to dose, method, and frequency of administration.

A number of organizations within the Anti-Doping family are responsible for conducting in and out-of-competition tests. Generally, responsibility for out-of-competition testing is shared between WADA, NADOs, IFs, and NGBs, whereas responsibility for in-competition usually rests with the NADO of the country in which the event is taking place.¹⁰²

⁹⁷ *Ibid*, see Article 4

⁹⁸ *Supra*, note 88, p. 6

⁹⁹ *Supra*, note 90, Article 4.4

¹⁰⁰ An abbreviated TUE is available for certain anti-asthma medicines (see *Supra*, note 88, p. 9)

¹⁰¹ *Supra*, note 88, p. 8. According the WADA: "The application process for a TUE needs to be followed carefully. The first step is for national level athletes to contact their NADO and for international level athletes to contact their IF and ask for a TUE application form. You will need to have your physician fill out the form. The next step is to send it to your IF or NADO where it will be reviewed by a TUE committee. This process should be completed as soon as possible, but optimally 21 days prior to participating in an event."

¹⁰² *Ibid*, p. 12

Under the World Anti-Doping Code, not only does an athlete have a negative obligation to refrain from using banned substances, but also an athlete identified by an Anti-Doping agency ("ADO") is under a positive obligation to provide accurate and current "whereabouts" information, so that the athlete can be located for testing any given day. According to WADA:

As an international or national level athlete identified in a registered testing pool, providing your whereabouts information is a key responsibility under the Code. Failure to provide accurate whereabouts information in accordance with your ADO's Anti-Doping regulations may be considered an antidoping rule violation and you could be sanctioned.

On being contacted to provide a sample, an athlete is entitled to be shown the doping control officer's identification and the authority to test. An athlete is also entitled to be informed of the consequences of refusing to provide a sample.¹⁰³ Conversely, the athlete is obliged to report for doping control as soon as possible, and, in any event, within the time period specified by the ADO, confirm their identity, sign an agreement to provide a sample, and be escorted until a sample has been provided. However, according to WADA: "Departures from these procedures will not invalidate a test result unless it is determined that the integrity of the sample has been affected."¹⁰⁴

In essence, the athlete is "responsible for everything [they] eat, drink or put in [their] body. It is recommended that [they] drink only individually sealed, caffeine-free, non-alcoholic beverages."¹⁰⁵

¹⁰³ Additional rights are: In-Competition testing: To be accompanied by an athlete representative (this is optional); With the DCO's agreement complete the following: locate a representative; warm down and collect your personal belongings; attend a medal ceremony; fulfill media commitments; participate in further events; receive treatment for injury; any other activity accepted by the DCO. Out-of-Competition testing: To be accompanied by an athlete representative, if available (this is optional); With the DCO's agreement, complete the following: complete a training session; receive treatment for injury; any other activity accepted by the DCO [see *Ibid*, p. 15]

¹⁰⁴ *Ibid*, p. 14

¹⁰⁵ *Ibid*, p. 16

The results of the test are reported simultaneously to WADA and the ADO responsible for results management.¹⁰⁶ In the event of a positive test, an initial review will be conducted to verify that the test was properly conducted. If this review fails to explain the positive test, the athlete is notified of the results and their rights regarding a test of the B sample. However, the athlete may be provisionally suspended. If the B sample also tests positive, a hearing will be held to determine whether there has been an Anti-Doping rule violation, and to impose sanctions, if warranted.¹⁰⁷ Sanctions range from a warning to a lifetime ban.¹⁰⁸ Importantly, under Article 10.2, with respect to prohibited substances and methods, a first violation results in a two year ban, whereas a second violation results in a lifetime ban. That said, the remainder of Article 10 sets out the circumstances under which a penalty will be reduced.¹⁰⁹ For example, Article 10.5 reads:

10.5 - Elimination or reduction of period of ineligibility based on exceptional circumstances.

10.5.1 - No fault or negligence.

If the athlete establishes in an individual case involving an Anti-Doping rule violation under Article 2.1 ... or use of a prohibited substance or prohibited method under Article 2.2 that he or she bears no fault or negligence for the violation, the otherwise applicable period of ineligibility shall be eliminated. When a prohibited substance or its markers or metabolites is detected in an athlete's specimen in violation of Article 2.1 ..., the athlete must also establish how the prohibited substance entered his or her system in order to have the period of ineligibility eliminated. In the event this article is applied in the period of ineligibility otherwise applicable is eliminated, the Anti-Doping rule violation shall not be considered a violation for the limited purpose of determining the period of ineligibility for multiple violations under Articles 10.2, 10.3 and 10.6.

10.5.2 - No significant fault or negligence.

¹⁰⁶ See *supra*, note 90, Article 7

¹⁰⁷ Article 8 of the World Anti-Doping Code sets out an athlete's right to a fair hearing

¹⁰⁸ Articles 9 and 10 of the World Anti-Doping Code list the possible sanctions. For a good summary of the sanctions available, including helpful flow charts, see D. Howman, "Sanctions under the World Anti-Doping Code" (November 12, 2003) at http://www.wada-ama.org/docs/web/editorials/sanctions_howman.pdf (last visited August 14, 2004)

¹⁰⁹ A draft version of the Code which provided for mandatory automatic punishment was criticized, see *supra*, note 94

This Article 10.5.2 applies only to Anti-Doping rule violations involving Article 2.1 ..., use of a prohibited substance or prohibited method under Article 2.2, failing to submit to sample collection under Article 2.3, or administration of a prohibited substance or prohibited method under Article 2.8. If an athlete establishes in an individual case involving such violations that he or she bears no significant fault or negligence, then the period of ineligibility may be reduced, but the reduced period of ineligibility may not be less than one-half of the minimum period of ineligibility otherwise applicable. If the otherwise applicable period of ineligibility is a lifetime, the reduced period under this section may be no less than eight years. When a prohibited substance or its markers or metabolites are detected in athletes specimen in violation of Article 2.1 ... the athlete must also establish how the prohibited substance entered his or her system in order to have the period of ineligibility reduced.

10.5.3 - Athlete's substantial assistance in discovering or establishing Anti-Doping rule violations by athlete support personnel and others.

An Anti-Doping organization may also reduce the period of ineligibility in an individual case where the athlete has provided substantial assistance to the Anti-Doping organization which results in the Anti-Doping organization discovering or establishing an Anti-Doping rule violation by another person involving possession under Article 2.6.2 ..., Article 2.7 ..., or Article 2.8. The reduced period of ineligibility may not, however, be less than one-half of the minimum period of ineligibility otherwise applicable. If the otherwise applicable period of ineligibility is a lifetime, the reduced period under this section may be no less than eight years.

In its comment on Article 10.5.2, WADA has stated:

The trend in doping cases has been to recognize that there must be some opportunity in the course of the hearing process to consider the unique facts and circumstances of each particular case in imposing sanctions. This principle was accepted at the World Conference on Doping in Sport 1999 and was incorporated into the OMADC which provides that sanctions can be reduced in 'exceptional circumstances'. The code also provides for the possible reduction or elimination of the period of ineligibility in the unique circumstance where the athlete can establish that he or she had no fault or negligence, or no significant fault or negligence, in connection with the violation. This approach is consistent with basic principles of human rights and provides a balance between those Anti-Doping organizations that argue for a much narrower exception, or none at all, and those that would reduce a two year suspension based on a range of other factors even when the athlete was admittedly at fault. These articles apply only to the imposition of sanctions; they are not applicable to the determination of whether an Anti-Doping rule violation has occurred.

Article 10.5 has been the subject of a comment from WADA:

Article 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.

To illustrate the operation of Article 10.5, an example where no fault or negligence would result in the total elimination of a sanction is where an athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of no fault or negligence in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a prohibited substance by the athlete's personal physician or trainer without disclosure to the athlete (athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any prohibited substance); and (c) sabotage of the athlete's food or drink by a spouse, coach or other person within the athlete's circle of associates (athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on no significant fault or negligence. (For example, reduction may well be appropriate in illustration (a) if the athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchase from a source with no connection to prohibited substances and the athlete exercised care in not taking other nutritional supplements.)

Articles 10.8 and 10.9 deal with the commencement of the ineligibility period and the status during ineligibility respectively:

10.8 - Commencement of ineligibility.

The period of ineligibility shall start on the date of the hearing decision providing for ineligibility or, if the hearing is waived, on the date ineligibility is accepted or otherwise imposed. Any period of provisional suspension (whether imposed or voluntarily accepted) shall be credited against the total period of ineligibility to be served. Where required by fairness, such as delays in the hearing process or other aspects of doping control not attributable to the athletes, the body imposing the sanction may start the period of ineligibility on an earlier date commencing as early as the date of sample collection.

10.9 - Status during ineligibility.

No person who has been declared ineligible may, during the period of ineligibility, participate in any capacity in a competition or activity (other than authorized Anti-Doping education or rehabilitation programs) authorized or organized by any signatory or signatory's member organization. In addition, for any Anti-Doping rule violation not involving specified substances described in Article 10.3, some or all sport-related financial support or other sport-related benefits received by such person shall be withheld by signatories, signatories' member organizations and government. A person subject to a period of ineligibility longer than four years may, after completing four years of the period of ineligibility, participate in local sport events in a sport other than the sport in which the person committed the Anti-Doping rule violation, but only so long as the local sport event is not at a level that could otherwise qualify such person directly or indirectly to compete in (or accumulate points toward) a national championship or international event.

WADA's Athlete's Guide sets out an athlete's appeal rights¹¹⁰ thus:

As an international athlete, you have the right to appeal any decision regarding a positive test attributed to you or sanctions (including a provisional suspension) imposed on you following an Anti-Doping rule violation. The normal organization to which you must file the appeal is the Court of Arbitration for Sport (CAS). If CAS or an appeal tribunal rules otherwise, the initial decision remains in effect while under appeal.

Also, if another party such as an ADO or WADA were to appeal a decision regarding your case, you would still have the right to be heard during proceedings. In such case, the procedure remains the same and you would still have the right to be heard during the proceedings.¹¹¹

It should be noted that the list of individuals/organizations with appeal rights under Article 13 does not include athletes or federations who may benefit from the disqualification of the accused athlete.

d. WADA and national governments - the Canadian response

Article 22 of the World Anti-Doping Code deals with the "Involvement of Governments". In essence, this Article encourages national governments to undertake various measures to combat doping in line with the World Anti-Doping Code. By way of illustration, on June 1, 2004, the Canadian Policy Against Doping in Sport and the Canadian Anti-Doping Program¹¹² came into force. The World Anti-Doping Code "is a source of interpretation of the Canadian Policy Against Doping in Sport". Moreover:

The Canadian Policy Against Doping in Sport commits to the implementation of the mandatory and other portions of the World Anti-Doping Program, including the World Anti-Doping Code, the mandatory *International Standards* and the Models of Best Practice. The POLICY further recognizes the role of the World Anti-Doping Agency in setting global standards and co-ordinating Anti-Doping world-wide. The mandatory *International Standards* and Models of Best Practice address, among other things, the *Prohibited List, doping*

¹¹⁰ Which are contained in Article 13 of the World Anti-Doping Code

¹¹¹ *Supra*, note 88, p. 26

¹¹² See <http://www.cces.ca/pdfs/CCES-POLICY-CADP-E.pdf> (last visited August 14, 2004)

control, doping violations and consequences, and appeals, and are situated in the Rules and Standards of the Canadian Anti-Doping Program.¹¹³

In Canada, the Canadian Centre for Ethics in Sport ("CCES") maintains and carries out the Canadian Anti-Doping Program. Its function, however, is not limited to ridding Canada of dope-cheats:

The CCES promotes the practice of sport pursued through fair and ethical means. However, being fair and ethical is not just about congratulatory cheers but rather an ongoing process of knowledge, culture, morals and values combined with monitoring, analysis, debate, agreement, refinement and judgment. Therefore, a number of elements contribute to "fair and ethical means". For example:

The presence and acceptance of codes of ethics for athletes, coaches and officials.

Basic human rights, like the absence of exploitation, respect for dignity and worth of human beings, self-determination and privacy.

- Principles of due process, including such things as informed consent, rights of appeal, and absence of bias and conflicts of interest.
- Responsibility of care for self and others.
- Business practices
- Quality control systems
- Other policies and practices on such things as gender equity, disabled integration, harassment, multiculturalism, access, safety, discrimination, racism, drug-free sport, violence, privacy and consent.¹¹⁴

The CCES accepted the World Anti-Doping Code on March 25, 2003.¹¹⁵

¹¹³ http://www.pch.gc.ca/progs/sc/pol/dop/index_e.cfm (last visited August 14, 2004)

¹¹⁴ http://www.cces.ca/forms/index.cfm?dsp=template&act=view3&template_id=62&lang=e (last visited August 14, 2004)

¹¹⁵ http://www.cces.ca/forms/index.cfm?dsp=template&act=view3&template_id=164&lang=e (last visited August 14, 2004)

Article 7 of the Canadian Anti-Doping Program¹¹⁶ deals with “Doping Violations and Consequences Rules”. These provisions are essentially the same as those in the World Anti-Doping Code dealing with sanctions, save that the Canadian ones are, as one might expect, tailored to meet the needs of Canadian organizations (for example, the Canadian provisions provide for funding consequences within Canada).

As evidence of the ever-changing nature of dispute resolution in the sporting realm, the ADR-SPORT-RED program was launched in Canada in January 2002, under the auspices of the CCES. This program was an ADR system to deal with sports-related disputes within Canada. It was based on the CAS model and was intended to be “an affordable and timely out-of-court settlement system for disputes that cannot or have not been settled internally.”¹¹⁷ It was replaced on June 1, 2004 by the Sport Dispute Resolution Centre of Canada (“SDRCC”).¹¹⁸ The mission of the SDRCC is to: “provide to the sport community (a) a national alternative dispute resolution service for sport disputes; and (b) expertise and assistance regarding alternative dispute resolution.”¹¹⁹

As of June 1, 2004, all doping disputes in Canada will be heard by the SDRCC. In addition, in Canada, all “National Sport Organizations (NSOs), Multi-sport Organizations (MSOs), and National Sport Centres (NSCs) that receive Sport Canada funding must provide for an appeal to the SDRCC after their internal processes have been exhausted. These organizations are expected to revise their

¹¹⁶ See *supra*, note 112

¹¹⁷ http://www.cces.ca/forms/index.cfm?dsp=template&act=view3&template_id=145&lang=e (last visited August 14, 2004). Throughout its life, ADR-SPORT-RED resolved over 30 disputes. Of these, 23 related to “selection”, 3 related to “disciplinary sanctions”, and 2 related to “eligibility”. By far the most frequent users of the system were athletes (26 out 32 disputes), and most disputes (69%) were resolved within 30 days [see http://www.adrsportred.ca/sdrcc_report_e.cfm (last visited August 14, 2004)]

¹¹⁸ The SDRCC was created in the *Physical Activity and Sport Act 2003*, RSC 2003, c.2, paras. 9 - 35

¹¹⁹ S. 10 of the *Physical Activity and Sport Act 2003*, RSC 2003, c.2

policies and by-laws accordingly and will be expected to comply during the period that their by-laws and policies are being revised.”¹²⁰

According to Straubel, in the United States, the World Anti Doping Code, WADA and the USADA (the equivalent of the CCES and the NADO in the U.S.¹²¹), although not perfect, have “improved the efficiency of the Olympic movement dispute settlement system”.¹²²

Accordingly, outside the period of the Olympic Games themselves, generally all doping disputes in Canada will be heard domestically before, should it be necessary, being decided by the CAS.¹²³

e. WADA and the Olympics

Before one can offer any opinion on the Olympic Anti-Doping scheme, one must first review that scheme as it exists today, with an acknowledgment that it has changed dramatically since the Sydney Games. Anti-Doping control prior to the 2000 Sydney Games has been described as “Byzantine and dysfunctional”.¹²⁴ As such, there was need for change. Indeed, with respect to the pre-Sydney system, Straubel has observed: “In all, it cannot be conclusively said that the Olympic Movement’s

¹²⁰ http://www.adrsportred.ca/sdrcc_ss_e.cfm (last visited August 14, 2004)

¹²¹ The USADA came into being on October 1, 2000. It created an infrastructure of testing adjudicatory machinery that has removed the USOC and NGB’s from policing doping among potential American Olympians. Prior to the creation of the USADA, in the US, the NGB’s and USOC were responsible for Anti-Doping, whereas internationally, the responsibility rested with the IF’s and IOC. Today, the USADA is solely responsible for doping within the borders of the United States. Obviously, this means that the IOC and IF’s, via WADA, are responsible internationally. For more on the USADA, see *supra*, note 54

¹²² *Supra*, note 76, pp. 567-568

¹²³ Article 8 of the Canadian Anti-Doping Program deals with Appeal Rules, and provides for CAS hearings

¹²⁴ *Supra*, note 76, p. 531. This article explains the differences between doping control before and after the 2000 Sydney Games

doping control process [was] less expensive than the court's."¹²⁵ Moreover, according to Straubel: "The hallmarks of a quality process that produces quality decisions include the following elements: reasoned decisions based upon the evidence, a chance to present a full defence and unbiased decision makers. The Olympic movement's doping control process has not always possessed these elements. Too often the decision makers in the process have had ties to the governing bodies appearing that are before them or have had the appearance of ties to the governing bodies that are appearing before them, thus creating the appearance of a biased decision."¹²⁶ Furthermore: "Even the most neutral appearing tribunal in the Olympic movement, the Court for the Arbitration of Sport [sic], receives much of its funding from the Olympic's movement governing bodies and uses arbitrators nominated by those same governing bodies. But it must be noted that the decisions of CAS have shown a strong streak of independence."¹²⁷

Indeed, Straubel was moved to conclude:

In summation, [prior to 2000] it cannot be said that the Olympic movement's doping control process [was] an efficient alternative dispute settlement system. While some portions of the process [were] proving to be efficient, most notably the CAS, as a whole, the doping control process' dispute settlement system is expensive, unpredictable, and often renders poor quality decisions.¹²⁸

The IOC accepted the World Anti-Doping Code at its 115th Session in Prague in July 2003. The IOC established the Anti-Doping Rules applicable to the Games of the XXVIII Olympiad in Athens in

¹²⁵ *Ibid*, p. 551

¹²⁶ *Ibid*, p. 552-553

¹²⁷ *Ibid*, p. 553

¹²⁸ *Ibid*, p. 553

2004 (the “Athens Rules”) in accordance with the Code.¹²⁹ Article 20.1 of the World Anti-Doping Code sets out the roles and responsibilities of the IOC with respect to the Code.¹³⁰

On June 4, 2004, the IOC’s Urs Lacotte wrote to every person/organization connected to Anti-Doping administration. Attached to this letter was a copy of the Athens Rules. In this letter, the IOC’s intention to “authorise WADA to carry out *Doping Controls*, on behalf of the IOC, during the *Period of the Olympic Games*, outside of Greece and at non-Olympic venues inside of Greece” was made clear.¹³¹

The Athens Rules are, in essence, a version of the World Anti-Doping Code tailored for the Games themselves. As such, the Athens Rules occupy the same basic ground as the World Anti-Doping Code, but their focus is on violations and consequences within the period of the Games. In this regard, it is worth noting that the IOC has defined the Period of the Athens Games as “the period commencing on the date of the opening of the Olympic village for the Olympic Games, namely, 30 July, 2004, up until and including the day of the closing ceremony of the Olympic Games, namely, 29 August 2004”. Accordingly, all tests in this period are deemed to be “in-competition”.

Article 3 of the Athens Rules (“Proof of Doping”) deals with “Burdens and Standards of Proof” (3.1) and “Methods of Establishing Facts and Presumptions” (3.2). These provisions are essentially the same as their counterparts in the World Anti-Doping Code and are as follows:

3.1 Burdens and Standards of Proof

The *IOC* shall have the burden of establishing that an Anti-Doping violation has occurred. The standard of proof shall be whether the *IOC* has established an Anti-Doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than

¹²⁹ IOC, *The IOC Anti-Doping Rules applicable to the Games of the XXVIII Olympiad in Athens in 2004* (IOC, 2004)

¹³⁰ The roles and responsibilities of the IFs, NOCs, and NADOs are set out at Articles 20.3 - 20.5 of the World Anti-Doping Code respectively

¹³¹ See http://multimedia.olympic.org/pdf/en_report_817.pdf (last visited August 14, 2004) at p. 2

proof beyond a reasonable doubt. Where these Rules place the burden of proof upon the *Athlete* or other *Person* alleged to have committed an Anti-Doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

3.2 Methods of Establishing Facts and Presumptions

Facts related to Anti-Doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:

3.2.1 WADA-accredited laboratories are presumed to have conducted *Sample* analysis and custodial procedures in accordance with the *International Standard for Laboratories*. The *Athlete* may rebut this presumption by establishing that a departure from the *International Standard*, undermining the validity of the *Adverse Analytical Finding*, occurred.

If the *Athlete* rebuts the preceding presumption by showing that a departure from the *International Standard* occurred, then the *IOC* shall have the burden to establish that such departure did not cause the *Adverse Analytical Finding*.

3.2.2 Departures from the *International Standard for Testing* which did not cause an *Adverse Analytical Finding* or other Anti-Doping rule violation shall not invalidate such results. If the *Athlete* establishes that departures from the *International Standard* occurred during *Testing* then the *IOC* shall have the burden to establish that such departures did not cause the *Adverse Analytical Finding* or the factual basis for the Anti-Doping rule violation.

Article 7 of the Athens Rule deals with "Management of Anti-Doping rule violations" and provides:

7.1 Procedures and general provisions with respect to Anti-Doping rule violations arising upon the occasion of the *Olympic Games*.

Pursuant to the Olympic Charter and, in particular, Paragraph 2.2.4 of Rule 25 thereof, the International Olympic Committee (IOC) Executive Board has delegated to a disciplinary commission, as set out in further detail below (the "Disciplinary Commission"), its powers to hear the *Athletes* and other persons concerned in relation to all Anti-Doping rule violations (including but not limited to the handling of adverse analytical findings) arising upon the occasion of the *Olympic Games*. The right of any person who may be subject to a measure or sanction, to be heard pursuant to Rule 25.4 of the Olympic Charter, will be exercised before the Disciplinary Commission. The Disciplinary Commission will then provide to the IOC Executive Board a report of the hearing, including a proposal as to the decision related thereto. The proposal of the Disciplinary Commission is not binding upon the IOC Executive Board, who retains the ultimate authority to decide.

Article 7.2 sets out the procedures to be followed. Once an adverse analytical finding has been identified, the Chairman of the IOC Medical Commission is informed. Assisted by the IOC Medical Director, the Chairman identifies the athlete and verifies the violation (or not). If a violation is

found, the Chairman must immediately inform the IOC President. The IOC President then sets up a Disciplinary Commission, and, in confidence, promptly notifies, under Article 7.2.5):

the *Athlete* or other person concerned, the *Athlete's* or other person's chef de mission, the *International Federation* concerned and the World Anti-Doping Agency of:

- a) any adverse analytical finding;
- b) the Anti-Doping rule violation or of the additional investigation that will be conducted as to whether there is an Anti-Doping rule violation;
- c) the *Athlete's* right to promptly request the analysis of the B sample or, failing such request, that the B sample analysis may be deemed waived;
- d) the right of the *Athlete* and/or the *Athlete's* representative to attend the B sample opening and analysis if such analysis is requested; and
- e) the *Athlete's* right to request copies of the A and B sample laboratory package, which includes information as requested by the International Standards for Laboratories.

The next step, under Article 7.2.6, is a hearing of the Disciplinary Commission: "The *Athlete*, or other person, may be accompanied or represented at the hearing by persons of their choice (- e.g. lawyer, doctor, etc.), with a maximum of three for each of the *Athlete* or other person. The President of the International Federation concerned, or his representative, shall also be invited to attend the hearing."

Under Article 7.2.7, the Chairman of the Disciplinary Commission can suspend the athlete pending the Executive Board's Decision.

With respect to adducing evidence, the Athens Rules state:

7.2.8 Nature and circumstances of violation; adducing evidence:

The Disciplinary Commission shall determine the nature and circumstances of any Anti-Doping rule violation which may have been committed. It shall allow the *Athlete* or other person concerned an opportunity to adduce any evidence, which does not require the use of disproportionate means (as decided by the Disciplinary Commission), which he deems helpful to the defence of his case in relation to the result of the test, or other Anti-Doping rule violation, either orally, before the Commission, or in writing, as the *Athlete* or other person concerned so wishes.

7.2.9 Opinion of experts, adducing other evidence:

The Disciplinary Commission may seek the opinion of experts or adduce other evidence of its own motion. The Disciplinary Commission shall be assisted by the IOC Legal Department and the IOC Medical and Scientific Department.

After the hearing, the Discipline Commission deliberates and the reports to the IOC President and the IOC Executive Board (Article 7.2.11).

According to Article 7.2.15:

The entire disciplinary procedure should not exceed 24 hours from (i) in the case of an adverse analytical finding, the conclusion of the sample analysis (- i.e. on the A sample and, if requested, the B sample) or (ii) in the case of an other Anti-Doping rule violation, the time the *Athlete* or other person concerned is informed of such Anti-Doping rule violation.

However, the IOC President may decide not to apply this time limit with regard to Anti-Doping rule violations which become apparent prior to one week before the Opening Ceremony of the *Olympic Games* or on the last two days of such *Olympic Games*.

Under Article 7.3.3, only if prejudice has been suffered can an affected person “invoke” a violation of the “procedures and general provisions”.

Articles 8¹³² and 9¹³³ cover sanctions on individuals, and provide for, *inter alia*, disqualification and a period of ineligibility. Article 10¹³⁴ deals with consequences to teams.

¹³² Article 8 reads:

8.1 Automatic Disqualification:

A violation of these *Rules* in connection with Doping Control automatically leads to *Disqualification* of the individual result obtained in that *Competition* (- i.e. with respect to which the Doping Control was carried out) with all resulting consequences, including forfeiture of any medals, points and prizes.

8.2 Ineligibility:

Should an *Athlete* be guilty of an Anti-Doping rule violation before he has actually participated in a *Competition* at the *Olympic Games* or, in the case where an *Athlete* has already participated in a *Competition* at the *Olympic Games* but is scheduled to participate in additional *Competitions* at the *Olympic Games*, the IOC may declare the *Athlete* ineligible for such *Competitions* at the *Olympic Games* in which he has not yet participated, along with other sanctions which may follow, such as exclusion of the *Athlete* and other persons concerned from the *Olympic Games* and the loss of accreditation. In addition, the IOC may declare the *Athlete*, as well as other persons concerned, ineligible for editions of the Games of the Olympiad and the Olympic Winter Games subsequent to the *Olympic Games*.

¹³³ Article 9 reads:

9.1 Disqualification of Olympic Games Results

An *Anti-Doping Rule* violation occurring during or in connection with the *Olympic Games* may lead to *Disqualification* of all of the *Athlete's* individual results obtained in the *Olympic Games* with all consequences, including forfeiture of all medals, points and prizes, except as provided in Article 9.1.1.

9.1.1 If the *Athlete* establishes that he or she bears *No Fault or Negligence* for the violation, the *Athlete's* individual results in the other *Competition* shall not be *Disqualified* unless the *Athlete's* results in *Competitions* other than the *Competition* in which the Anti-Doping rule violation occurred were likely to have been affected by the *Athlete's* Anti-Doping rule violation.

9.2 Status During Ineligibility

No *Person* who has been declared *Ineligible* may, during the period of *Ineligibility*, participate in any capacity in the *Olympic Games*.

9.3 Management of Anti-Doping Rule Violations beyond Disqualification:

The management of Anti-Doping rule violations and the conduct of additional hearings as a consequence of hearings and decisions of the IOC, including with regard to the imposition of sanctions over and above those relating to the *Olympic Games*, shall be managed by the relevant *International Federations*.

¹³⁴ Article 10 reads:

10.1 Where more than one team member in a *Team Sport* has been notified of a possible Anti-Doping Rule violation under Article 7 in connection with the *Olympic Games*, the Team shall be subject to *Target Testing* for the *Olympic Games*. If more than one team member in a *Team Sport* is found to have committed an Anti-Doping rule violation during the *Period of the Olympic Games*, the team may be subject to *Disqualification* or other disciplinary action, as provided in the applicable rules of the relevant International Federation. In sports which are not Team Sports but where awards are given to teams disqualification or other disciplinary action against the team when one or more team members have committed an Anti-Doping rule violation shall be as provided in the applicable rules of the relevant *International Federation*.

Article 12 deals with appeals, and provides:

12.1 Decisions Subject to Appeal

Decisions made under these *Rules* may be appealed as set forth below in Article 12.2 through 12.4. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise.

12.2 Appeals from Decisions Regarding *Anti-Doping* Rule Violations, Consequences, and *Provisional Suspensions*

A decision that an Anti-Doping rule violation was committed, a decision imposing *Consequences* of an antidoping rule violation, a decision that no Anti-Doping rule violation was committed, a decision that the IOC lacks jurisdiction to rule on an alleged Anti-Doping rule violation or its *Consequences*, and a decision to impose a *Provisional Suspension* may be appealed exclusively as provided in this Article 12.2. [Notwithstanding any other provision herein, the only *Person* that may appeal from a *Provisional Suspension* is the *Athlete* or other *Person* upon whom the *Provisional Suspension* is imposed.]

12.2.1 In all cases arising from the *Olympic Games*, the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court.

12.2.2 In cases under Article 12.2.1, only the following parties shall have the right to appeal to CAS:

- (a) the *Athlete* or other *Person* who is the subject of the decision being appealed;
- (b) the IOC;
- (c) the relevant *International Federation* and any other *Anti-Doping Organisation* under whose rules a sanction could have been imposed; and (d) WADA.

12.3 Appeals from Decisions Granting or Denying a Therapeutic Use Exemption

Decisions by *WADA* reversing the grant or denial of a TUE exemption may be appealed exclusively to CAS by the *Athlete*, the IOC, or *Anti-Doping Organisation* or other body designated by an *NOC* which granted or denied the exemption. Decisions to deny TUEs, and which are not reversed by *WADA*, may be appealed by *Athletes* to CAS.

12.4 Appeal from Decisions Pursuant to Article 11

Decisions by IOC pursuant to Article 11 may be appealed exclusively to CAS by the *NOC* or *International Federation*.

12.5 Time for Filing Appeals

The time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party. The above notwithstanding, the following shall apply in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings having lead to the decision subject to appeal:

12.5.1 Within ten (10) days from notice of the decision, such party/ies shall have the right to request from the body having issued the decision a copy of the file on which such body relied;

- 12.5.2 If such a request is made within the ten-day period, then the party making such request shall have twenty-one (21) days from receipt of the file to file an appeal to CAS.

Accordingly, whether a dispute is within the Period of the Olympic Games or without, the CAS is the venue of last resort for an aggrieved party.

V. RESOLVING SPORTING DISPUTES AND THE COURTS

Generally speaking, the AHD generally applies the rules laid down by the IOC, the IFs, the NOCs and WADA. Specifically, it operates within the parameters set by its own governing statute and rules. That said, before one can subject such rules to a “fairness” analysis, one must first review how such entities have historically been viewed by the courts, and what tests the courts have used to determine “fairness” in such contexts.

1. Principle of non-intervention

In *Halsbury's Laws of England*,¹³⁵ the relationship between fair play in sport and the law is put thus:

Implicit in the concept of fair adjudication lie two critical principles, namely, that no man shall be a judge in his own cause (*nemo judex in causa sua*) and that no man shall be condemned unheard (*audi alteram partem*). These two principles, the rules of natural justice, must be observed by courts save where application is excluded expressly by necessary implication.

So, the courts have a role to play in ensuring a fair adjudication system. However, that role is a limited one.¹³⁶ In the English case of *Enderby Town Football Club v. The Football Association*¹³⁷, Lord Denning said: “Justice can often be done in domestic tribunals better by a good layman than

¹³⁵ [4th], Vol. 1, para. 64 at p. 76

¹³⁶ For a detailed discussion of the role of the courts see U. Naidoo and N. Sarin, “Dispute Resolution at Games Time” (2002) 12 Fordham Intell. Prop. Media & Ent. L.J. 489

¹³⁷ [1971] 1 All E.R. 215

by a bad lawyer.” This comment can be said to succinctly sum up the historical attitude illustrated by the Anglo-Canadian-American approach.¹³⁸

a. England and Wales

In England, cases such as *R. v. Football Association*,¹³⁹ and *R. v. Disciplinary Committee of the Jockey Club, ex part Aga Khan*,¹⁴⁰ generally speaking, show that the law of England and Wales is that the governing body of any particular sport is a domestic body and not an arm of government and so their decisions are not amenable to judicial review.¹⁴¹ This is despite a general acknowledgment that the governing bodies of certain sporting activities perform a function which would more than likely be performed by a governmental entity were it not for their existence. In other words, if the particular domestic body did not perform the function, a government would have to step in and create an organization which did.

b. Canada

In *Johnson v. Athletics Canada*¹⁴², disgraced Canadian sprinter sought to overturn an Athletics Canada and IAAF doping ban. In dismissing Johnson’s application, Caswell J. stated:¹⁴³

This court is required to extend a measure of deference to the justifications advanced by the IAAF as the world governing body for amateur athletes when considering the reasonableness of the ban. It is not this court’s function to serve as a court of appeal on the merits of decisions reached by tribunals exercising jurisdiction

¹³⁸ For an analysis of the application of European law with respect to natural justice and procedural fairness, see *supra*, note 136, pp. 507-510

¹³⁹ [1993] 2 All. E.R. 833

¹⁴⁰ [1993] 2 All. E.R. 853

¹⁴¹ M. Gunn, “The Impact of the Law on Sport with Specific Reference to the Way Sport is Played,” [1998] CIL 223, at p. 223

¹⁴² (1997), 41 OTC 95 (Ont. Ct. Just.). Johnson’s appeal was dismissed on September 23, 1998

¹⁴³ *Ibid*, paras. 32-33

over specialized fields. The IAAF has special expertise not only in regulating amateur athletics but also in regulating, detecting and preventing drug abuse.

In *MacInnes v. Onslow-Fane* [1978] 1 W.L.R. 1520, Megarry V.-C. stated, at 1535:

I think that the courts must be slow to allow an implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts. This is even so where those bodies are concerned with the means of livelihood of those who take part in those activities. The concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens.

Johnson also argued that the actions and proceedings of both AC and the IAAF “were inherently unfair” and resulted in a denial of natural justice. Caswell J. dealt with this issue as follows:¹⁴⁴

The requirements of natural justice are set out by the Supreme Court of Canada in many cases including *Lakeside Colony of Hutterian Brethren v. Hoffer*, [1992] 3 SCR 165 Gonthier J. at p. 195:

The content of the principles of natural justice is flexible and depends on the circumstances in which the question arises. However, the most basic requirements are that of notice, opportunity to make representations, and an unbiased tribunal.

Caswell J. concluded:¹⁴⁵

Even if I were to find that on March 5, 1993, the Doping Commission should have heard from Mr. Johnson's counsel and should have considered any additional evidence, I am faced with the fact that Mr. Johnson did not avail himself of any of the several opportunities that were available to him for further hearings on the merits. Such hearings were capable of curing any perceived lack of fairness at the Doping Commission hearing and it must be assumed that they would do so: *Grey v. Canadian Track and Field and Association* (1986), 39 ACWS (2d) 483 (Ont.HC); *Trumbley v. Saskatchewan Amateur Hockey Association*, (1986), 49 Sask. R. 296 at 300 (CA); and *Harelkin v. University of Regina*, [1979] 2 SCR 561 at 567, 592-593, 595-596.

Mr. Johnson failed to exhaust the remedies that were available to him without sufficient justification. The procedures in place in 1993 complied with the requirements of natural justice and were procedurally fair. In my view there was no violation of the rules of natural justice.

¹⁴⁴ *Ibid*, para. 34

¹⁴⁵ *Ibid*, para. 38-39

More recently, a British Columbia court considered a triathlete's application in relation to a doping ban in *Smith v. International Triathlon Union*¹⁴⁶. In October 1998, Smith, a member of both the British Triathlon Federation (the "BTA") and the US Triathlon Federation (the "USAT"), tested positive for nandrolone after coming fifth at the Ironman in Hawaii. A Disciplinary Panel of the BTA concluded, on a preliminary motion, that there was no *prima facie* doping case for Smith to answer and it dismissed the charge. USAT appealed that decision and a panel of the Doping Hearing and Appeals Board (the "Appeals Board") of the International Triathlon Union (the "ITU") was convened.

Smith sought a declaration that the ITU Appeals Board had no jurisdiction to hear the appeal, or, in the alternative, that the USAT had no standing to appeal the BTA Disciplinary Panel's decision of March 29, 1999 (reasons May 21, 1999). Smith also sought an injunction prohibiting the ITU from proceeding with the appeal. Accordingly, there were two basic issues before the Court:

1. Did USAT have standing to bring the appeal?
2. Did the ITU Appeals Board have jurisdiction to hear USAT's appeal in light of ITU's Doping Control Rules and Procedural Guidelines?

Notably, Smith originally sought relief in the form of prohibition pursuant to the *Judicial Review Procedures Act* R.S.B.C. 1996, c. 241. Allan J. noted: "It is clear that judicial review is not available to attack a decision of a domestic, non-statutory tribunal: *Mohr v. Vancouver, New Westminster & Fraser Valley Dist. Council of Carpenters* (1988), 32 B.C.L.R. (2d) 104 (C.A.)."

As such, Smith had to amend his petition to seek alternative relief under Rule 10(1)(b) of the BC Supreme Court Rules¹⁴⁷, though the applicability of the Rule was questioned by the ITU. The ITU

¹⁴⁶ (1999), 19 Admin LR (3d) 248

¹⁴⁷ Rule 10(1)(b) reads: (1) An application, other than an interlocutory application or an application in the nature of an appeal, may be made by originating application where ... (b) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract, or other document

characterized the issues as a "question of whether the Court is in a better position than the ITU Appeals Board to rule on that tribunal's standing and jurisdiction".

Allan J. performed an analysis of the ITU Rules and Guidelines, and then went on to consider the issue of the ITU Appeal Board's jurisdiction to hear the appeal. Allan J. agreed with the ITU's submission that even if the Court could intervene prior to the hearing of the appeal, it should decline to do so. Allan J. stated:

[22] I agree that there are many reasons for waiting to review any legal issues arising from the decision of the Appeals Board rather than anticipating them and answering them pre-emptively. It may be that the Appeals Board will accept the Smith's arguments with respect to the procedural issues raised in Mr. Roberts' [for Smith] submissions and judicial review will be unnecessary.

Allan J. continued:

[23] In my view, the Court should refrain from intervening prematurely in a case such as this where a national sports organization has set down rules of conduct and guidelines for investigating charges of doping and appealing decisions of the first instance.

[24] Members of a National Federation are undoubtedly in a contractual relationship with that Federation and with ITU. Accordingly, the Courts do have jurisdiction to protect the civil and contractual rights of members and grant relief by way of declaration and injunction: *Lakeside Colony of Hutterian Brethren v. Hofer* (1929), 97 D.L.R. (4th) 17 at 20 (S.C.C.); *Lee v. Showmen's Guild of Great Britain*, [1952] 2 QB 329 at 346 (C.A.). The Court will exercise a supervisory role in both public and private cases to ensure that the fundamentals of natural justice are followed.

[25] However, it has been held that the Court's supervisory jurisdiction over private sporting bodies is narrow. In *Peerless (Guardian Ad Litem of) v. B.C. School Sports* (1998), 50 B.C.L.R. (2d) 35 (C.A.), Prowse J.A. for the majority adopted the following passage from the reasons for judgment of Dohm J. in *Vancouver Hockey Club Ltd. v. 8 Hockey Ventures Inc.* (1987), 18 B.C.L.R. (2d) 372 (S.C.) at 378:

The review by the court of orders made by an unincorporated association such as the N.H.L. through its president and chief executive officer (a domestic tribunal as it were) is limited. The power in no way includes the right in the court to submit its decision for that of the domestic tribunal. The court is not a court of appeal. Rather, its power is narrow and it may only interfere if the order was made without jurisdiction (or against the rules) or if it was made in bad faith or contrary to the rules of natural justice. In addition, the courts will be reluctant to interfere with the decisions of a domestic tribunal where it is shown that internal remedies have not been

exhausted. And there is even greater reluctance to interfere if the decision is based upon opinion regarding the standards of propriety and conduct appropriate for members of a particular association.

[26] It is true that a disciplinary suspension against a professional athlete such as Smith can have a devastating effect upon his career. In *Kane v. Board of Governors of UBC*, [1980] 1 SCR 1105 at 1113, Dickson J. stated that "A higher standard of justice is required when the right to continue in one's profession or employment is at stake." I agree with Mr. Roberts that the consequences of an adverse finding by the ITU Appeals Board are far more serious for a professional athlete such as Smith than they would be for an amateur.

[27] The determination of whether a private tribunal is acting within its jurisdiction is dependent upon the proper construction of its rules. In *Lee, supra*, Lord Denning stated, at p. 345:

In most of the cases which comes before such a domestic tribunal the task of the committee can be divided into two parts: firstly, they must construe the rules; secondly, they must apply the rules to the facts. The first is a question of law which they must answer correctly if they are to keep within their jurisdiction; the second is a question of fact which is essentially a matter for them. The whole point of giving jurisdiction to a committee is so that they can determine the facts and decide what is to be done about them. The two parts of the task are, however, often inextricably mixed together. The construction of the rules is so bound up with the application of the rules to the facts that no one can tell one from the other. When that happens, the question whether the committee has acted within its jurisdiction depends, in my opinion, on whether the facts adduced before them were reasonably capable of being held to be a breach of the rules. If they were, then the proper inference is that the committee correctly construed the rules and have acted within their jurisdiction. If, however, the facts were not reasonably capable of being held to be a breach, and yet the committee held them to be a breach, then the only inference is that the committee have misconstrued the rules and exceeded their jurisdiction.

[28] On the basis of that reasoning, which I adopt, it is better that the ITU Appeals Board interpret ITU's Rules and Guidelines in the first instance.

In the result, Allan J. stated:

[29] In my opinion, it is premature to ask this Court to determine those issue before giving the ITU Appeals Board an opportunity to rule on those submissions.

[30] On this application, there is no decision for the Court to review. To accede to Mr. Roberts' submissions and enjoin the ITU Appeals Board from convening to hear the submissions on behalf of the parties would require the Court to conclude that there is but one correct interpretation of the Rules and Guidelines that confer jurisdiction. The Appeals Board should be given the opportunity to interpret and apply its own Rules and Guidelines in the context of the factual matrix and ITU policy. Several of the Rules cited in the course of submissions could be construed broadly or narrowly. I do not find that jurisdiction is clearly lacking. The

jurisdictional issues raised by Smith are preliminary objections to the hearing of the appeal which can, and should, be raised before the ITU Appeals Board. The Court should not usurp the authority of the Appeals Board to hear those objections and rule on them.

The *Smith* case eventually found its way to the CAS.¹⁴⁸ On October 14, 1999, the ITU appealed to the CAS following the dismissal of its appeal by the ITU Appeals Board. On May 31, 2000, the CAS dismissed the ITU's appeal.

c. *The United States*

In the world of professional North American sports dispute resolution, "arbitration is the king".¹⁴⁹ In the United States, the Supreme Court recognized that it is appropriate for arbitrators to interpret contract language in the context of a particular industry's unique circumstances (see the *Steelworkers* trilogy of cases (*United Steelworkers v. American Manufacturing*;¹⁵⁰ *United Steelworkers v. Warrior and Gulf*¹⁵¹; and *United Steelworkers v. Enterprise Wheel and Car*¹⁵²).

In the United States, "national courts are reluctant to hear sports disputes".¹⁵³ Indeed, in the Tonya Harding case, the Federal District Court in Oregon wrote:

The court should rightly hesitate before intervening in disciplinary hearings held by private associations ... intervention is appropriate only in the most extraordinary circumstances, where the association has clearly breached its own rules, that breach will eminently result in *serious* and

¹⁴⁸ *USA Triathlon v. Smith* (CAS, Lausanne, May 31, 2000)

¹⁴⁹ A. G. Feliu, "Essays: Foreword: Discipline in Professional Sports," (1999) 17 Hofstra Lab & Emp L Rev 129, at p. 131

¹⁵⁰ 363 U.S. 564 (1960)

¹⁵¹ 363 U.S. 574 (1960)

¹⁵² 363 U.S. 593 (1960)

¹⁵³ J.A.R. Nafziger, "Symposium: Sports Law in the 21st Century: Globalizing Sports Law" 9 Marq Sports LJ 225, at p. 228

irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies. Even then, injunctive relief is limited to correcting the breach of the rules. The court should not intervene in the merits of the underlying dispute.¹⁵⁴

In the case of *Michaels v. USOC*,¹⁵⁵ Judge Richard Posner stated:

There can be few less suitable bodies than the federal courts for determining the eligibility or the procedure for determining the eligibility, of athletes.

As Nafziger has pointed out:

Courts of law are, first of all, very reluctant to review eligibility and other decisions by sports bodies involving access to competitions. When they do undertake such review, the process is often time consuming and risky. Although that may also be true for arbitration, on balance, arbitration is less costly, more expeditious, and more flexible in responding to new circumstances.¹⁵⁶

Unlike England, Wales, and Canada, the United States has seen its own courts wreak what can only be described as havoc when they have attempted to solve sporting disputes. Perhaps the most famous example of such conduct is the Reynolds litigation, wherein the sprinter Harry "Butch" Reynolds sought to overturn an IAAF ban before the Ohio courts. Nafziger has referred to the Reynolds litigation as a "three year circus".¹⁵⁷

Accordingly, the suitability of an arbitration system to solve sporting disputes must not only be tested against generally accepted principles of law, but it must also judges against the main alternative - the domestic court process.¹⁵⁸

¹⁵⁴ *Harding v. United States Figure Skating Association*, 851, F. Supp. 1476, 1479 (D.Or. 1994)

¹⁵⁵ 741 F.2d 155, 159 (7th Cir. 1984)

¹⁵⁶ J.A.R. Nafziger, "Articles & Speeches: Arbitration of Rights and Obligations in the International Sports Arena" (Spring 2001) 35:2 Valparaiso Univ L Rev 357, at p. 359-360

¹⁵⁷ *Supra*, note 153, p. 227. Also see J.A. R. Nafziger, "International Sports Law as a Process for Resolving Disputes," (1994/1995) 2 Intl Sports L Rev 2, 109

¹⁵⁸ According to Nafziger, the *Harding* case "demonstrates that adjudication outside the prescribed process of international sports law is fundamentally unstable". Nafziger continued: "The message is clear: except in the

d. Generally

According to McCutcheon:¹⁵⁹

A well regulated sport will ensure that an athlete who faces disciplinary proceedings is entitled to independent representation, prior notification of the charges he or she faces, the right to confront witnesses and the right to present his or her case in defence or mitigation. In addition, burdens and standards of proof often reflect those that operate in legal proceedings with the standards in serious disciplinary cases approaching that of proof beyond reasonable doubt.

As McArdle has pointed out:

If sports bodies adhere to their own disciplinary procedures, ensure the alleged miscreants are given a fair hearing and generally fulfill their duty to act fairly, they would have little reason to fear judicial intervention.¹⁶⁰

That is not to say that the courts will never intervene, nor is it to say that the parties to a dispute can ever remove entirely the supervisory jurisdiction of the Courts.¹⁶¹ It is to say, however, that, in practical terms, the parties can avoid the Courts to a large degree: according to Grayson: "The Courts of law become the last resort for victims of maladministration and oppression to obtain justice when

most serious cases of due process or public order, courts should generally abstain from resolving disputes out of international sports activity." [at J.A.R. Nafziger, "International Sports Law as a Process for Resolving Disputes," (1994/1995) 2 Intl Sports L Rev 2, 109]

¹⁵⁹ P. McCutcheon, "Sports Discipline, Natural Justice and Strict Liability," (1999) Anglo American Law Review pp. 37-72, as quoted in D. McArdle, "Judicial Review, 'Public Authorities' and Disciplinary Powers of Sports Organizations," (1999) Camb L Rev 31, at p. 33

¹⁶⁰ McArdle, *Ibid*, pp. 33-34

¹⁶¹ In *Baker v. Jones*, [1954] 2 All E.R. 553 at 558-559, Mr. Justice Lynskey observed: "The parties can, of course, make a tribunal or counsel the final arbiter on questions of fact. They can leave questions of law to the decisions of a tribunal, but they cannot make it the final arbiter on questions of law. They cannot prevent its decision being examined by the Court."

their application does not conform to common law or the equity rules of natural justice.”¹⁶² The words of Lord Denning in *Breen v. A.E.U.*¹⁶³ resonate still today:

Take first statutory bodies. It is now well settled that a statutory body, which is entrusted by statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand, or as administrative on the other hand, or what you will. Still it must act fairly. It must, in a proper case, give a party a chance to be heard ... The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside.

Does all this apply to a domestic body? I think it does, at any rate when it is a body set up by one of the powerful associations which we see nowadays. These instances are to be readily found in the books, notably the Stock Exchange, the Jockey Club, the Football Association, the innumerable trade unions. All these delegate power to committees. These committees are domestic bodies which control the destinies of thousands. They have quite as much power as the statutory bodies of which I have been speaking. They can make or mar a man by their decisions. Not only by expelling him from membership, but also by refusing to admit him as a member: or, it may be, by a refusal to grant a licence or to give their approval. Often their rules are framed so as to give them a discretion. They then claim that it is an unfettered discretion with which the courts have no right to interfere. They go too far. They claim too much. The Minister made the same claim in the *Padfield* Case, and was roundly rebuked by the House of Lords for his impudence. So should we treat this claim by trade unions. They are not above the law, but subject to it. The laws are said to be a contract between the members and the union. So be it. If they are a contract, then it is an implied term that the discretion should be exercised fairly. But the rules are in reality more than a contract. They are a legislated code laid down by the council of the union to be obeyed by the members. This code should be subject to control by the courts just as much as a code laid down by Parliament itself. If the rules set up by a domestic body give it a discretion, it is to be implied that the body must exercise its discretion fairly. Even though its functions are not judicial or quasi-judicial, but only administrative, still it must act fairly. Should it not do so, the court can review its decision, just as it can review the decision of a statutory body. The court cannot grant the prerogative writ such as *certiorari* and *mandamus* against domestic bodies, but they can grant declarations and injunctions which are the modern machinery for enforcing administrative law.

¹⁶² E. Grayson, *Sport and the Law*, 3rd ed., (London: Butterworths, 1999), p. 386

¹⁶³ [1971] 2 K.B. 175 at 189-190

Indeed, it has been said that Lord Denning “took the first step on the road which has led to the modern law of natural justice in sport”.¹⁶⁴ In the English Court of Appeal case of *Russell v. Duke of Norfolk*,¹⁶⁵ Lord Denning stated the following preconditions for a challenge to decisions by domestic sporting tribunals and their governing bodies:

1. Common justice requires that before any man is found guilty of an offence carrying such consequences [as taking away his livelihood] there should be an inquiry at which he has an opportunity of being heard.
2. The Jockey Club has a monopoly in an important field of human activity ...
3. Whether the inquiry was held in accordance with the essentials of justice.

McArdle has argued forcefully that the decisions of sporting bodies should not be immune from judicial scrutiny.¹⁶⁶ He points to the fact patterns in the cases of *Couch v. The British Boxing Board of Control*,¹⁶⁷ *Hardwick v. The Football Association*,¹⁶⁸ *Hussaney v. Chester City F.C. and Kevin Ratcliffe*,¹⁶⁹ and says that they “lead one to conclude that some sports bodies are incapable of being left to their own devices and cannot be trusted to run their affairs properly.”. That said, he accepts the comments of the Court in *R. v. Disciplinary Committee of The Jockey Club, ex parte Massingberd-Mundy*,¹⁷⁰ per Neil L.J. that: ““The courts should act with restraint for interfering with the decisions of sporting bodies, however wide ranging their powers may be.”

¹⁶⁴ *Supra*, note 162, p. 391

¹⁶⁵ [1949] 1 All E.R. at 119-120

¹⁶⁶ McArdle, *supra*, note 160, p. 38

¹⁶⁷ (1998), unreported, I.T. transcript 2304321/97

¹⁶⁸ (1987), unreported, I.T. transcript 220651/96

¹⁶⁹ (1997), unreported, I.T. transcript 210242/97

¹⁷⁰ [1993] 2 All E.R. 207 at p. 220

Grayson identifies the following “sound elementary rules of common sense extracted from the [English] cases ...1. avoid any risk of prejudgment or prejudice or bias or likelihood of it; 2. formulate and notify clearly, preferably in writing, any assertions needing reply; 3. notify clearly, and preferably in writing, any dates for investigation or hearing; 4. act *intra vires*, within the rules, and not *ultra vires*, outside them ; 5. remember the right to be heard in defence of any allegations; and 6. in cases of difficulty or complexity, consider carefully any request for legal representation.”¹⁷¹ Although these comments were only made with respect to English cases, in my view, they can be said to represent the international view of sports dispute resolution mechanisms.

Does the AHD - CAS-based system pass the test?

VI. CAS AND THE AHD

1. Introduction

According to the IOC, it “devotes a great deal of attention to protecting the athletes, the heroes of the Olympic Games”.¹⁷² The CAS is one of the “actions” that the IOC lists as having been undertaken with at least a nod in the direction of athlete protection. In this context, the IOC has described the CAS as “an international court which handles the legal problems encountered by athletes. Its procedure is universally applicable, and is simple, quick, flexible and inexpensive”.¹⁷³

According to Kaufmann-Kohler, the CAS must be viewed in the wider context of the proliferation of private dispute settlement:

¹⁷¹ *Supra*, note 162, p. 413

¹⁷² www.olympic.org/uk/organisation/missions/athletes_uk.asp (last visited August 14, 2004)

¹⁷³ *Ibid*

Before addressing the operation of the ad hoc division, it may be worthwhile to consider a broader perspective. Beyond Olympic arbitration, beyond sports arbitration, the story of the ad hoc division is a paradigm of contemporary dispute resolution. The evolution of this field features two prevailing tendencies: diversification and globalization.

The diversification occurs through different segments of activities. Different activities give rise to different types of disputes with specific needs in terms of dispute resolution. By establishing tailor-made mechanisms, it becomes possible to meet those particular needs. This generally implies adapting the method of dispute resolution to the environment in which that very dispute arose. In the context of the Olympic Games, medals are won in seconds or minutes at the competition site and it therefore follows that the ad hoc division must render arbitral awards in hours (not in minutes) ... at the place where the competition takes place.

Within each segment of activity, the mode of resolving the dispute is also globalized. Wherever in the world a dispute arises, wherever it is resolved, the result is the same. There is no difference depending on geographical, territorial, national conditions - just like the time on a stopwatch is the same wherever you compete. For the ad hoc division, this means applying the same procedural and substantive rules, including for the court control over the award, wherever the Olympic Games are held.¹⁷⁴

Moreover:

Since the 1980s, the astonishing speed with which professional sport and high level sport in general have developed means that athletes, sports clubs, federations, sponsors, sports event organisers and other people or bodies involved in sport become much more demanding when it comes to legal matters. The logical result of this situation is a higher number of potential sources of disputes, given the growth in the economic issues at stake. Today, the attitude of state courts in relation to sporting issues has changed, and intervention by state judges is on the increase.

.... For even if sports-legal disputes can always be settled by the ordinary courts, an international court like the CAS, which can offer specialist knowledge, low cost and rapid action, provides a means of resolving sports disputes adapted to the specific needs of the international sporting community.¹⁷⁵

Since its humble beginnings in 1984, the CAS has undergone significant change. According to Reeb:

¹⁷⁴ G. Kaufmann-Kohler, *Arbitration at the Olympics: Issues of Fast Track Dispute Resolution in Sports Law* (Kluwer Law International: The Hague, Netherlands), pp. 4-5

¹⁷⁵ M. Reeb, "The Court of Arbitration for Sport" at <http://www.tas-cas.org/en/histoire/histoireA.htm> (last visited August 14, 2004)

... the CAS has not finished growing. Although almost all the Olympic International Federations and several non-Olympic federations recognise the jurisdiction of the CAS, it seems that the international sports community as a whole does not yet know enough about the role and work of the CAS to make optimum use of its services. The CAS thus needs to publish its decisions more regularly and continue its awareness-raising efforts. It appears that the CAS is known chiefly as an appeals authority for disciplinary cases. This is due notably to the fact that the CAS appeals procedures are not, as a rule, confidential. And people sometimes forget that the CAS also acts as a court of sole instance for settling sports-related contractual disputes, thanks to an arbitration procedure which is adapted to this.

In the future, it is probable that the ICAS will seek to facilitate access to CAS jurisdiction still further, for example by creating new decentralised offices or new ad hoc divisions, while maintaining the principle of not charging for appeals proceedings.¹⁷⁶

According to the CAS itself, today:

The Court of Arbitration for Sport (CAS) is an institution independent of any sports organization which provides for services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world. The CAS was created in 1984 and is placed under the administrative and financial authority of the International Council of Arbitration for Sport (ICAS). The CAS has more than 150 arbitrators from 55 countries, chosen for their specialist knowledge of arbitration and sports law. Around 50 cases are registered by the CAS every year.¹⁷⁷

The CAS is headquartered in Lausanne, Switzerland. It has offices in Sydney, Australia, and New York, U.S.A..¹⁷⁸ Any sport-related dispute may be submitted to the CAS.¹⁷⁹ The CAS can be used by individuals and organisations.¹⁸⁰

¹⁷⁶ *Ibid*

¹⁷⁷ <http://www.tas-cas.org/en/present/frmpres.htm> (last visited August 14, 2004)

¹⁷⁸ <http://www.tas-cas.org/en/present/presentC.htm> (last visited August 14, 2004)

¹⁷⁹ <http://www.tas-cas.org/en/present/presentD.htm> (last visited August 14, 2004)

¹⁸⁰ <http://www.tas-cas.org/en/present/presentE.htm> (last visited August 14, 2004)

Although the CAS can be used to settle commercial disputes, the majority of its work has concerned cases which impact on an athlete's eligibility to compete. As such, no paper on the subject of eligibility to compete in the Olympic Games would be complete without a consideration of the CAS. Indeed, it is not overstating its importance to say that the CAS is the organization which has the ability to have the most impact on an elite athlete's eligibility, in the event of a dispute.

With respect to what the CAS does:

The CAS has the task of resolving legal disputes in the field of sport through arbitration. It does this pronouncing arbitral awards that have the same enforceability as judgements of ordinary courts. It can also help parties solve their disputes on an amicable basis through mediation, when this procedure is allowed. In addition, the CAS gives advisory opinions concerning legal questions related to sport. Lastly, the CAS sets up non-permanent tribunals, which it does for the Olympic Games, the Commonwealth Games or other similar major events. To take into account the circumstances of such events, special procedural rules are established on each occasion.¹⁸¹

Given that the CAS sets up ad hoc tribunals for the Olympic Games, there are two CAS-related bodies that deal with Olympic eligibility disputes, depending on the timing of same: disputes before the period of the Games are handled by the "regular" tribunal process, whereas disputes during the period of the Games are handled by the AHD. The "regular" procedure will be discussed briefly, but only to provide the context within which the AHD operates.

2. Permanent tribunal(s)

There are two types of arbitration: the Ordinary Arbitration Division and the Appeal Arbitration Division:¹⁸² "In the context of ordinary arbitration, the parties are free to agree on the law applicable

¹⁸¹ <http://www.tas-cas.org/en/present/presentB.htm> (last visited August 14, 2004)

¹⁸² The Code of Sports-Related Arbitration, Article S3 at <http://www.tas-cas.org/en/code/codeAa.htm> (last visited August 14, 2004)

to the merits of the dispute. Failing such agreement, Swiss law applies. In the context of the appeals procedure, the arbitrators rule on the basis of the regulations of the body concerned by the appeal and, subsidiarily, the law of the country in which the body is domiciled. The procedure itself is governed by the Code of Sports-related Arbitration.”¹⁸³

In almost every case concerning an athlete’s eligibility, a decision(s) will have been made by a sports organization’s internal body (or bodies). Any party to such a decision can use the appeal procedure provided for by the CAS.¹⁸⁴

With respect to cost, the ordinary procedure “involves paying the relatively modest costs and fees of the arbitrators, calculated on the basis of a fixed scale of charges, plus a share of the costs of the CAS [, whereas the] appeals procedure is free, except for an initial Court Office fee of CHF 500.—“.¹⁸⁵

The major difference between the permanent tribunals and the AHD is the speed in which decisions are rendered. Although the ordinary procedure and the appeals procedure differ slightly in how long they take to resolve disputes (between six and 12 months in the case of the former, and within four months in the case of the latter), their business is measured in months. In contrast, given the very nature of the immediacy of the sporting event in question, the ad hoc tribunals must give decisions, wherever possible, within 24 hours.

¹⁸³ <http://www.tas-cas.org/en/present/presentM.htm> (last visited August 14, 2004)

¹⁸⁴ “In the case of the appeals procedure, a party may lodge an appeal only if it has exhausted all the internal remedies of the sports organisation concerned,” at <http://www.tas-cas.org/en/present/presentI.htm> (last visited August 14, 2004)

¹⁸⁵ <http://www.tas-cas.org/en/present/presentN.htm> (last visited August 14, 2004)

As is the case for every arbitral body, its make-up is of incredible importance. According to Article S6 of the Code of sports-related Arbitration, the ICAS exercises, *inter alia*, the following functions:

2. It elects from among its members for a renewable period of four years :
 - the President proposed by the IOC,
 - two Vice-Presidents (one proposed by the IFS and one by the National Olympic Committees [NOCs]), who shall deputize the President if necessary, by order of seniority in age,
 - the President of the Ordinary Arbitration Division and the President of the Appeals Arbitration Division of the CAS,
 - the deputies of the two Division Presidents who can replace them in the event they are prevented from carrying out their functions ;
3. It appoints the personalities who are to constitute the list of arbitrators and the list of CAS mediators and can remove them from those lists (Article S3).¹⁸⁶

One should note that the ICAS "is composed of twenty members, namely high-level jurists appointed on the following manner:

- S4
- a. four members are appointed by the International Sports Federations ("IFS"), viz. three by the Summer Olympic IFS (ASOIF) and one by the Winter Olympic IFS ("AIWF"), chosen from within or from outside their membership;
 - b. four members are appointed by the Association of the National Olympic Committees ("ANOC"), chosen from within or from outside its membership;
 - c. four members are appointed by the International Olympic Committee ("IOC"), chosen from within or from outside its membership;
 - d. four members are appointed by the twelve members of the ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes;
 - e. four members are appointed by the sixteen members of the ICAS listed above and chosen from among personalities independent of the bodies designating the other members of the ICAS.¹⁸⁷

¹⁸⁶ <http://www.tas-cas.org/en/code/codeAbb.htm> (last visited August 14, 2004)

¹⁸⁷ <http://www.tas-cas.org/en/code/codeAba.htm> (last visited August 14, 2004)

Accordingly, a body dominated by non-athlete-aligned groups dominates the organization responsible for the naming of available arbitrators.

Moreover, according to Article S14:¹⁸⁸

In establishing the list of CAS arbitrators, the ICAS shall call upon personalities with full 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. In addition, the ICAS shall respect, in principle, the following distribution:

3. 1/5th of the arbitrators selected from among the persons proposed by the IOC, chosen from within its membership or from outside ;
4. 1/5th of the arbitrators selected from among the persons proposed by the IFS, chosen from within their membership or outside ;
5. 1/5th of the arbitrators selected from among the persons proposed by the NOCs, chosen from within their membership or outside ;
6. 1/5th of the arbitrators chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes ;
7. 1/5th of the arbitrators chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article.

The net result of this is that a body with minimal athlete input chooses a list of arbitrators whose membership comprises 1/5th “with a view to safeguarding the interest of athletes”. As is explored in more detail below, that is not enough.

That said, each member of the CAS must make a solemn declaration (see Article 10, line 2):

I solemnly declare in my honour and being fully conscious that I will fulfill appropriately and duly my duties as arbitrator, that I will keep secrecy as regards to every deliberation and that I will act in absolute objectivity and complete independence.

¹⁸⁸ <http://www.tas-cas.org/en/code/codeAcb.htm> (last visited August 14, 2004)

The Procedural Rules in the Code begin at Rule 27. Highlights of the Rules include:

- R28 The seat of the CAS and of each Arbitration Panel ("Panel") is in Lausanne, Switzerland. However, should circumstances so warrant, and after consultation with all parties, the President of the Panel or, if he has not yet been appointed, the President of the relevant Division may decide to hold a hearing in another place and issues the appropriate directions related to such hearing.¹⁸⁹

Special Provisions Applicable to the Ordinary Arbitration Procedure:

- R45 The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide *ex aequo et bono*.¹⁹⁰
- R46 ...
- The award notified by the CAS Court Office shall be final and binding upon the parties. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration.¹⁹¹

Special Provisions Applicable to the Appeal Arbitration Procedure:

- R57 The Panel shall have 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. Upon transfer of the file, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments. He may also request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal. Articles R44.2 and R44.3 shall apply.
- After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing. At the hearing, the proceedings take place in camera, unless the parties agree otherwise.

¹⁸⁹ <http://www.tas-cas.org/en/code/frmco.htm> (last visited August 14, 2004)

¹⁹⁰ *Ibid*

¹⁹¹ *Ibid*

If any of the parties is duly summoned yet fails to appear, the Panel may nevertheless proceed with the hearing.¹⁹²

R58 The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.¹⁹³

R59 ...
The award, notified by the CAS Court Office, shall be final and binding upon the parties. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration.

The operative part of the award shall be communicated to the parties within four months after the filing of the statement of appeal. Such time-limit may be extended by the President of the Appeals Arbitration Division upon a reasoned request from the President of the Panel.

The award, a summary and/or a press release setting forth the results of the proceedings shall be made public by the CAS, unless both parties agree that they should remain confidential.¹⁹⁴

Whereas there are provisions for the award of costs by permanent tribunals,¹⁹⁵ all proceedings before the ad hoc tribunal are free. And it is to the AHD we now turn.

3. Ad hoc tribunals

All proceedings of the AHD of the CAS are governed by the CAS arbitration rules for the particular Olympic Games in question and they are designed and enacted by the ICAS before each Olympic Games. These rules are in addition to the Code of Sports-related Arbitration. As a result of the

¹⁹² *Ibid*

¹⁹³ *Ibid*

¹⁹⁴ *Ibid*

¹⁹⁵ See Part F of the Code of sports-related Arbitration Rr 64-65.4 at *Ibid*

express choice of law contained in Article XVII of the rules, as well as the choice of Lausanne, Switzerland as the seat of the Ad Hoc Division of the CAS, pursuant to Article VII of the rules, Chapter 12 of the *Swiss Private International Law Act* of December 18, 1987, applies to all proceedings.

The most important rules from the Arbitration Rules for the Olympic Games are as follows:

Article 1 - Application of the Present Rules and the Jurisdiction of the Court of Arbitration for Sport ("CAS")

The purpose of the present Rules is to provide, in the interest of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 74 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of 10 days preceding the opening ceremony of the Olympic Games.

In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an international federation or an organizing committee for the Olympic Games, the claimant must, before filing such a request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective.

Article 2 - Ad Hoc Division

For the period fixed in Article 1, the ICAS shall establish an Ad Hoc Division of the CAS (hereinafter the "Ad Hoc Division"), the function of which is to provide for the resolution by arbitration of the disputes covered by Article 1 by means of Panels set up in accordance with the present Rules.

The Ad Hoc Division consists of arbitrators appearing on a special list, a President, and a Court Office.

Article 3 - Special List of Arbitrators

The ICAS, acting through its Board, shall draw up the special list of arbitrators referred to in Article 2.

The special list consists of only arbitrators who appear on the CAS general list of arbitrators and who are present at the OG.

The special list of arbitrators shall be published before the opening of the OG. It may be subsequently modified by the ICAS Board where necessary.

Article 7 - Seat of Arbitration and Law Governing the Arbitration

The seat of the Ad Hoc Division and of each Panel is in Lausanne, Switzerland. However, the Ad Hoc Division and each Panel may carry out all the actions which fall within their mission at the site of the Olympic Games or at any other place they deem appropriate.

The arbitration is governed by Chapter 12 of the *Swiss Act on Private International Law*.

Article 9 - Notifications and Communications

- (a) All notifications and communications from the Ad Hoc Division (Panel, presidency or court office) shall be given as follows:
- To the claimant: by delivery to the address at the OG site appearing in the request or by facsimile, or at the electronic mail address specified in the request or, in the absence of all of the above, by deposit at the court office.
 - To the respondent: by delivery, facsimile or electronic mail to his or her office or place of residence at the site of the OG.

The Ad Hoc Division may also give notifications and communications by telephone and confirm them subsequently in writing, or by electronic mail. In the absence of written confirmation, the communication is nevertheless valid if the addressee had actual knowledge of it.

- (b) Notifications and communications from the party shall be delivered or faxed to the court office with the exception of the application referred to in Article 10 which must be delivered to the court office in return for a seat.

Article 11 - Formation of the Panel

Upon receipt of the application, the President of the Ad Hoc Division constitutes a Panel composed of three arbitrators appearing on the special list within the meaning of Article 2 of the Rules (the "Panel") and appoints the President thereof.

In the event that it appears appropriate under the circumstances, the President of the Ad Hoc Division may, in his discretion, appoint a sole arbitrator.

...

Article 14 - Stay of Decision Challenged and Preliminary Relief of Extreme Urgency

In the case of an extreme emergency, the Panel, where already formed, or otherwise the President of the Ad Hoc Division, may rule on an application for a stay of the effects of the challenged decision or for any other preliminary relief without hearing the respondent first. The decision granting such relief ceased to be effective when the Panel gives a decision within the meaning of the present Rules.

When deciding whether to award any preliminary relief, the President of the Ad Hoc Division or the Panel, as the case may be, shall consider whether the relief is necessary to protect the applicant from irreparable harm, the likelihood of success on the merits of the claim, and whether the interests of the applicant outweigh those of the opponent or of other members of the Olympic community.

Article 15 Procedure before the Panel

a) Defence of lack of jurisdiction

Any defence of lack of jurisdiction of the Panel must be raised at the start of the proceedings or, at the latest, at the start of the hearing.

b) Procedure

The Panel organizes the procedure as it considers appropriate while taking into account the specific needs and circumstances of the case, the interests of the parties, in particular their right to be heard, and the particular constraints of speed and efficiency specific to the present ad hoc procedure. The Panel shall have full control over the evidentiary proceedings.

c) Hearing

Except where it considers another form of procedure more appropriate, the Panel shall summon the parties to a hearing on very short notice immediately upon receipt of the application. It shall append a copy of the application to the summons to appear addressed to the respondent.

At the hearing, the Panel shall hear the parties and take all appropriate action with respect to evidence. The parties shall introduce at the hearing all the evidence they intend to adduce and produce the witnesses, who shall be heard immediately.

d) Other evidentiary measures

If a party requests an opportunity to introduce additional evidence which, for legitimate reasons, it was not able to produce at the hearing, the Panel may permit it to the extent necessary to the resolution of the dispute.

The Panel may at any time take any appropriate action with respect to evidence. In particular, it may appoint an expert and order the production of documents, information or any other evidence. It may also, in its discretion, decide whether to admit or exclude evidence offered by the parties and assess the weight of evidence. The Panel shall inform the parties accordingly.

e) Failure to appear

If one party or both parties fail to appear at the hearing or to comply with injunctions, summonses or other communications issued by the Panel, the Panel may nevertheless proceed.

Article 16 - the Panel's Power to Review

The Panel shall have full power to establish the facts on which the application is based.

Article 17 - Law Applicable

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.

Article 18 - Time Limit

The Panel shall give a decision within 24 hours of the lodging of the application. In exceptional cases, this time limit may be extended by the President of the Ad Hoc Division if circumstances so require.

...

Article 20 - Enforceability and Scope of the Decision

(a) Choice of final award or referral

Taking into account all the circumstances of the case, including the claimant's request for relief, the nature and complexity of the dispute, the urgency of its resolution, the extent of the evidence required and of the legal issues to be resolved, the party's right to be heard and the state of the record at the end of the ad hoc arbitration proceedings, the Panel may either make a final award or a further dispute to arbitration by the CAS in accordance with the Code of sports-related arbitration. The Panel may also make an award on part of the dispute and refer the unresolved part of the dispute to regular CAS procedures.

(b) Preliminary Relief in Case of Referral

If it refers the dispute to regular CAS procedure, the Panel may, even where the parties have made no application to that effect, grant preliminary relief which will remain in effect until the arbitrators decide otherwise in the regular CAS procedures.

(c) Referral

If the Panel refers the dispute to regular CAS procedure, the following provisions shall apply:

- i) The Panel may set a time limit for the claimant to bring the case before the CAS according to Articles R38 and R48 of the Code of Sports Related Arbitration or provide for referral on its own motion ("ex officio referral"). In either case, the time limits laid down by the statutes

or regulations of the bodies the decision of which is being challenged or by Article R49 of the Code of Sports Related Arbitration do not apply.

- ii) Depending on the nature of the case, the CAS court office shall assign the arbitration to the ordinary arbitration division or to the appeals arbitration division.
- iii) The Panel formed during the OG remains assigned to the resolution of the dispute for purposes of regular CAS procedure and, by submitting to the present rules, the parties waive any provision to the contrary in the Code of Sports Related Arbitration or in their agreement concerning the number of arbitrators and the way in which the panel is formed.
- iv) In the event of ex officio referral, the CAS court office shall take any appropriate action which may facilitate the initiation of the regular CAS procedure, having special regard to the present provisions.

Article 21 - Enforceability; No Remedies

The decision is enforceable immediately and may not be appealed against or otherwise challenged.

Article 22 - Cost Free Nature of the Proceedings

Facilities and services of the CAS Ad Hoc Division, including the provision of arbitrators to the parties to a dispute, are free of charge.

However, the parties shall pay their own costs of legal representation, experts, witnesses and interpreters.

The rules in place for the Athens Olympics were adopted by the ICAS in New Delhi on October 14, 2003 on the authority of Rule 74 of the Olympic Charter and Articles S6, paragraphs 1, 8 and 10, S8, S23 and R69 of the Code of Sports Related Arbitration.

Between 1986 and 2003, the CAS, in both permanent and ad hoc guises, has seen 505 requests for arbitration filed, with 71 requests for advisory opinions filed. The CAS has rendered 314 awards, and given 16 opinions. Since the entry into force of the Code of Sports-related Arbitration on November 22, 1994, there have been 445 cases submitted to the CAS. 34 (just under 8% of the total) were submitted to the ad hoc tribunals.¹⁹⁶

¹⁹⁶ *Ibid* under "Statistics"

4. Case law - an overview

To put the current demand for arbitration of sports disputes in perspective, not one request for arbitration was filed during the Seoul Games of 1998.¹⁹⁷ At the Sydney Games, the AHD dealt with 15 cases, and as Kaufmann-Kohler has noted, "many of the legal issues raised in Sydney were more complex than at previous Olympic Games."¹⁹⁸ This number is to be contrasted to the six cases it handled in Atlanta and six in Nagano.¹⁹⁹ Below is a brief overview of some of the issues with which the CAS and AHD have been faced.

As identified by McLaren, the following types of disputes have arisen during the Games:

- I. the jurisdiction of the CAS;
- II. affected third parties and national eligibility rules;
- III. validity of athlete suspensions by the IOC and IF's;
- IV. the principle of non-interference with the decisions of sports officials;
- V. doping violations and the existence of strict liability regimes;
- VI. the resolution of commercial advertising issues at the Games; and
- VII. the manipulation of sporting rules for strategic advantage.²⁰⁰

With respect to the jurisdiction of the CAS, in the case of *Schaatsefabriek Viking B.V. v. German Speed Skating Association [Viking]*,²⁰¹ a skate manufacturing corporation applied for an order prohibiting members of the German National Skating Federation from wearing skate covers manufactured by a rival company. In the result, the application was dismissed because the Olympic Charter had not been violated. The AHD noted that it had no jurisdiction to render an award as it could only deal with disputes arising at, or in connection with, the Games.

¹⁹⁷ See *supra*, note 156, at p. 357

¹⁹⁸ *Supra*, note 174, p. 7

¹⁹⁹ *Ibid*, p. 7

²⁰⁰ R.H. McLaren, "International Sports Law Perspective: Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games" (2001) 12 Marq Sports L Rev 515, at p. 523

²⁰¹ (Nagano 1998)

In the case of *Steel v. The CIO*,²⁰² the applicant claimed that he had been improperly excluded from competition by the International Ski Federation. He argued that he was eligible to compete under the rules of the Puerto Rico Ski Federation. In the result, he failed to persuade the CAS of his eligibility. The CAS noted that the PRSF was not recognized by the Puerto Rican Olympic Committee, and so he had no standing to bring the dispute to the AHD.

An interesting jurisdictional battle played itself out in the matter of the eligibility of Dieter Baumann, a German middle distance runner.²⁰³ In summary, Baumann had been cleared of an alleged doping infraction by the German athletic federation (DLV) - a member of the IAAF. He was then properly credited to participate in the Sydney Games by the IOC. However, the IAAF disagreed with the DLV's decision and so brought the case before its arbitration panels, which found a doping infraction and applied a two year ineligibility sanction. Thus, the DLV decision was overruled. The IAAF then requested that the IOC remove Baumann's accreditation for the Sydney Games. Baumann responded by appealing to the AHD. Despite the IAAF raising a preliminary objection disputing the AHD's jurisdiction, the AHD held that it had jurisdiction which prompted the IAAF to "withdraw from the proceedings and [walk] out of the hearing room".²⁰⁴

The AHD also dismissed a *res judicata* argument, pointing out that neither Baumann nor the IOC had been a party to the IAAF arbitration. That said, in the result, Baumann's accreditation was removed and he was therefore no longer eligible to compete in the Games.

In the case of *Mihaela Melinte v. IAAF*,²⁰⁵ a female Romanian hammer thrower challenged the IAAF's provisional suspension following a positive Nandrolone sample. As in the Baumann case,

²⁰² (Nagano 1998)

²⁰³ Arbitration CAS Ad Hoc Division (OG Sidney 2000) 006, *Dieter Baumann v. The International Olympic Committee (IOC), National Olympic Committee of Germany and International Amateur Athletics Federation (IAAF)*, Award of 22 September 2000

²⁰⁴ *Supra*, note 200, at p. 525

²⁰⁵ *Mihaela Melinte v. IAAF*, Arbitration AHD (Sydney 2000) 015, Award of September 2000

the IAAF refused to be recognized as a party to the dispute. However, this time, it participated in the hearing. In the result, the AHD dismissed the application and so upheld the IAAF suspension. However, the AHD made it clear that its decision did not determine whether or not Melinte had committed a doping offence, or rather, its decision was only related to her participation in the Games. The AHD stated that IAAF procedures would have to be followed after the Games to determine the issues between Melinte and the IAAF. Ultimately, an IAAF arbitration panel found Melinte guilty of a doping offence and she was suspended for two years.²⁰⁶

In the case of *Segura v. IAAF*,²⁰⁷ a Mexican 20 kilometer race walker sought to challenge his disqualification. In this case, as in *Baumann* and *Melinte*, the AHD rejected the athlete's arguments and the application was dismissed. Interestingly, though, the IAAF fully participated before the AHD. As McLaren has observed:

The three Sydney cases illustrate that the IAAF had come full circle in attorning to the jurisdiction of the AHD. It went from a refusal to participate on the grounds of lack of jurisdiction and the decision having already been made; to remaining as an observer, and then finally submitting to the AHD's jurisdiction and arguing its case. The change of attitude apparently arose out of the way CAS dealt with the two previous IAAF cases and the praise it had received in the German newspapers in connection to the Baumann case.²⁰⁸

A number of cases dealt with by the AHD at the Sydney Games illustrate the extent to which CAS decisions bind affected parties.²⁰⁹ In summary, of the 15 cases that were filed with the AHD at the Sydney Games between September 10 and 28, 2000, the case involving *Sieracki* was withdrawn as

²⁰⁶ *Supra*, note 200

²⁰⁷ Arbitration AHD (Sydney 2000), Award of 30 September 2000

²⁰⁸ *Supra*, note 200, p. 528

²⁰⁹ *Raguz v. Sullivan*, 2000 NSWCA 290; Arbitration AHD (Sydney 2000) 001; Arbitration CAS Ad Hoc Division (OS Sydney 2000) 001, *USOC v. USA Canoe/Kayak v. IOC*, Arbitration AHD (Sydney 2000) 005, Award of 13 September 2000 ("Perez 1"), *Angel Perez v. IOC*, Arbitration AHD (Sydney 2000) 009, Award of 19 September 2000 ("Perez 2"), *In the Matter of Angel Perez*, Arbitration AHD (Sydney 2000) 003, Award of 25 September 2000 ("Perez 3"), *Arturo Miranda v. IOC*, Arbitration AHD (Sydney 2000) 008, Award of 13 September 2000 ("Miranda 1"), *Arturo Miranda, COA, and Canadian Amateur Diving Association v. IOC*, Arbitration AHD (Sydney 2000) Award of 24 September 2000 ("Miranda 2"). See *Ibid*, pp. 528-530

the result of a US Court issued injunction, three applications were granted (*Ofisa*, *Perez 2*, and *Tzagaev*), and 11 applications were dismissed (*Perez 1*, *Miranda 1*, *Kibunde*, *Baumann*, *Miranda 2*, *Perez 3*, *Raducan*, *Neykova*, *Segura*, *FFG*, and *Melinte*).²¹⁰

According to Kaufmann-Kohler:

Five arbitrations were completed within 24 hours [*Kibunde*, *Miranda 2*, *Perez 3*, *Tzagaev*, and *Melinte* (which was completed in seven hours)] ..., five within 48 hours [*Baumann*, *Raducan*, *Segura*, and *FFG*], three lasted around 50 hours [*Ofisa*, *Miranda 1*, and *Neykova*] (out of which two took place before the Games, at a time when matters were less urgent [*Ofisa* and *Miranda 1*]), and one further case handled before the Games took 72 hours [*Perez 1*]. Interestingly, the hearing was often deferred at the party's request, including the Claimants, who needed time to prepare their case.²¹¹

As Kaufmann-Kohler observed of the AHD at the Sydney Games:

In all cases, the Division was able to give a decision at the time when it was needed, which is the true purpose of the 24 hour rule.²¹²

In Sydney, 11 cases involved the participation of an athlete in the competition, three cases dealt with the result of the competition (all concerning a gold medal), one case dealt with advertising on an athlete's clothing (*FFG*), two matters giving rise to five awards address nationality issues (*Perez 1* to 3 and *Miranda 1* and 2), four cases involved doping (*Baumann*, *Tzagaev*, *Raducan* and *Melinte*). Field of play rules were discussed in three cases (*Kibunde*, *Neykova* and *Segura*), and athlete eligibility arose in three cases (*Kibunde*, *Sieracki* and *Ofisa*).²¹³

The panel at the Sydney Games applied the Olympic Charter in eight instances (*Perez 1* and 2, *Ofisa*, *Miranda 1* and 2, *Kibunde*, *Raducan* and *FFG*). The panel applied the IOC Anti-Doping Code and

²¹⁰ *Supra*, note 174, p. 10

²¹¹ *Ibid*, pp. 10-11

²¹² *Ibid*, p. 11

²¹³ *Ibid*, p. 11

the SOG Doping Control Guide in one instance (*Raducan*). In eight cases (*Ofisa*, *Kibunde*, *Baumann*, *Tzagaev*, *Raducan*, *Neykova*, *Segura* and *Melinte*), the AHD relied on an IF's regulations. In two cases, the outcome was dictated by the decision of a national Court (*Ofisa* and *Sieracki*), and in the nationality cases of *Miranda* and *Perez*, international law was applied over domestic law on citizenship and nationality.²¹⁴

In the *Segura* decision, at paragraph 17, the AHD underlined the fact that it will not review field of play decisions:

CAS arbitrators do not review the determinations made on the playing field by judges, referees, umpires, or other officials who are charged with applying what is sometime called 'rules of the game' (one exception among others would be if such rules had been applied in bad faith, e.g. as a consequence of corruption).

The *Ofisa* case requires a little more attention. Prior to the Sydney Games, the Samoan Weightlifting Federation suspended one of its weightlifters, Ofisa Junior Ofisa, precluding him from participating in the Games, as a result of alleged sexual misconduct. The International Weightlifting Federation adopted the Samoan suspension. Ofisa then obtained an interim Court Order in Samoa which prevented the enforcement of the SWF imposed suspension. When the dispute was brought before the AHD, the AHD acknowledged that the SWF was affected by the Samoan Court Order and had the effect of removing the suspension on Ofisa. However, the AHD also held that the Samoan Order was not binding on the IWF. However, because the IWF suspension was based on the SWF's decision, the IWF decision was invalid and so the CAS set the suspension aside.²¹⁵ Accordingly, although it would appear that domestic Courts cannot attempt to lock the barn door once the horse has bolted (i.e. nullify the decision of the CAS once the CAS has ruled), they still have a very important role to play prior to a dispute coming before the CAS. Accordingly, an athlete may seek to circumvent disciplinary sanctions by obtaining interim injunctions before their domestic Courts

²¹⁴ *Ibid*, p. 11

²¹⁵ *Samoa NOC and Sports Federation Inc. v. International Weightlifting Federation*, Arbitration AHD (Sydney 2000) 002, Award of 12 September 2000 ("Ofisa")

before the dispute has reached the CAS. That said, success in such scenarios is by no means assured, as the Anglo-American tradition, at least, is to respect the decisions of private bodies.

Not only did an athlete benefit from the AHD's willingness to set aside the disciplinary sanction where there was no jurisdiction to impose same in the Rebagliati case, a Bulgarian weightlifter similarly benefitted. In the case of *Alan Tzagaev v. International Weightlifting Federation*,²¹⁶ the IWF sought to suspend the Bulgarian Weightlifting Federation ("BWF") after three of its athletes tested positive for banned substances. The IOC Executive Board allowed the suspension of the entire team, including Mr. Tzagaev - a "clean" athlete. In the result, the AHD held that the suspension of an entire federation, including "innocent" athletes, must have an explicit legal basis, and as the suspension in this case did not (the IWF could, under its rules, only impose a fine and then a suspension for failure to pay that fine), Tzagaev was allowed to compete and indeed eventually won a silver medal.

That said, not all cases have been decided in favour of the athlete. In the case of, *Congolese Olympic Committee and Jesus Kibunde v. The International Amateur Boxing Association*,²¹⁷ the suspension of Kibunde was upheld, as it was properly imposed under the AIBA's rules.

Although the CAS is not bound to follow its earlier decisions or obey the general principle of *stare decisis*, over the years the CAS panels have indicated that they will follow previous decisions for reasons of comity and predictability.²¹⁸

²¹⁶ Arbitration AHD (Sydney 2000) 010 Award of 25 September 2000

²¹⁷ Arbitration AHD (Sydney 2000) 004 Award of 18 September 2000

²¹⁸ F. Oschutz, "International Sports Law Perspectives: Harmonization of Anti-Doping Code Through Arbitration: The Case Law of the Court of Arbitration for Sport" (2002) 12 Marq Sports L Rev 675, at p. 680

5. Commentary

Comments on the structure and performance of the AHD can be separated into ten parts: a) Compulsory agreement; b) Due process rights ; c) Right to be heard for all affected parties; d) Law to be applied; e) Flexibility; f) Speed; g) Dueling jurisdictions; h) Independence; i) Comparison to the domestic courts; and j) Finality / enforcement of the decision.

Kaufmann-Kohler has described the “first days” of the AHD at the 1996 Games in Atlanta as “difficult ... largely because the surrounding skepticism, if not hostility, toward this new institution”.²¹⁹ She continued:

[In Atlanta], the ad hoc division itself was on trial. It passed this first critical test: the athletes and their representatives and their attorneys appreciated the professional approach, the speed and the fact that the proceedings were cost free; the sports officials seemed to conclude that, in a world where no activity is immune from law and lawsuits, the ad hoc division may be the lesser of many potential evils.²²⁰

A great deal has happened since.

a. *Compulsory agreement*

As noted, every Olympic participant must sign a form which mandates resort to the AHD in the event of a dispute. At least one commentator has suggested that this contract ought to be subject to standard contract analysis.²²¹ Under general principles of contract law, a contract may be void or voidable for a number of reasons. Naidoo and Sarin list seven “key issues” which specifically apply to the AHD arbitration clause:²²²

²¹⁹ *Supra*, note 174, pp. 1-2

²²⁰ *Ibid*, p. 2

²²¹ M. Bitting, “Mandatory Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for ‘Job Security’?” (1998) 25 FLA U.L.R. 655, at 665

²²² *Supra*, note 136 pp. 503-505

- (1) Unequal bargaining power (the clause relating to the submission of all disputes to the CAS is a take it or leave it clause - if an athlete does not agree, they do not compete);
- (2) Public policy (under English law, a contract cannot oust the ultimate jurisdiction of the Courts - this can only be done through statute: The clause in the athlete agreement purports to do just that which has led Naidoo and Sarin to question whether or not an English Court would uphold such a clause);
- (3) Unconscionability (this is related to issue (1) above);
- (4) Undue influence/adhesion (this is also related to issue (1) above);
- (5) Duress (this is also related to issue (1) above);
- (6) Capacity (many Olympians are under the age of 18 which begs the question if they have the capacity to waive any rights to resort to litigation); and
- (7) Restraint of trade (Naidoo and Sarin ask the question if the doctrine of restraint of trade which has been used in Europe to protect a worker from an unreasonable interference in their right to work can be applied by an athlete with respect to their right to compete - at least up until now, the CAS has been unwilling to overturn a decision affecting an athlete on such a basis).

Naidoo and Sarin²²³ identified restraint of trade as “perhaps the strongest claim” an athlete could bring against the AHD as a result of the clause mandating the athlete’s resort to it in the event of an Olympic dispute.²²⁴

²²³ *Ibid*

²²⁴ Though such an argument received short shrift in the *Ben Johnson* case (see *supra*, note 142)

As it is indeed a stretch to say that consent on the part of the athlete is genuine, one ought not summarily dismiss the above questions. Equally, however, one should not place undue emphasis on general contractual principles. Accordingly, the absence of true consent should not be seen as a bar to arbitration's ability to solve disputes:

More and more the classical concept of arbitration based on consent is being supplemented by other concepts of arbitration which largely ignore this requirement. This is so especially in the areas of sport, consumer transactions, and investment arbitrations based on treaties or national statutes. This is only natural, as arbitration becomes the most common method for settling international disputes. One may choose to cling to the dogma of consent and when no true and meaningful consent exists, rely on a fiction of consent. But if we merely preserve the appearance of consent, this justification for arbitration is no longer compelling. Indeed, it may be more accurate and intellectually honest to simply admit that arbitration without consent exists. Having made that admission, one can then investigate the requirements that have come to replace consent. Are there any? What are they? Simply the fairness of the process? Or others? Which ones? It seems clear that this type of investigation is more likely to identify the true forces at play and thus protect the interests of the arbitration users more effectively than insisting on an obsolete dogma.²²⁵

In other words, although consent may be lacking, the athlete can be protected by a fair process. Indeed, in the absence of true consent, as Kaufmann-Kohler and Peter have observed: "Compulsory arbitration can only be justified if the process imposed by one party on the other is fair, which implies the respect of due process rights."²²⁶ And such due process rights are so fundamental as to have been "deemed to be part of transnational or truly international public policy."²²⁷

Having determined that lack of consent switches attention to the due process rights of the parties before the AHD, it is appropriate that such rights be canvassed.

²²⁵ G. Kaufmann-Kohler and H. Peter, "Formula 1 Racing and Arbitration: The FIA Tailor-Made System for Fast Track Dispute Resolution" 17:2 Arb Intl 173, at p. 186

²²⁶ *Ibid*, at p. 189

²²⁷ *Ibid*, at p. 187

b. Due process rights

As Kaufmann-Kohler has observed:

Although [the] fundamental concept [of natural justice] must always be preserved, its exact definition be assessed by taking into account the nature of the dispute resolution mechanism and its finality. Because of the need for speed and the summary nature of the ad hoc proceedings, the due process standards are necessarily lower than in regular commercial arbitration. By agreeing to the ad hoc arbitration mechanism, the parties accept these lower standards.²²⁸

That said, there is a question as to what the requirement of due process is. It is generally accepted that a key component is a right to be notified. In this regard, given Article 9(a) dealing with notice, one can see how an intended party could unwittingly avoid being notified of a proceeding. It is therefore suggested that each participant in the Olympic Games provide an address or other method for delivery in the event of a dispute to which they may be a party. This is of particular importance in light of the fact that the panel can proceed even in the absence of a named party.

In addition to notice, another key component of due process is both the opportunity and right to lead evidence. The provision which governs the proceeding itself, Article 15, provides little in the way of formal guidance for the Panel. However, although it would be perhaps be preferable for there to some guidance, for instance, the order of evidence, it is submitted that in view of the time constraints under which the Panel operates under, there may be no better protection than that afforded by the words "taking into account ..., in particular their right to be heard". In this area, the AHD has a tremendous amount of flexibility - additional evidence will be allowed, under Article 15.D paragraph 1 of the arbitration rules if the party was not legitimately able to adduce it at the original hearing. Also, as any hearing before the CAS could be a hearing *de novo*, at the outset of any such hearings, parties are allowed to adduce any and all evidence in support of their position.

A number of comments can be made with respect to due process in doping disputes. The burdens of proof are, it is submitted, appropriate bearing in mind the fairness to both the accused in question

²²⁸ *Supra*, note 174, p. 37

and his or her competitors. Similarly, the right to a hearing with respect to a suspected violation is another indicator of fairness. It is also positive that the athlete is entitled to adduce any and all exculpatory evidence before the Disciplinary Commission. Of course, it is to be remembered that the AHD the venue of last resort for any athlete accused of a doping infraction during Games time. As such, the athlete is entitled to the procedural protections under both systems.

Generally speaking, as has been noted, doping is a strict liability offence before the IF's and CAS.²²⁹ Accordingly, athletes are presumed guilty if it can be proved that they likely ingested a banned substance. That said, as Oschutz has observed:

Only in one case did the panel refuse to take into account any exculpatory evidence without further explanation or referral to the already well established jurisprudence.²³⁰

In addition, the CAS has stated that if a federation wishes to allow no defences whatsoever to a doping allegation, the rules regarding such an intention had to be explicit, clear and unambiguous.²³¹ That said, although not impossible, the decisions of the CAS illustrate that it is very difficult for an athlete to rebut an presumption of guilt or successfully submit that he or she acted without intent or negligence. Elite athletes are held to a very high standard of care, well above the man on the street.²³²

Generally speaking, where an IF's rules are clear, an athlete will be disqualified from any competition during which they test positive. In addition, a team will be disqualified if one or more of its members tests positive if such a disqualification is provided for clearly and unequivocally in the IF's rules. Typically, the CAS has less of a problem disqualifying an athlete from a competition

²²⁹ At least one commentator has argued that "the principle of strict liability cannot be justified if additional suspensions are at stake". See *supra*, note 218, at p. 689

²³⁰ *Ibid*, at p. 690, and comment on the *Jogert* decision, No. 97/176 at 20

²³¹ See *USA Shooting v. International Shooting Union*, No. 94/129 (CAS 1993)

²³² *Supra*, note 218, at p. 692

for a positive test than it does imposing additional sanctions beyond the competition where there is exculpatory evidence advanced by the athletes.²³³

Lastly, Grayson has noted that the silence in the CAS rules on the “crucial question of legal aid or assistance”.²³⁴ In the words of Grayson: “For the resources of a sporting governing body with access to direct or indirect funding and resources can easily *place an individual adversary at a disadvantage professionally and create a clear-cut injustice position*. ... Until activated to create equal professional access and resources, any such system must not only lack credibility; it also justifies suspicion towards attempts for denial of justice to anyone eligible for an audience in a public Court of Law.”²³⁵ Moreover: “The extent to which any international jurisdiction will be effective must depend upon the extent to which IF’s regulations so permit or with a prior agreement and the capacity of any potential attendee to afford the facilities for travel and legal services in the absence of any funding assistance.”²³⁶ Of course, these comments have less application to the AHD, but they notable nevertheless, as access to any body of the CAS should always be possible for all members of the sporting community.

Given the complexities of the issues with which WADA and the AHD deal with, it would be unfair to unduly criticise the approaches taken. My view is that, in general, and subject to the recommendation that the suggestion of a legal aid system for the CAS system as a whole be studied in more detail, WADA and the CAS-based AHD system provide adequate protection of an athlete’s due process rights.

Of course, it is trite to say that any fast track arbitration must strike a balance between speed and respect for due process rights. The speed of the AHD is discussed in part “f” below.

²³³ *Ibid*, pp. 697-698

²³⁴ *Supra*, note 162, p. 259

²³⁵ *Ibid*, p. 360

²³⁶ *Ibid*, p. 360

c. Right to be heard for all affected parties

It is generally accepted that notice is a key component of due process. For instance, Article V(1)(b) of the New York Convention provides that enforcement of an award may be avoided if proper notice was not given to the respondent. The key is actual notice rather than technical proof of service, which is understandable, given the need for speed.

The Lindland/Sieracki dispute is illustrative of the damage that is possible if not all those affected are parties to an arbitration. Prior to the Sydney Games, the USA Wrestling Association declared Keith Sieracki to be the winner of its Greco-Roman Olympic trials.²³⁷ However, Matthew Lindland, who had placed second to Sieracki, protested the results. Ultimately, Lindland submitted the dispute to arbitration.²³⁸ Sieracki was not a party to the arbitration between Lindland and USA Wrestling. The result of the arbitration was that the result was set aside and a rematch was ordered. However, as Sieracki had not been notified of, and so he did not participate in the arbitration, although Sieracki participated in the rematch, he did so under protest and after requesting arbitration of the dispute he now had with USA Wrestling.²³⁹ To complicate matters, Lindland won the rematch. But that was not the end of the matter. USA Wrestling chose not to replace Sieracki with Lindland, but rather put Lindland on a standby list. Lindland responded by filing an action in the US District Court in Illinois to enforce the earlier arbitration award.²⁴⁰ An additional complicating factor was that in the Sieracki-initiated arbitration, the arbitrator directed USA Wrestling to withdraw the nomination of Lindland and to designate Sieracki as the US representative in the particular weight class. The Illinois District Court dismissed Lindland's action to enforce the arbitration award in his favour.

²³⁷ For a detailed account of this dispute, see J.E. Grenig, "Arbitration of Olympic Eligibility Disputes: Fair Play and the Right to be Heard" (2001) 12 Marq Sports L Rev 261. In addition, an interesting perspective on the Lindland/Sieracki dispute is offered by S. Thompson in his article, "Olympic Team Arbitrations: The Case of Olympic Wrestler Matt Lindland" (Spring 2001) 35:2 Valparaiso Univ L Rev 407. Thompson was Lindland's counsel throughout Lindland's bid to be part of the US Olympic Team for the Sydney Games

²³⁸ *Lindland v. USA Wrestling*, AAA No. 30 190 00443 00 (Aug 6, 2000)

²³⁹ *Sieracki v. USA Wrestling*, AAA No. 30 190 00483 00 (Aug 24, 2000)

²⁴⁰ *Lindland v. USA Wrestling Association*, 227 F 3d 1000, 1005 (7th Cir 2000)

Lindland appealed to the US Court of Appeals for the 7th Circuit.²⁴¹ At this time, both USA Wrestling and the USOC submitted that the arbitration award in favour of Lindland was “problematic” because Sieracki was not a party. Interestingly, Lindland was a party to the Sieracki-initiated arbitration.

On August 24, 2000, the appeal Court ordered USA Wrestling to make Lindland its nominee. However, that was not the end of the matter. Two days later, on August 26, 2000, USA Wrestling forwarded Lindland’s nomination to the USOC. The USOC, however, refused to accept it on the basis that Sieracki’s name had already been sent to the IOC.

In yet another proceeding, Lindland sought an Order compelling the USA to forward his nomination to the IOC,²⁴² while Sieracki sought confirmation of the arbitration award in his favour. In the result, it was Lindland who prevailed. The USOC requested that the IOC substitute Lindland’s name for that of Sieracki, and the IOC complied.

Sieracki’s appeal was dismissed. In dismissing Sieracki’s appeal, the 7th Circuit acknowledged that Sieracki was not a party to the original arbitration as a result of which the rematch was ordered, but it noted that the *Amateur Sports Act* only provided for an arbitration between an aggrieved athlete and their governing body, and not for arbitration among athletes, as well as noting that Sieracki’s interests were protected by USA Wrestling. Although it is certainly possible to see how a national governing body would not protect the interests of the athlete who has benefitted from the decision which was under attack to the same extent as that athlete would protect their own interests as a party, in an arbitration setting there is at least the appearance of an absence of a conflict of interest between the governing body and that athlete.²⁴³

²⁴¹ *Lindland v. USA Wrestling Association*, 230 F 3d 1036, 1038 (7th Cir 2000)

²⁴² *Lindland v. USA Wrestling Association*, 228 F 3d 782, 783 (7th Cir 2000)

²⁴³ The same could not be said for a mediation setting, where a governing body would be expected to reach a compromise thus diminishing the rights/benefits of the non-party athletes

As is cogently argued by Grenig, the problem presented by two inconsistent arbitration awards in the Lindland-Sieracki series of disputes could have been avoided had Lindland and Sieracki been parties to the Lindland-initiated first arbitration.²⁴⁴ Accordingly, if there is one lesson to be learned from this affair it is that, in line with the USOC's constitution, all those who are potentially adversely affected by an arbitration decision should be notified of the arbitration. It is then their decision to participate or not. The observation by the arbitrator in the Sieracki-initiated arbitration that the USOC did not consider the non-initiating athlete to be a necessary party which meant that customarily they were not a participant was a custom which should go the way of the dodo.

The problems with not naming all affected athletes as parties are obvious. As Grenig has eloquently put it:

While in many cases, the national governing body may argue vigorously on behalf of the athlete who prevailed in the athletic competition, this may not always be the case. There may be situations where the national governing body has no strong interest in defending the athlete who prevailed in the competition or may actually favour the athlete challenging the results. By giving the both athletes the opportunity to participate in the arbitration hearing or, at the very least, in the hearing to confirm the arbitration award, fair play and due process will be the winners.²⁴⁵

That is not to say that there is a history of all the correct parties being before a CAS panel. In the *Perez* cases, the notice that the Cuban NOC had of *Perez 2*, in which it chose not to participate, was sufficient to bar it from proceeding in *Perez 3*. In *Perez 1*, the claim was brought by the USOC and the US National Canoe/Kayak federation. Mr. Perez was not a party. The fact that Mr. Perez was not a party allowed him to take the position that he was not bound by the decision in *Perez 1*, a decision which *de facto* went against him, successfully. However, the Cuban National Olympic Committee failed in its attempt to advance such a *res judicata* argument in *Perez 3*, as it had been given an opportunity to participate in *Perez 2*, but it had chosen not to do so. In short, one of the many lessons to be learned from the *Perez* litigation is that all parties should be joined at first instance, to prevent any affected person from attempting to retry the case in the event of an initial

²⁴⁴ For more on the Lindland/Sieracki dispute, please see *supra*, note 156

²⁴⁵ Grenig, *supra*, note 23,7 p. 272

failure. Kaufmann-Kohler has correctly pointed out: "Joining the right parties is directly linked to the speed of the process. What is needed within the shortest amount of time possible is not *any* decision, but a *final* decision binding all persons affected by it."²⁴⁶

After an initial review of the application, the AHD as an institution (not the Panel itself), can add parties to the proceedings if in its view, there are relevant parties not named as respondents - indeed, it has been observed that the "CAS has also developed the practice of serving notice to third parties that could be affected by the AHD award".²⁴⁷ As Kaufmann-Kohler has observed: "Although this practice is well accepted and efficient, it would certainly be on safer ground if it were contained in an express provision of the arbitration rules,"²⁴⁸ perhaps in much the same way as it is provided for in the USOC Charter [see Article IX, paragraphs 2 and 3].

Not only is notice to all affected parties positive from a fairness perspective, but also there is a practical reason for parties being told of a dispute and being given a chance to be heard. As McLaren has noted: "As demonstrated in *Perez 3*, so long as an interested party has been served notice and has had an opportunity to participate in the arbitration proceedings, the AHD's award will be binding upon that party and they will be estopped from bringing further applications."²⁴⁹ Moreover, whereas in the worlds of commercial arbitration and civil procedure "it is unheard of ... for the arbitral institution to *sua sponte* identify and join additional parties ... in sports arbitration, this proved to be a necessity",²⁵⁰ and the cases of *Sieracki* and *Perez* underline the point. As Kaufmann-Kohler has, in my view correctly, pointed out, the "competing" arbitrations, one brought

²⁴⁶ *Supra*, note 174, pp. 35-36

²⁴⁷ *Supra*, note 200, at p. 522. It is also worth noting that, under Article 12.2.2, the parties to a doping appeal are limited and do not include otherwise affected athletes

²⁴⁸ *Supra*, note 174, p. 36

²⁴⁹ *Supra*, note 200, p. 540

²⁵⁰ *Supra*, note 174 p. 35

by Lindland and the other by Sieracki “could have been avoided and substantial money, time, and anger saved had Sieracki been involved in the first arbitration [brought by Lindland]”.²⁵¹

By way of summary, Kaufmann-Kohler has this to say on the subject of who must be joined as a party:

The rules applicable in commercial arbitration and in civil procedure are of little assistance to answer [the question of who must be joined] which does not arise in these areas. Here again, dispute resolution in sports is closer to administrative or criminal procedures. In these fields, under varying conditions of course, the person whose legal interests may be affected may become a party to the proceeding. It is obvious that the athlete whose result is being challenged should be made a party, whenever possible. And what about the other athletes? In *Segura*, *Raducan*, and *Neykova*, the gold medal was at stake. In each of these cases, the ad hoc division joined all of the medalists. Strictly speaking, one could argue that the outcome of the arbitration equally threatened the ranking of all the other competitors. Although other competitors may be affected, a reasonable balance must be achieved, otherwise the process would become unmanageable.²⁵²

Clearly, thought must be given to where to draw the line. Given the need for speed, one can understand why the AHD panels have made a practice of joining the medallists. It is suggested that all athletes with the chance of a medal if the hearing results in a disqualification be given an opportunity to be heard, as such individuals would appear to be affected the most by any panel decision. That said, it is perhaps appropriate that the panel possess some residual discretion to name parties beyond such criteria where the situation warrants.

d. Law to be applied

Although under Article 17, the law to be applied by the AHD is clear on its face: “the Olympic Charter, the applicable Regulations, general principles of law and the rules of law, the application of which it deems appropriate.”

²⁵¹ *Ibid*, p. 35

²⁵² *Ibid*, p. 36

An important distinction is to be drawn between the law applied by the AHD and the law applied by its permanent brethren. According to Straubel:

One of the important procedural aspects of the CAS involves the law to be applied in appeal cases. Although the CAS code of sports-related arbitration specifies that the substantive law of an appeal will be the IF's rules and the law agreed to by the parties, CAS panels have resorted to general principles of law and concepts of natural justice on several occasions (see 1991 CAS No. 56 and 1994 CAS No. 129). It is presumed that the use of these principles and concepts, is not tied to the agreed law or law of the IF stated domicile because the court does not cite authority for its decisions. The CAS, by freely using general, non-state specific legal doctrine, is staking out the prerogative to develop its own jurisprudence and independence.

The wisdom of a certain degree of independence of CAS is open to debate. However, in light of the CAS procedural rule that applies either the law agreed to by the parties or, if no agreement, the law of the IF stated domicile (see rule 58), this independence could serve to protect athlete's interests. It is quite logical to conclude that an IF will not agree to apply a body of law over the laws of the IF's domicile if that body of law is more protective of an athlete's interest. As evidenced, substantive law applied by CAS will always be the least favourable to the athlete. The use of general principles of law may help to correct that imbalance.²⁵³

Accordingly, from an athlete's perspective, the discretion enjoyed by the AHD may well work in an athlete's favour. Moreover, the CAS will apply the rules as they were at the time of the offence, however the principle of *lex mitior* obliges the panel to apply the law as it is at the time of the decision, if that would be more favourable to the athlete.²⁵⁴ It is likely that the AHD would proceed similarly, and this is to be applauded.

With further respect to the general principles in Article 17, Kaufmann-Kohler has observed:

To the extent it deals with disciplinary sanctions, the ad hoc division's activities are closer to administrative or even criminal law than to contract law. The general principles applied are thus generally drawn from these areas of the law. This was confirmed in Sydney where the ad hoc division referred to such principles as equal treatment [*Kibunde* at para. 11] (including that there can be no

²⁵³ *Supra*, note 76, pp. 542-543

²⁵⁴ *Union Cycliste Internationale v. Comité Nationale Olympique Italien*, Advisory Opinion No. 94/128 (CAS 1995), in *Digest of CAS Awards 1996-1998* (Mathiew Reeb Ed. 1998) at 495, 509

equal treatment between two situations when one was treated unlawfully) [FFG, at para. 27], proportionality, and *Nulla, Poena, Sine Lege* [Tzagaev, at para 22].²⁵⁵

One issue, which Kaufmann-Kohler has referred to as “of increasing significance” is how is the applicable law ascertained - does it need to be proved?²⁵⁶ It is worth considering *Perez 1* and 2. In *Perez 1*, the panel rejected the submission that Mr. Perez had acquired US nationality before 1999 under US law because no opinion evidence had been tendered by any competent US lawyer [see *Perez 2*, para. 10].

In *Perez 2*, the claimant raised an argument that he had become stateless upon defection in 1993 in support of which he tendered evidence from a Cuban lawyer. This opinion was uncontradicted (as the NOC did not appear at the hearing), and was ultimately accepted as evidence of Cuban law. Notably, the panel did not make any investigation of its own into the rules of Cuban law. The Court stated (at para. 18):

Issues of national law, when presented to an international tribunal such as this Panel must be established by competent evidence adduced by the parties. The Panel is conscious of the fact that the propositions articulated by Mr. Gonzales [the author of the legal opinion on Cuban law] may be susceptible to significant qualifications, or indeed rebuttal, but the Panel has no reason to question the evidence proffered in the absence of any challenge to it. This consideration is particularly relevant in circumstances where all interested parties ... know or should know that CAS is bound to operate with great speed in order to ensure that its decisions are not pointless given the exigencies of the Olympic Code.

Interestingly, after relying on the legal opinion of Mr. Gonzales and finding that Mr. Perez had been deprived of his civic rights, the panel went on to consider the existence of an international rule of statelessness to assist in interpreting Rule 46 of the Olympic Charter. As Kaufmann-Kohler has observed:

Doing so [the panel] referred to authorities cited by the parties, specifically to treatises, a United Nations resolution on the practice of the United Nations Secretariat. On this basis, it construed the

²⁵⁵ *Supra*, note 174, p. 27

²⁵⁶ *Ibid*, p. 27

Olympic Charter to include the *de facto* statelessness and this accepted Perez' additional submission. It was apparently not bothered in the slightest by the lack of opinion evidence on the Charter and on international law.²⁵⁷

Perhaps the approaches of the panel in this case can be reconciled. If one takes whether or not Mr. Perez was stateless at the material time to be material fact, then one can understand why the Panel required evidence to be adduced to prove that fact. However, once that fact had been proved, it was then the job of the Panel to apply the law to that fact, along with all the others. In doing so, it could apply the law as it saw fit and did not require any formal opinions from either party - submissions which were presumably made, would have sufficed.

Kaufmann-Kohler wrote of the approach taken by the court in the *Perez* case to the application of domestic rules:

The difference in approach is striking: national law must be proven by the parties like a fact, while the contents of international law is ascertained by the arbitral tribunal in its discretion. That distinction is not unheard of. It resembles the different treatment foreign law receives in courts in civil law and common law jurisdictions. In the former, foreign law is generally viewed as a matter of law; its contents are established by the judge on the basis of his own research or of submissions by counsel. In the latter, foreign law must be proven like any fact, most often by way of written opinions or testimony by expert witnesses. Admittedly, there are many variations of these two extremes in national court practice, and the gap between the two conceptions tends to become narrow or sometimes even to disappear, at least on the books.

In international commercial arbitration these two conceptions often meet and, through the approach adopted in a given case may at times depend on the *lex arbitri*, its more often as the result of the legal background of arbitrators and counsel.²⁵⁸

It is worth quoting from Kaufmann-Kohler at length with respect to how the contents of law should be ascertained by the AHD:

Flexibility may be one answer. It would mean that a Panel may in its discretion either rely on party-produced evidence and, in the absence of it, dismiss the claim for failure of proof, or reach its

²⁵⁷ *Ibid*, p. 28

²⁵⁸ *Ibid*, pp. 28-29

conclusions on the basis of its own research and of parties' submissions. The difficulty with this answer is its total lack of guidance and predictability. Fortunately, *Perez* leads the way to a better defined practice, where the Panel would have full discretion over the method of determining the contents of the applicable rules, but would in principle exercise this discretion according to the following parameters:

- The contents of national law must be proven by the parties like a fact. Exceptions may be made, for instance where the Panel has easy access to the law, because one arbitrator is a national of that jurisdiction;
- The contents of international law, at the interpretation of the Olympic Charter and of sports regulations of a transnational nature, such as the Olympic movement, Anti-Doping code or the regulations of the I.F.'s, are established by the arbitrators on the basis of the parties' submissions and their own investigations;
- If the Panel engages in independent research, it should give the parties an opportunity to comment on the results, whenever this is feasible (e.g. when the Panel has carried out the research already before a hearing). However, the timing constraints of Arbitration at the Olympics may not always make such a consultation possible.

The approach just set out will accelerate the decision making process, because it saves time-consuming research into national laws which are sometimes difficult to access, not to speak of translation delays. At the same time, it is in line with the transnational nature of this dispute resolution mechanism and of the text that most often come to bear. For instance, even though it is an instrument issued by a private organization, an *Association* organized under the laws of Switzerland, not a subject of international law, the Olympic Charter serves a global function and regulates world sports with an effectiveness that is equal or better than that of an international treaty.²⁵⁹

Accordingly, it has to be recognised that the law to be applied in any given case can never be entirely predictable, owing to the transnational nature of many of disputes before the AHD. The above passage is a description of perhaps the best that can be done at this time. However, as the *lex sportiva* referred to by McLaren²⁶⁰ grows from within the CAS and without, perhaps problems relating to which law to apply will diminish over time.

²⁵⁹ *Ibid*, pp. 29-30

²⁶⁰ *Supra*, note 200, at p. 516

e. Flexibility

In addition to the welcome flexibility under Article 17 with respect to choice of law, under Rule 44.2 of the Code and Article 15(b) of the AHD Rules, arbitrators have extensive power and discretion to organize the procedure in a hearing. There is also a similar discretion in relation to evidence as found in article 15(d). McLaren has commented on a number of hearings: "there was a mixture of styles in conducting the hearing. Some were conducted on the inquisitorial principle, others more on the common law approach of formal oral evidence and submissions. The result has been that the AHD has preserved a wide range of powers to study each case and clarify the material truth. The process is a curious mixture of the civil law approach through the inquisitorial principle, and the common law approach of examination and cross-examination. The clash of these two methods in conducting the hearing process is most evidenced in doping cases, particularly in the *Raducan* doping case²⁶¹ that arose at the games."²⁶²

Also with respect to doping cases, Oschutz has observed: "On various further occasions the Panels have stressed that a flexible system of disciplinary sanctions in doping cases should be preferred, in order to appreciate the circumstance of each doping case."²⁶³

Indeed, in this regard, in the case of *Foschi*,²⁶⁴ the Panel opined:

That, if ... a lower degree of guilt or no fault at all can be proved by the athlete, sports federations may (for legal reasons) have to introduce some flexibility in their sanctions taking into consideration the offender's level of guilt. Although this may be burdensome for the federation it may be necessary in order to treat the athletes involved justly.

²⁶¹ *Raducan v. IOC*, Arbitration AHD (Sydney 2000) 011, Award of September 28, 2000

²⁶² R.H. McLaren, "Sports Law Arbitration by CAS: Is It the Same as International Arbitration?" (2001) 29 *Pepperdine L Rev* 101, pp. 111-112

²⁶³ *Supra*, note 218, p. 699 and see *C. v. Federation Internationale de Natone Amateur*, No. 95/141 (CAS 1996)

²⁶⁴ No. 96/156

For the sake of completeness, the AHD's ability to render interlocutory decisions²⁶⁵ must be noted. Where it is not possible to produce a final decision, the panel will, as it did in *Melinte*, issue what is in effect an interlocutory order concerning participation in the Olympic Games without pronouncing finally on the merits of the underlying dispute, which it will leave for another day and for the IF's internal procedures to deal with.

Of course, the downside to flexibility is unpredictability. Unfortunately, this can never be entirely eliminated. While ever the Panel retains a large degree of discretion, the identity of its members is of vital importance, and this topic is dealt with below. That said, the nature of the Olympic Games and the role of the AHD are such that there will always be disputes which some may argue will require a degree of flexibility to avoid what many would consider a perverse result. In such cases, any potential athlete / association bias is irrelevant. A good example is provided by the *Samuelsson* case in Nagano.²⁶⁶

Samuelsson was a member of the Swedish men's hockey team, and had played a number of games for Sweden when it was discovered that he was no longer Swedish - he had become an American some years earlier and Swedish law operated so as to strip him of his Swedish nationality on his assumption of US citizenship. The decision to ban the player was straightforward - the rules of the IIHF and the Olympic Charter clearly stated that an athlete must hold the nationality of the country for which he competes. However, the rules of the IIHF also provided that any team who fields an ineligible player must forfeit that game. In short, the rules would appear to dictate that Samuelsson should have been found to have contaminated his teammates with the result that Sweden's games would have been forfeited, thus allowing the Czech Republic to profit and advance in the tournament. However, in this case, such a ruling would also have had the effect of penalizing "innocent" teams, such as Russia. As Kaufmann-Kohler observed:

²⁶⁵ Article 20

²⁶⁶ *Czech Olympic Committee, Swedish Olympic Committee and Samuelsson v. IIHF*, 18 February 1998, in Digest of CAS Awards 1986-1998 (Berne, 1998)

In order to avoid a result which was not intended by the rule, the arbitrators refuse to disqualify Sweden. This decision was approved in sports circles and by the media as being true to the spirit of sport, fair play and the Olympic ideal. Maybe, but one may have doubt whether it was really in accordance with the applicable legal texts.²⁶⁷

It appears that in the *Samuelsson* case, the IIHF took the position that its rules governing the fielding of an ineligible player were only deemed to apply to international tournaments and not the Olympic Games. We assume this because the *Samuelsson* proceedings arose from a decision of the IIHF to ban Samuelsson but not Sweden from the Games. The banning of Samuelsson led to his appeal before the CAS and the failure to ban Sweden led to the Czech Republic's appeal before the CAS. Accordingly, the panel was left in a difficult spot. One can easily say that any decision it reached would have been criticized. When faced with such a choice, it may have simply chosen to do what they thought would be the right thing and ignore the IIHF's stated rules in favour of the IIHF's evidence of their policy towards those rules.

That said, the result in *Samuelsson* could indeed be said to bode ill for the predictability of future decisions. Although one may find the Czech Republic's claim distasteful, one cannot say that it was baseless. In short, the panel in *Samuelsson* did not apply the rules, and this is lamentable. Fundamentally, the CAS is still a Court of law, and should conduct itself accordingly.

There will always be difficult cases for the AHD to handle. However, in my view the AHD's flexibility should cease at refusing to apply a clearly stated rule, even if the result of such an application would leave a sour taste.

f. Speed

Given the nature of AHD cases, the need for speed is a given. The proceedings must be as quick as possible. The question is how fast can the process be completed without jeopardizing quality.²⁶⁸

²⁶⁷ *Supra*, note 174, p. 99

²⁶⁸ *Ibid*, p. 30

The Arbitration Rules speed matters along in various ways. A summary of the way in which the Arbitration Rules facilitate speed is as follows:

- Notices may be given by fax, telephone and email;
- Parties have no involvement in the constitution of the Panel, which is appointed by the Presidents, with potential conflicts having been already dealt with;
- There are no written pleadings beyond the standard form Request for Arbitration;
- There is only one hearing; and
- There is an accelerated procedure for communicating decisions - the results may be communicated before the Reasons, interim relief may be granted, and national laws are avoided wherever possible so as to avoid time consuming investigations into same.²⁶⁹

In addition, infrastructure and logistics are crucial to the success of the AHD, and these appear to be well organised.²⁷⁰ Indeed, according to Kaufmann- Kohler: "Instant action involves immediately issuing Summons²⁷¹ and requesting the production of documents or other evidence; for that purpose,

²⁶⁹ *Ibid*, p. 31

²⁷⁰ *Ibid*, p. 31

²⁷¹ However, that begs such questions as how does the AHD enforce a summons or an order requiring third party production of documents? In a time sensitive case, it is unclear how the CAS would enforce an order against an individual or entity from outside the Olympic family, who the CAS could not sanction in the event of non-compliance. An obvious example of such a person would be a member of the public who, either is a spectator or not, witnessed an event which gave rise to a dispute. While not necessarily an issue which would only impact the speed of the hearing, thought must be given to orders impacting third parties who may not wish to participate

identifying the proper parties and possibly witnesses; doing research into legal questions not covered by existing memoranda; drafting uncontroversial parts of the award (using a standard form).”²⁷²

The experience of the AHD has been that most disputes are indeed solved quickly - within 24 hours if possible and necessary, but as soon as possible, in any event. Relatedly, the requirement that the WADA disciplinary procedure take 24 hours or less is to be welcomed, however the discretion on the part of the IOC President to ignore this time limit if the violation becomes apparent either prior to one week before the opening ceremony or within the last two days of the Games is, in my view, both unnecessary and regrettable. If the process can be completed within 24 hours, there is no reason why it shouldn't be given the opportunity. With such a provision in place, one can see how an athlete who is scheduled to compete on either the penultimate or last day of the Games could be caught by an improper exercise of discretion.

g. Dueling jurisdictions

As evidenced by the *Sieracki* litigation before the US Courts and its impact on the impending CAS arbitration (which was eventually withdrawn as a result of the US injunction), anti-suit injunctions seem to be rising in prominence.²⁷³ However, they ought not to pose too much of an operational problem for the AHD. Although such injunctions ignore the principle of *kompetenz-kompetenz* (the power of each court or arbitral tribunal to assess its own jurisdiction), they can usually be dealt with according to the principle of *lis alibi pendens* (and *res judicata* if a final foreign judgment has already been issued).²⁷⁴ That is, of course, if the foreign court has managed to seize itself of the issue, which in most CAS-related cases it will not be able to owing to the growing international respect for arbitration clauses.

²⁷² *Supra*, note 174, p. 31

²⁷³ *Ibid*, p. 33

²⁷⁴ *Ibid*, pp. 33-34

h. Independence

Although it has been said that the CAS has exhibited a strong independent spirit in its decisions²⁷⁵ - an independence no doubt helped by the experience of the arbitrators involved²⁷⁶ and their perceived apolitical positions²⁷⁷ - there remains the criticism that the arbitrators are chosen by a body heavily influenced by non-athlete-aligned interests.

Many of these criticisms were expressed in a landmark case before the Swiss Federal Tribunal, following the Salt Lake City Winter Games. It is worth noting that the Swiss Supreme Court²⁷⁸ noted that CAS decisions were true arbitral awards in the case where the respondent was an IF but where the matter was left open where the respondent was the IOC. In *Raducan*, the Court expressly restated that the situation with respect to the IOC as a party was still unresolved.²⁷⁹

This changed on May 27, 2003, when the Swiss Federal Tribunal issued its decision in the case of *A & B v. IOC, FIS, & CAS*. A and B had tested positive and had been disqualified by the IOC Executive Board from the Salt Lake City Games. Both athletes unsuccessfully appealed to the CAS. The athletes then appealed to the Swiss Federal Tribunal.

The principal argument of the athletes was that the CAS was not independent when the IOC was a party before it. Prior to this case, the Swiss Federal Tribunal had never ruled on this issue. The athletes admitted that they had not raised this argument before the CAS. In this regard, the Tribunal

²⁷⁵ R.H. McLaren, "The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes" (Spring 2001) 35:2 Valparaiso Univ L Rev 379, at p. 383

²⁷⁶ *Ibid*, pp. 384-390. In this regard, McLaren referred to the case of *Merlene Ottey v. IAAF* (July 3, 2000) - McLaren noted that "the decision in this case is wrong and the IAAF acknowledges the error in subsequent cases."

²⁷⁷ *Ibid*, at pp. 384-390. In this regard, McLaren referred to the case of *Javier Sotomayor v. IAAF* (July 24, 2000), wherein the IAAF council invoked an "exceptional circumstances clause" to reinstate Sotomayor after he had been found guilty of a doping offence by the IAAF arbitration panel

²⁷⁸ in its decision at ATF 119 II 271 at 280

²⁷⁹ *Supra*, note 174, p. 22

said that “to raise this issue for the first time before the Federal Supreme Court in an appeal against the final award appears incompatible with the rules of good faith”.²⁸⁰

The court noted that the “Plaintiffs dispute the fact that the CAS offers sufficient guarantees of impartiality and independence vis-à-vis the IOC. In their view, the structure of the ICAS, the way in which arbitrators are appointed, and the organisation, financing and functioning of the CAS create excessively close links between the permanent arbitral institution and the supreme authority of the Olympic Movement.”²⁸¹ These arguments were quickly dismissed. In doing so, the Court, in my view, paid too little attention to the control the IOC can exercise over both the composition of the ICAS, and, relatedly, the composition of the CAS roster. It is the following paragraph which is most troubling:

Furthermore, the establishment of an independent body - the ICAS - which is responsible for drawing up the list of arbitrators, means that the IOC cannot influence the composition of the list. The same is true regarding the appointment of arbitrators to the list, given that the IOC can only propose one-fifth of the candidates. It is also worth mentioning that a further fifth are meant to be chosen to protect the interests of the athletes, thus enabling athletes involved in a procedure before the CAS to select from a pool of at least thirty arbitrators appointed on that basis.²⁸²

The Court failed to appreciate the differences between the formal influence of the IOC, the IFs, the NOCs, and the informal influence of the athletes - the ICAS members chosen to safeguard the interests of the athletes are chosen by the representatives of the IOC, the IFs, and the NOCs, all of whom are closely linked and often have shared interests which differ from those of the athletes. A cynic may say that the foxes are therefore in complete control of the hen-house. And such control is cemented by the IOC/IF/NOC-controlled ICAS choosing the arbitrators - only one-fifth of the list are chosen to safeguard the interests of the athletes, as the Court noted. But, again, these individuals are chosen without any formal athlete-centred input. And at the AHD, the situation for the athletes will be worse than it is before the CAS. As the ICAS has control over the list of arbitrators, and as

²⁸⁰ Paragraph 3.1

²⁸¹ Paragraph 3.3.3.1

²⁸² Paragraph 3.3.3.2

such people will be fewer in number at the Games themselves, the Swiss Federal Tribunal's point in *A & B* that an athlete has, in essence, "plenty to choose from" may not hold quite as true as it does for the permanent CAS procedure.

In addition, Article 11, which allows the President to strike a Panel, differs from the Rules for the permanent tribunal insofar as under those rules both parties are allowed to choose an arbitrator each, with the chosen two choosing the final third. Although time will obviously be an issue in the Olympic Games themselves, there is no reason why the parties should not be afforded these rights. Accordingly, it is suggested that the Panel be chosen by the parties, with the President only having the ability to appoint the panel in the event of exceptional time demands and/or the failure by the parties to appoint an arbitrator.

It is also suggested that the ICAS ensure that there are representatives from each category of arbitrator able to serve on any panel. In this regard, the only concession the Court made to the Plaintiffs in *A & B* was to recommend that each arbitrator be identified by how they were appointed, so that parties could identify their naturally perceived allies. This is a welcome step, but one which does not go far enough.

The athletes' arguments in the *A & B* case, though unsuccessful, are indicative of the fact that not every member of the Olympic family has the utmost confidence in CAS. To meet this criticism, it is suggested that the athletes, by way of an invigorated Athletes' Commission, have formal input into the roster of arbitrators available at the Games. This is but only a small aspect of my wider recommendation that the athletes be granted at least some collective bargaining rights with respect to matters concerning the Olympic Games. As is stated later, the major difference between the major north American professional sports and the Olympic Games is that the dispute resolution mechanisms in the former benefit from the legitimacy of being a product of discussions between the organisation responsible for the sport and its players. No matter how independent the Olympic CAS-based mechanisms may appear, at the very least until the way CAS members are chosen is reformed, they will continue to be open to the criticism that they lack legitimacy in the eyes of the athletes.

Indeed, as McLaren correctly, in my view, points out:

An international arbitration system that is not independent and for which there is a political override, no matter how well intended, will ultimately bring both itself and its sports federation into disrepute. In the end, the international panel is no more independent in its actions than the national panels whose decisions they are reviewing.²⁸³

It is notable that not even the IOC can overturn a CAS decision. Indeed, the only way a CAS decision can be attacked is on very limited grounds by the Swiss Federal Tribunal. However, although the chances of direct political interference would seem remote, there remains the possibility of indirect influence through the CAS membership, and this is lamentable.

As, however, the Court in *A & B* correctly noted:

CAS is meeting a real need. There appears to be no viable alternative to this institution, which can resolve international sports-related disputes quickly and inexpensively. Certainly, the plaintiffs have not suggested one. The CAS, with its current structure, can undoubtedly be improved. This has already been noted in relation to the legitimacy of the list of arbitrators (see rec. 3.3.3.2, above). Having gradually built up the trust of the sporting world, this institution which is now widely recognised and which will soon celebrate its twentieth birthday, remains one of the principal mainstays of organised sport.²⁸⁴

As such, the point is not that the baby must be thrown out with bath water. Rather, the CAS can be improved, and beyond the steps recommended by the Court in *A&B*. While ever there are disgruntled athletes, they will be able to properly allege that their interests are not properly protected within the CAS structure. Dealing effectively with such an argument would not be difficult, but it would require the political will within the IOC. The birth of WADA would seem to indicate that change is possible, but that any such change takes a long time, and any victories will be hard-fought. In short, if I was an athlete, I would not be holding my breath.

²⁸³ *Supra*, note 275, p. 390

²⁸⁴ Paragraph 3.3.3.3

i. Comparison to the domestic courts

Over the years, many sporting disputes have found themselves before domestic courts. Generally speaking, the experience for all parties has not been a happy one. In addition to the lessons learned from the Reynolds litigation are similar lessons from the experience of former East German elite sprinter Katrin Krabbe.²⁸⁵ As Faylor has noted: "The facts and events on which [the Krabbe decisions] are based provide a leading example of how a brilliant athlete can be destroyed by the absence of coherent and independent dispute resolution procedures in sport which guarantee natural right and a fair process."²⁸⁶ According to Faylor:

There can be no question that independent sports arbitration, such as that offered by the CAS, provides the athlete a speedy, efficient and relatively inexpensive forum for dispute resolution. Decisions regarding conviction or acquittal and the measure of the sanction will be made by professionals with backgrounds in sports and the commercial enterprises attaching to sports. In my view, the civil courts are hard stretched to understand and to address the sports-specific issues posed by the principles of 'equal chance' and 'fair play' in sports.²⁸⁷

As can be seen from the Reynolds and Krabbe litigation, which both ran their course through well-respected legal systems, the systemic guarantees present in both the American and German court process cannot be seen as a bar to chaos, which benefits neither the athlete nor the governing organization. Accordingly, although the CAS system can be improved, and in some instances by reference to lessons learned from the domestic court process and natural justice rules which arose therein, it would be a mistake to think that the domestic courts offer a real alternative to the CAS system. And this is even more so for the AHD. Domestic court processes are simply not suited to such rapid dispute settlement.

²⁸⁵ For a reasoned analysis in support of independent sports arbitration over domestic Courts, please see J.A. Faylor, "The Dismantling of a German Champion: Katrin Krabbe and her Ordeal with the German Track and Field Association and the International Amateur Athletic Federation (IAAF)" (2001) 17:2 Arb Intl 163

²⁸⁶ *Ibid*, at p. 164

²⁸⁷ *Ibid*, at p. 171

j. *Finality / enforcement of the decision*

In the case of *Raguz v. Sullivan*,²⁸⁸ the New South Wales Appeal Court found that the seat of the arbitration was the legal connection between the Tribunal, the parties and the applicable municipal law.²⁸⁹ The effect of the New South Wales Appeal Court ruling was that the parties had excluded a review of the CAS decision, acknowledging Switzerland as the national legal system with jurisdiction of the arbitration.²⁹⁰ It has been noted that the *Raguz*²⁹¹ and *Raducan*²⁹² decisions: “stand the proposition that CAS awards will final, binding, and offer very narrow grounds for review. Enforcement of the award will be carried out in accordance with the decision of the CAS. The Swiss Federal Court, through the reciprocal enforcement of international arbitration awards through the 1958 New York Convention, will result in the enforceability of the final and binding decision of CAS in the event that a party will not comply.”²⁹³

²⁸⁸ 2000 NSWCA 290

²⁸⁹ According to Kaufmann-Kohler: “To the best of our knowledge, the New South Wales court of appeal was the first court in the world to be faced with [the issue of whether the place or seat of the arbitration being Lausanne was a valid choice for an arbitration conducted entirely outside Switzerland] in respect of CAS arbitrations.” [*Supra*, note 174, pp. 3-4]

²⁹⁰ Kaufmann-Kohler has described the *Raguz* decision as setting “a remarkable precedent and [lending] support to the CAS’ effort to create a global system of dispute resolution consistent with the needs of global sports.” [see *Ibid*, p. 20]

²⁹¹ *Supra*, note 288

²⁹² 5P.427/2000 (December 4, 2000)

²⁹³ *Supra*, note 262 p. 114

The significance of the *Raguz* decision cannot be understated,²⁹⁴ and there have been calls for it to be respected insofar as the residual jurisdiction of the Swiss Federal Court is concerned.²⁹⁵ That is not, though, to say that a court will never intervene. Every dispute submitted to the CAS is governed by the same Swiss municipal law, irrespective of the actual location of the hearing. As such, Chapter 12 of the *Swiss Private International Law Act* requires the arbitrators to grant due process (Article 182, paragraph 3), and Article 190 sets out the parties remedies against an award. There are six grounds for vacating a tribunal award: (1) that the tribunal was not properly constituted; (2) it had no jurisdiction; (3) it ruled beyond the claims submitted to it; (4) it failed to decide one of the claims; (5) it failed to grant due process; and (6) it rendered an award irreconcilable with public policy.²⁹⁶

In addition, outside Switzerland, challenges to a CAS decision will be bound by the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")²⁹⁷ Article V of the New York Convention²⁹⁸ sets out the grounds for refusing to recognize an arbitration award: (1) incapacity or invalidity of the agreement; (2) improper notice; (3) the decision was beyond the scope of the proceedings; (4) the arbitrator of the proceedings did not accord with the agreement; or (5) a competent authority has suspended or set aside the award. In addition, Article V provides that an award may be unenforceable if: (1) it is invalid according to

²⁹⁴ "In a carefully reasoned decision, the court upheld the choice of Lausanne as the place of arbitration and dismissed the application based upon lack of jurisdiction. In doing so, the court set a remarkable precedent lending support to the CAS' efforts to create a global system of dispute resolution consistent with the needs of global sports." [*Supra*, note 174, p. 4]

²⁹⁵ "It is to be hoped that courts in other countries [beyond Australia] will follow [the *Raguz* decision] in recognition of the fact that the Swiss supreme court, when properly seized, will set aside CAS arbitral awards in the even of major procedural errors, such as lack of jurisdiction and breach of due process, or a violation of international public policy." [*Supra*, note 174, p. 4]

²⁹⁶ *Supra*, note 262, at p. 104

²⁹⁷ *Supra*, note 136, at p. 493. Also see A.T. Polvino, "Comments, Arbitration as Preventive Medicine for Olympic Ailments: the International Olympic Committee's Court of Arbitration for Sport and the Future for Settlement of International Sporting Disputes," (1994) 8 *Emory International L. Rev.* 347

²⁹⁸ For the full text of the New York Convention, see International Dispute Resolution at <http://www.internationaladr.com/tc121.htm>

the laws of the state where its recognition and enforcement is sought; or (2) it is contrary to public policy.

With respect to the treatment of CAS decisions in the United States, the Court in the *Slaney* case²⁹⁹ held that not only would it not re-litigate the issues decided by the arbitration panel unless there was a valid argument under the New York Convention which served to bar enforcement of the award, but also, if an athlete wishes to claim that they did not agree to the arbitration, such an argument must be raised before the arbitration panel and not *ex post facto*.

As stated, the Anglo-American tradition, which is a tradition shared by the Canadian courts, is to allow sporting organizations a large degree of autonomy in the way they operate. This autonomy extends to both eligibility and discipline decisions regarding their athletes. Generally speaking, only in egregious circumstances have Courts intervened. However, a strong argument can be made that in the past, the various bodies to which Courts have deferred have not resembled judicial bodies too closely at all, with negative consequences for any affected athlete. Although there is merit to the principle that sports people should make sports-related decisions, fairness can easily be perverted, or at its worst, ignored entirely, by bodies which determine eligibility and discipline of their own constrained by basic legal principles. Viewed in this context, the CAS which comprises jurists with tremendous sporting knowledge is to be viewed as a great leap forward for international athletes. Although not perfect, in my view the CAS is preferable to what came before and the increasing recognition and enforcement of its awards can only bode well.

6. Conclusion

As Naidoo and Sarin have pointed out, despite the numerous concerns with the propriety of the clause mandating the use of the CAS, the Ad Hoc Division has “several key factors in its favour: (1) it is more neutral than arbitration by the governing bodies of sport; (2) the composition of the panel makes it better qualified in the subject area than the state judiciary; (3) there is speedy resolution -

²⁹⁹ *Slaney v. IAAF*, 244 F. 3d 580, 591 (7th Cir. 2001)

litigation is lengthy; (4) there is no cost involved - litigation is expensive; (5) confidentiality; (6) there is some flexibility in proceedings, not bound by rigid court rules of procedure and evidence; (7) a court judgment, even though favourable, may be difficult to enforce; and (8) domestic courts may not have the jurisdiction to hear the case, particularly if the sports governing body is based in another country.”³⁰⁰ To this list of positive features can be added the fact that an athlete’s due process rights are, by and large, respected by the AHD.

However, as stated, there is room for improvement. Authors such as Naidoo and Sarin, and Raber, have made a number of suggestions for the improvement of the AHD: “(1) a publication of CAS decisions; (2) provide for cross examination of witnesses; (3) ensure a diversity of backgrounds in arbitrators; (4) allow more liberal discoveries; (5) ensure that athletes are fully informed of their rights and the implications of an arbitration agreement before signing; and (6) to assist the appeal process they should ensure the following are ready and easily accessible for the athletes: (a) standard forms; (b) a list of scientific experts; (c) a list of lawyers specializing in sports law; (d) interpreters; (e) steno typists; (f) legal research resources; and (g) appropriate hearing and meeting rooms.”³⁰¹

Based on the analysis herein, to this list can be added:

1. Each participant in the Olympic Games must provide a means of contact for the AHD, in the event of a dispute.
2. All parties who could be materially affected by the outcome of a hearing must be notified and offered an opportunity to be heard. In this regard, it is suggested that all athletes who could achieve a medal as result of a decision must be so notified.

³⁰⁰ *Supra*, note 136, at p. 515

³⁰¹ *Ibid*, at p. 515. Also see N.K. Raber, “Dispute Resolution in Olympic Sports: The Court of Arbitration for Sport” (1998) 8 Seton Hall J. Sports L. 75

3. For the benefit of predictability, the AHD must apply the rules before it, however unpalatable they may be.
4. The discretion to alter the 24 hour limit for the WADA Disciplinary Commission must be removed.
5. Party-chosen arbitrators must be allowed before the AHD. Each prospective arbitrator must be identified by category under which they chosen. The ICAS must ensure that all categories are represented at each instalment of the Games.

As has been noted above a number of times, there would appear to be something to learn from a review of the dispute resolution mechanisms in the world of north American pro sports. It is to such an analysis I now turn.

PART TWO *HOW DO OTHER SPORTS ORGANISATIONS DO IT?*

As the focus of this thesis is the dispute resolution mechanisms relating to eligibility to compete in the Olympic Games, the following analysis of the various other methods of dispute resolution, mostly under collective bargaining agreements, is limited to areas which can provide some instruction. Accordingly, although all collectively bargained agreements in the major north American sports provide mechanisms for such disputes as salary arbitration, this thesis only deals with grievance arbitration. With respect to the NCAA, although there are extensive procedures dealing with academic eligibility therein, this thesis only deals with its procedures related to other disputes impacting eligibility, such as discipline disputes.

VII. MAJOR NORTH AMERICAN SPORTS

1. **Generally**

The players in each of the four major league North American sports are unionized. Players in Major League Baseball ("MLB"), the National Basketball Association ("NBA"), the National Football League ("NFL"), and the National Hockey League ("NHL") are represented by their respective players associations (the "PA"s). It is the unions' jobs to negotiate with the respective management groups with respect to the terms and conditions which govern their working relationships. As in any other labour environment, this relationship is reflected in a collective bargaining agreement ("CBA"). CBAs deal with such issues as salary, bonus structures, travel per diems, and importantly for this thesis, discipline procedures. CBAs are also supplemented by league bylaws and the terms of the standard or uniform players contract ("UPC"). Although players can negotiate separate bonus terms, all players in a particular league must sign the same basic contract.

The CBA represents the biggest difference between the governance structures of the Olympic Movement and the major north American professional sports (the "MNAPS"). That said, although the CAS-based system and those employed the major north American leagues differ, the respect for the decisions of arbitrators thereunder is remarkable similar. As Wong has noted: "The Courts will almost always respect the decision of binding arbitration unless they uncover an egregious procedural error or if the decision is inconsistent with the national labour relations act."³⁰² The U.S. Supreme Court case of *Major League Baseball Players Association v. Garvey*,³⁰³ confirmed that the Courts will ordinarily not interfere with an arbitration decision, as they do not wish to usurp the tribunal's function.

³⁰² *Supra*, note 73, at p. 522

³⁰³ 532 U.S. 505 (2001)

2. Drugs

Although the focus of this thesis is not doping, as the World Anti-Doping Code is but a part of the eligibility rules applied by the CAS, it is necessary to add a few comments on the anti-drug policies within the MNAPS and the context in which they operate.

The governments of the United States and Canada do not, for the most part, regulate drug testing in professional sports. Accordingly, the drug testing programs which exist in professional sports have seen their challenges in the form of disputes under the particular CBA. With respect to the prosecution of drug users, Marazzo has urged caution:

We should not lose perspective in our support for the 'war on drugs'. Our athletes, our heroes, are put in a microcosm of society, reflecting its best and its worst. As such, we should provide whatever carrots and other support we can to ensure a drug free sports environment. We should resist the temptation to drop the anvil on those of our heroes who occasionally stumble. There are less oppressive means to address the problem than to forever ban a person from participating in an endeavour he or she has prepared for most of his or her life. As with any form of punishment, whether for violation of law or rules of conduct, such punishment should be meted out on a progressive scale based on the history of the offender's violations, and should be measured against the underlying nature of the offence in comparison to other violations of similar magnitude. As we demand our athletes to be role models for our youth, we should provide leadership and role models for athletes themselves. They are, after all, what we in society have made them to be.³⁰⁴

It is with this in mind that Marrazzo offers his support for governance by CBA for the arena of professional sports:

The success of any employee related program, particularly one as emotionally charged as drug testing, rests with the 'buy in' of its participants. Accordingly, the collective bargaining process should be allowed to provide the necessary form for debate and resolution of drug testing programs in professional sports.³⁰⁵

³⁰⁴ *Supra*, note 55, pp. 90-91

³⁰⁵ *Ibid*, p. 87. For an articulate explanation of the concerns, in a similar vein, of NBA players with respect to drug testing, please see the comments of Mr. Ron Klempner of the NBA Players Association in E. Jurith, A.A. Birch III, R. Housman, R. Klempner, M. Oliveau, "Panel II: Regulations Governing Drugs and Performance Enhancers in Sports" (2002) 12 Fordham Intell. Prop. Media & Ent. L.J. 337

The major operational difference between the WADA-based Anti-Doping program and those in MLB, the NBA, and the NFL is that whereas the former is a "catch and punish" system, the latter take a "catch and treat" approach. Almost certainly relatedly, what is also clear from a bare comparison of the WADA system and those within MLB, the NBA, and the NFL is that the WADA system has had comparatively little direct athlete input. It may well be that Olympic athletes are fully supportive of WADA's rules, but it would be better for them to have a stronger formal position within WADA from which they can express such sentiments.

3. Major League Baseball

Baseball and arbitration have a long history. Over the years, baseball arbitrations have decided many important issues concerning player eligibility.³⁰⁶ It is worth noting that, according to Hylton, "the desire for some form of grievance arbitration began as a reaction to the management practice [in baseball] of blacklisting players who engaged in unapproved conduct."³⁰⁷ The consequences of being blacklisted are obvious. Indeed, one need look no further than the experiences of outfielder Charles Wesley Jones, who was suspended for having the temerity to demand the salary he was owed under his contract!³⁰⁸

Perhaps the most (in)famous case of drug use in Major League Baseball is that involving Steve Howe. MLB had suspended Howe indefinitely as a result of his repeated use of cocaine. In the 1992 arbitration, Howe's suspension was reduced to 119 days.³⁰⁹ The reasoning of the arbitrator, George

³⁰⁶ "Whether arbitration and unions in baseball are good or bad is not an easy question to answer. However, one thing is certain: it is all part of the game," in R. Kiner, "The Role of Unions and Arbitration in Professional Baseball" (1999) 17 Hofstra Lab & Emp L Rev 159, at p. 164

³⁰⁷ J.G. Hylton, "The Historical Origins of Professional Baseball Grievance Arbitration" (2001) 11 Marq Sports L Rev 168, at p. 175

³⁰⁸ For a fascinating account of the origins of grievance arbitration in professional baseball, see *Ibid*

³⁰⁹ *In the Matter of the Arbitration Between Major League Baseball Players Association and the Commissioner of Major League Baseball*, Grievance No. 92-7 of November 12, 1992, suspension of Steven Howe

Nicolau, was that Howe had psychiatric problems which had contributed to his use of drugs. The then-commissioner, Fay Vincent, said that the ruling made baseball look "silly". This is perhaps the best example of an organization being prevented from unilaterally imposing its conception of an optimal drug policy.³¹⁰

More recently, in the December 27, 1999 *Sports Illustrated*, journalist Jeff Parlman reported the controversial comments of then-Atlanta Braves pitcher, John Roker.³¹¹ Roker denigrated an impressive list of minority groups: Asians, Koreans, Vietnamese, Indians, Russians, Spanish, African-American, homosexuals, and single mothers. The response of MLB commissioner Bud Selig was predictable. Roker was barred from spring training and the first month of the 2000 season and was fined \$20,000. As predictable as Commissioner Selig's response was the reaction of Roker and his union, the MLBPA. In the ultimate result, arbitrator Shaym Das reduced Roker's fine to \$500 (the maximum permitted under the rules at that time - Selig had no jurisdiction to levy any fine beyond this amount at the time of Roker's indiscretion), and the in-season suspension was reduced to two weeks. Roker was also allowed to join the Braves for spring training.³¹²

Although MLB players are relatively well paid and relatively well known, they are, as Abrams reminds us: "covered by the same protections, and subject to the same uncertainties, as factory workers."³¹³ As Abrams observes:

Major League Baseball players are a talented and fortunate group, having beaten the 14:1 odds that face every minor leaguer against making it to 'The Show'. They can be 'released' - what rank-and-file workers would call a discharge - at management's discretion when they can no longer play expert

³¹⁰ *Supra*, note 73, at pp. 280-281

³¹¹ J. Parlman, "At Full Blast, Shooting Outrageously From the Lip, Braves Closer John Roker Bangs Away at His Favourite Targets: The Mets, Their Fans, Their City, and Just About Everybody In It," *Sports Illustrated*, December 27, 1999, at p. 60

³¹² *In the Matter of the Arbitration Between Major League Baseball Players Association and the Commissioner of Major League Baseball*, Grievance No. 00-3 of March 1, 2000

³¹³ R.I. Abrams, "Symposium: John Roker: Off His Roker: Sports Discipline and Labor Arbitration" (2001) 11 Marq Sports L Rev 167, at p. 169

baseball, subject only to pay guarantees included in their individual player contracts or in the protective terms in the collective bargaining agreement.³¹⁴

It is within this context that Arbitrator Das rendered his decision. In other words, although Rocker's comments could easily be perceived as egregious by the general public, the consequences of those comments must be considered not only in light of proper public outrage, but also they must be proportionate having regard to the commissioner's powers under the collective agreement and the penalties imposed for other forms of misconduct.³¹⁵

So under what scheme did Arbitrator Das render his decision?

There are two sets of provisions in Major League Baseball's collective agreement which provide for the settlement of disputes. Article XI of the Major League Baseball Basic Agreement (2003-2006) contains Major League Baseball's grievance procedure.³¹⁶ "Grievance" is defined as

a complaint which involves the existence or interpretation of, or compliance with, any agreement, or any provision of any agreement, between the Association and the Clubs or any of them, or between a Player and a Club, except that disputes relating to the following agreements between the Association and the Clubs shall not be subject to the Grievance Procedure set forth herein:

- (i) The Major League Baseball Players Benefit Plan;
- (ii) The Agreement Re Major League Baseball Players Benefit Plan;
- (iii) The Agreement regarding dues check-off.³¹⁷

Notably, "grievance" does not include "a complaint which involves action taken with respect to a Player or Players by the Commissioner involving the preservation of the integrity of, or the

³¹⁴ *Ibid*, at p. 169

³¹⁵ See *Ibid*, pp. 167-194

³¹⁶ http://us.il.yimg.com/us.yimg.com/i/spo/mlbpa/mlbpa_cba.pdf (last visited August 14, 2004)

³¹⁷ Article XI A(1)(a)

maintenance of public confidence in, the game of baseball”.³¹⁸ Such disputes are ultimately dealt with by the Commissioner.

Arbitration is the ultimate destination for all grievances which cannot be settled more informally. Such cases are heard by either an impartial arbitrator or a panel comprising one member appointed by the MLBPA, one appointed by the MLB Labor Relations Department (“LRD”), and an impartial member appointed by the first two (the “Panel”).³¹⁹ Where a tripartite Panel sits, decisions are by majority vote.

The grievance procedures are set out at Article XI B (for those initiated / appealed by a player) and D (for those initiated / appealed by a club), wherein a number of time limits are prescribed for the following activities: The first port of call is the player’s club. If a complaint is not satisfactorily dealt with by the club, the player can appeal to the LRD, who must consider the grievance and provide written reasons for their decision. This decision can then be appealed to the Panel, which must render a written decision. According to the CBA: “The decision of the Arbitration Panel shall constitute full, final and complete disposition of the Grievance appealed to it.”

With respect to the Panel’s jurisdiction: “the Arbitration Panel shall have jurisdiction and authority only to determine the existence of or compliance with, or to interpret or apply agreements or provisions of agreements between the Association and the Clubs or any of them, or between individual Players and Clubs. The Arbitration Panel shall not have jurisdiction or authority to add to, detract from, or alter in any way the provisions of such agreements.”

With respect to costs: “All costs of arbitration, including the fees and expenses of the impartial arbitrator, shall be borne equally by the parties, provided that each of the parties shall bear the cost of its own party arbitrator, witnesses, counsel and the like.”

³¹⁸ Article XI A(1)(b)

³¹⁹ Article XI A(9)

There is a "special procedure" for "complaints involving a fine or suspension imposed upon a Player by the Vice President, On-Field Operations or the Commissioner for conduct on the playing field or in the ballpark".³²⁰ These complaints are dealt with by the League President and CEO or Commissioner, and any decision of same "shall constitute full, final and complete disposition of the complaint and shall have the same effect as a Grievance decision of the Arbitration Panel".

Article XII of the Major League Baseball Basic Agreement (2003-2006) contains Major League Baseball's rules relating to discipline.³²¹ This exists in the context provided by the grievance arbitration procedure. It is made clear that "a player who disciplined shall have the right to discover, in timely fashion, all documents and evidence adduced during any investigation of the charges involved".³²²

Appendix A to the Major League Baseball Basic Agreement (2003-2006) contains the rules of procedure for grievance arbitration hearings. According to paragraph 3:

3. Conduct of Hearings.

Hearings will be conducted in an informal manner. The arbitration hearing shall be regarded as a cooperative endeavor to review and secure the facts which will enable the Arbitration Panel to make just decisions. The procedure to be followed in the hearing will be in conformity with this intent.

The most pertinent of the Rules of Procedure are:

8. Evidence.

The Parties may offer such evidence as they desire and shall produce such additional evidence as the Panel Chairman may deem necessary to an understanding and determination of the dispute. The Panel Chairman shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the Parties except where any of the Parties is absent in default or has waived his right to be present.

³²⁰ Article XI C

³²¹ *Supra*, note 316

³²² Article XII C

9. Testimony.

All testimony shall be taken under oath or by affirmation. All witnesses whose testimony shall be introduced as evidence at the hearing shall be made available for cross-examination by the other Party. The Arbitration Panel may receive and consider the evidence of witnesses by affidavit, but shall give it only such weight as it deems proper after consideration of any objections made to its admission.

Paragraph 9(b) of the Uniform [MLB] Player's Contract provides:³²³

Disputes

9.(b) All disputes between the Player and the Club which are covered by the Grievance Procedure as set forth in the Basic Agreement shall be resolved in accordance with such Grievance Procedure.

Although MLB has a drug policy³²⁴, this thesis will not consider same. In the author's view, it lacks the detail to be compared to the WADA-based system used at the Olympic Games beyond the very general comment that it is much "softer" than the WADA-based system. One can conclude that this bears a direct relationship to the collectively bargained nature of the structure of MLB.

4. National Basketball Association

As with MLB, the NBA has a drug policy,³²⁵ but this thesis will not consider same beyond stating, similar to the comments with respect to the MLB policy, that the NBA policy, while tougher than the MLB policy, is still softer than the WADA-based system in the Olympics. As with MLB, one can infer that such a stance taken in the NBA is directly related to the collectively bargained relationship between the league and the players.

Article XXXI of the NBA CBA contains the NBA's "Grievance and Arbitration Procedure". Section 1 sets out the procedure's scope:

³²³ *Supra*, note 316

³²⁴ At <http://news.findlaw.com/legalnews/sports/drugs/policy/baseball/index.html> (last visited August 14, 2004)

³²⁵ *Ibid*, also see <http://www.nbpa.com/cba/articleXXXIII.html> (last visited August 14, 2004)

a) Any dispute (such dispute hereinafter being referred to as a "Grievance") involving the interpretation or application of, or compliance with, the provisions of this Agreement or the provisions of a Player Contract (except as provided in paragraph 9 of a Uniform Player Contract), including a dispute concerning the validity of a Player Contract, shall be resolved exclusively by the Grievance Arbitrator in accordance with the procedures set forth in this Article; provided, however, that disputes arising under Articles VII, VIII, X, XI, XII, XIII, XIV, XV, XVI, XXXVII, XXXIX, and XL shall (except as otherwise specifically provided by Article VII, Section 3(d)(5) above) be determined by the System Arbitrator provided for in Article XXXII.

(b) The Grievance Arbitrator shall also have jurisdiction over disputes involving player discipline to the extent set forth in Section 8 below and over disputes concerning the disposition of funds deposited in accordance with Section 9 below to the extent set forth in that Section.

According to section 2:

(a) Grievances may be initiated, as set forth below, by a player, a Team, the NBA, or the Players Association, except that the Players Association may not initiate a Grievance involving player discipline without the approval of the player(s) concerned.

(b) No party may initiate a Grievance until and unless it has first discussed the matter with the party or parties against whom the Grievance is to be initiated in an attempt to settle it.

With respect to procedure, section 4 provides:

(b) Not later than three (3) business days prior to the hearing, the parties shall exchange witness lists, relevant documents and other evidentiary materials, and citations of legal authorities that each side intends to rely on in its affirmative case. Absent a showing of good cause, no party may proffer, refer to, or rely on the testimony of any witness, any document or other evidentiary material in its affirmative case that has not been identified to the other side as required by this subsection.

Section 5(a) mandates the Arbitrator to provide a written decision within 30 days of the award (and the award has to be made "as soon as practicable"). The award "shall constitute full, final and complete disposition of the Grievance, and shall be binding upon the player(s) and Team(s) involved and the parties to this Agreement".

Section 5(b) and (c) provide for the arbitrator's jurisdiction:

(b) The Grievance Arbitrator shall have jurisdiction and authority only to: (i) interpret, apply, or determine compliance with the provisions of this Agreement; (ii) interpret, apply or determine compliance with the provisions of Player Contracts; (iii) determine the validity of Player Contracts pursuant to Section 1 of this Article; (iv) award damages in connection with a proceeding provided for in Section 11 below; (v) award declaratory relief in connection with a proceeding initiated by a Team to determine whether such Team may properly terminate a Player Contract pursuant to paragraph 16(a) of such Contract, and what, if any, liability such Team would incur as a result of such termination; and (vi) resolve disputes arising under Article VII, Section 3(d)(5), Article XXII, Section 5, Article XXVI, and Article XXXIII in the manner set forth therein. The Grievance Arbitrator shall not have jurisdiction or authority to add to, detract from, or alter in any way the provisions of this Agreement (including the provisions of this subsection) or any Player Contract. Nor, in the absence of agreement by the NBA and the Players Association, shall the Grievance Arbitrator have jurisdiction or authority to resolve questions of substantive arbitrability.

(c) In any Grievance that involves an action taken by the Commissioner (or his designee) concerning (i) the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball, and (ii) a fine and/or suspension that results in a financial impact to the player of more than \$25,000, the Grievance Arbitrator shall apply an "arbitrary and capricious" standard of review.

The NBA has a permanent arbitrator appointed by the union and management for the life of the Agreement.³²⁶

Section 8 provides a "special procedure with respect to player discipline", and grants the Commissioner exclusive power to deal with matters resulting in a fine of \$25,000.00 or less. The only appeal of any such decision is to the Commissioner. Accordingly, the arbitrator may only hear appeals of Commissioner decisions which result in a fine of more than \$25,000.00.

Section 12 provides for an expedited procedure. Under this provision, a hearing is to be convened within 24 hours of the arbitrator's receipt of the grievance notice. If the Grievance Arbitrator is unavailable and the parties are unable to agree a replacement, the American Arbitration Association appoints the arbitrator. Section 12(c) provides:

³²⁶ Section 6

The award, which shall be issued not later than twenty-four (24) hours after the conclusion of the hearing, shall be in writing and may be issued with or without opinion. If any party desires an opinion, one shall be issued but its issuance shall not delay compliance with or enforcement of the award. The award shall constitute full, final and complete disposition of the dispute or alleged breach, and shall be binding upon the player(s) and Team(s) involved and the parties to this Agreement.

With respect to costs, section 14(f) provides that: "all costs of arbitration, including the fees and expenses of the Grievance Arbitrator, shall be borne equally by the parties thereto; but each party shall bear the cost of its own witnesses, counsel, and the like."

Unlike MLB, in the NBA all arbitration hearings are "conducted in accordance with the Labor Arbitration Rules of the American Arbitration Association; provided, however, that in the event of any conflict between such Rules and the provisions of this Agreement, the provisions of this Agreement shall control".³²⁷ Rules 28 and 29 provide as follows:

28. Evidence

The parties may offer such evidence as is relevant and material to the dispute, and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator authorized by law to subpoena witnesses and documents may do so independently or upon the request of any party. The arbitrator shall be the judge of the relevance and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties except where any of the parties is absent in default or has waived the right to be present.

29. Evidence by Affidavit and Filing of Documents

The arbitrator may receive and consider the evidence of witnesses by affidavit, giving it only such weight as seems proper after consideration of any objection made to its admission.

All documents that are not filed with the arbitrator at the hearing, but arranged at the hearing or subsequently by agreement of the parties to be submitted, shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded opportunity to examine such documents.

³²⁷ Section 3(h)

The AAA also provides rule for expedited proceedings. Rule E7 reads:

E7. Proceedings

The hearing shall be conducted by the arbitrator in whatever manner will most expeditiously permit full presentation of the evidence and arguments of the parties. The arbitrator shall make an appropriate minute of the proceedings. Normally, the hearing shall be completed within one day. In unusual circumstances and for good cause shown, the arbitrator may schedule an additional hearing to be held within seven days.

Paragraph 17 of the NBA Uniform Player Contract provides:

In the event of any dispute arising between the Player and the Team relating to any matter arising under this Contract, or concerning the performance or interpretation thereof (except for a dispute arising under paragraph 9 hereof), such dispute shall be resolved in accordance with the Grievance and Arbitration Procedure set forth in the NBA/NBPA Collective Bargaining Agreement.³²⁸

In sum, there is not only one method for the resolving of disputes within the NBA. Under the NBA's CBA, there are three levels of decision makers: the commissioner, the impartial arbitrator, and the system arbitrator. In essence, the commissioner is given authority under the collective agreement to decide all matters that relate to on-court conduct.

In 1997, Larry Johnston and Patrick Ewing, then of the New York Knicks, left their bench during an altercation with the Miami Heat during a playoff game. In doing so, they gave the Commissioner an opportunity to exercise such a power. Although Ewing and Johnston did not join the fight, they broke the rule which mandates that players cannot leave their benches during a fight. The penalty for such an infraction was suspension. Thus, both players were suspended by the commissioner. The fact that the Players' Association attempted to enjoin the commissioner from enforcing the suspension but ultimately failed underlines the commissioner's authority for dealing with such on-court antics.³²⁹

³²⁸ <http://www.nbpa.com/cba/exhibits/exhibitA.html> (last visited August 14, 2004)

³²⁹ See J.A. Mishkin, "Dispute Resolution in the NBA: The Allocation of Decision Making Among the Commissioner, Impartial Arbitrator, System Arbitrator, and the Courts" (Spring 2001) 35:2 Valparaiso Univ L Rev 449

The next level of decision making is the impartial arbitrator. It was the impartial arbitrator who dealt with Latrell Sprewell's dispute with the Golden State Warriors and the League.³³⁰ Perhaps the most famous recent example of an arbitration relating to a dispute arising out of the NBACBA involved Latrell Sprewell, then of the Golden State Warriors. On December 1, 1997, Latrell Sprewell attacked his coach during practice. But that was not the end of the matter. After leaving after the first attack, he returned between ten and twenty minutes later for a second, though he was restrained before reaching his coach. The Warriors, in essence, dismissed Sprewell for cause and the commissioner, David Stern, suspended Sprewell from the MBA for one year. The NBAPA appealed calling the sanctions against Sprewell "arbitrary and capricious". The arbitrator found against the Warriors and the NBA with respect to the dismissal and ordered the Warriors to honour the final two years of Sprewell's contract or trade him. The arbitrator did, however, uphold the suspension for the remainder of that season, which resulted in a loss of \$6.5 million in salary. As a footnote, Sprewell then sued the MBA and the Warriors in Federal District Court, seeking the return of his lost salary. Sprewell was unsuccessful in this regard.³³¹

In essence, the impartial arbitrator deals with all disputes arising under either the collective agreement or the uniform player contract.

Although there are perhaps lessons to be learned by the international sporting community which has thrown its weight behind the CAS system, from the way the NBA resolves its disputes, the growing internationalization of basketball means that perhaps the NBA could learn a thing or two from the CAS supporters. Occasionally, a non-American player comes to the attention of one of the NBA teams. Often, the international club for whom the individual players will resist the NBA's attempts to sign their player unless it is handsomely compensated. In the early 1990's, the NBA entered into a contract with the International Basketball Federation ("FIBA") to set up an arbitration system to deal with international basketball related disputes. Under such a system, if an NBA team wishes to

³³⁰ For a detailed account of the Sprewell incident and the disciplinary proceedings thereafter, please see R.A. Javier, "You Cannot Choke Your Boss & Hold Your Job Unless You Play in the NBA: The Latrell Sprewell Incident Undermines Disciplinary Authority in the NBA" (2002) 7 Villanova Sports & Ent. L.J. 209

³³¹ see *Sprewell v. Golden State Warriors*, 231 F. 3d 520 (U.S. App. 2000)

sign a player who last played for a FIBA recognized team outside North America, the NBA must ask FIBA for clearance to sign the player. If FIBA's response is that the player in question is under contract, the NBA has the right to dispute that determination before an international arbitrator. After some to-ing and fro-ing, FIBA and the NBA agreed on London as the location for any such arbitration. According to Mishkin, "the process was formed with the intent of making the international arbitration expensive and cumbersome so that people would settle and not use it."³³² One can see how this could benefit comparatively wealthy NBA teams and perhaps even some European clubs, however, one can also see how the interest of the athlete could suffer if the interest by the NBA team began to wane. Set against this, one should bear in mind the overriding mantra of the CAS system, which is "speedy and inexpensive".

5. The National Football League

The relationship between the NFL and its players is governed by the NFL CBA.³³³

Article IX deals with non-injury grievances. Under section 3, a party files a grievance and is entitled to receive an answer. If the grievance is unresolved, it may be appealed to the "Notice Arbitrator",³³⁴ and a hearing conducted.

Generally, each party must disclose any and all documents "relevant to the dispute" 10 days before the hearing.³³⁵

Section 6 governs the appointments of the arbitrators. In essence, the arbitrators must be agreed to by both the union and management.

³³² *Supra*, note 329, at p. 459

³³³ <http://www.nflpa.org/Members/main.asp?subPage=CBA+Complete> (last visited August 14, 2004)

³³⁴ Section 4. This section also provides for an expedited process

³³⁵ Section 5. Note that the time limit is 2 days prior regarding expedited hearings

According to section 8:

The decision of the arbitrator will constitute full, final and complete disposition of the grievance, and will be binding upon the player(s) and Club(s) involved and the parties to this Agreement; provided, however, that the arbitrator will not have the jurisdiction or authority: (a) to add to, subtract from, or alter in any way the provisions of this Agreement or any other applicable document; or (b) to grant any remedy other than a money award, an order of reinstatement, suspension without pay, a stay of suspension pending decision, a cease and desist order, a credit or benefit award under the Bert Bell/Pete Rozelle NFL Player Retirement Plan, or an order of compliance, with a specific term of this Agreement or any other applicable document, or an advisory opinion pursuant to Article XIII (Committees), Section 1(c).

Section 11 governs the award of costs:

All costs of arbitration, including the fees and expenses of the arbitrator and the transcript costs, will be borne equally between the parties. Notwithstanding the above, if the hearing occurs in the Club city and if the arbitrator finds liability on the part of the Club, the arbitrator shall award the player reasonable expenses incurred in traveling to and from his residence to the Club city and one night's lodging.

Article XI Deals with Commissioner discipline. In essence, the Commissioner has the responsibility of controlling on-field behavior and to deal with "conduct detrimental to the integrity of, or public confidence in, the game of professional football".³³⁶ As in the NBA, the only appeals of any such decisions are to the Commissioner.

According to paragraph 19 of the NFL Player Contract (Appendix C to the CBA):

19. DISPUTES. During the term of any collective bargaining agreement, any dispute between Player and Club involving the interpretation or application of any provision of this contract will be submitted to final and binding arbitration in accordance with the procedure called for in any collective bargaining agreement in existence at the time the event giving rise to any such dispute occurs.

³³⁶ Article XI, s. 1(a)

The NFL anti-drug policy is similar to the policies in MLB and the NBA in that, in general, it provides not only for punishment, but also treatment of its athletes.³³⁷

6. The National Hockey League

The relationship between the NHL and the NHLPA is governed by the parties' collective bargaining agreement.³³⁸

In the NHL, only the union and the League can initiate a grievance.³³⁹ If the grievance cannot be settled informally, it will be referred to either the Impartial Arbitrator or the Grievance Committee.³⁴⁰ The Impartial Arbitrator will be handed the issue if the Grievance Committee cannot settle it.³⁴¹

Similar to the situation in the NBA, for the NHL there is union-management appointed Impartial Arbitrator for the life of the CBA.³⁴²

Article 17.7 deals with the hearing itself:

It is intended that witnesses appear at the arbitration hearing. The parties shall each use their best efforts to require witnesses to appear at the scheduled hearing. If a witness is unavailable, the party offering the witness shall notify the other party as soon as the unavailability of the witness is known. If the parties agree, the witness

³³⁷ <http://www.nflpa.org/Members/main.asp?subPage=Drug+Policy> (last visited August 14, 2004)

³³⁸ <http://www.nhlcbnews.com/cba/> (last visited August 14, 2004)

³³⁹ Article 17.2

³⁴⁰ Article 17.4

³⁴¹ Article 17.5

³⁴² Article 17.6

may testify by telephone. If the parties do not agree, a hearing date shall be selected for the purpose of taking the witnesses' testimony.

The Arbitrator's powers are contained in Article 17.8:

The Impartial Arbitrator will issue a written decision within thirty (30) days of the close of the record. The decision of the Impartial Arbitrator will constitute full, final and complete disposition of the grievance, as the case may be, and will be binding upon the player(s) and Club(s) involved and the parties to this Agreement; provided, however, that the Impartial Arbitrator will not have the jurisdiction or authority to add to, subtract from, or alter in any way the provisions of this Agreement or any NHL Player Contract or addenda. In resolving grievances, the Impartial Arbitrator has the authority to interpret, apply and determine compliance with any provision of this Agreement, or an NHL Player Contract. Otherwise, the Arbitrator shall have no authority to alter or modify the contractual relationship or status between a player and a Club, other than where such remedy is expressly provided for in this Agreement.

With respect to costs, Article 17.10 provides:

Except as otherwise set forth herein, all costs of arbitration, including the fees and expenses of the Impartial Arbitrator, the neutral physician and the joint transcript costs, if any, will be borne equally between the parties, except that each party shall bear its own costs of transportation, counsel, witnesses and the like.

In the NHL, expedited hearings are anticipated, but only receive limited attention in the CBA: "Upon a showing of good cause, either party may request an expedited hearing before the independent arbitrator and he may so direct such a hearing if he determines that the circumstances so warrant."³⁴³

Commissioner discipline is provided for in Exhibit 8 to the CBA. In the NHL, the Commissioner has ultimate, and significant, disciplinary power.

³⁴³ Article 17.12

Paragraph 18 of Exhibit 1 (the Standard player's Contract (1995 Form)).³⁴⁴

The Club and the Player further agree that in case of dispute between them, except as to the compensation to be paid to the Player on a new contract, the dispute shall be referred within one year from the date it arose to the Commissioner of the League, as an arbitrator and his decision shall be accepted as final by both parties, unless, and to extent that, other arbitration procedures are provided in any Collective Bargaining Agreement between the member clubs of the League and the NHLPA to cover such dispute.

7. Commentary

In the world of the MNAPS, as has been described, disputes often arise with respect to the rights and responsibilities of athletes provided for in the particular collective bargaining agreements. Although the commissioners of the major North American sports exercise considerable power, the primary method for the resolution of disputes is the grievance procedure outlined in such CBAs. According to Wong: "When unionization occurred on a wide scale in professional sports, one of the first demands that the players associations made was for the implementation of a grievance procedure that was not controlled by the league. The intent of the grievance procedure is twofold: first, to keep litigation outside of the formal court system (the arbitration process is quicker, cheaper and private), and second, to give players due process and the power to exercise due process rights."³⁴⁵ Wong continued: "Players associations argued for an independent arbitrator to preside over grievances because they identified a conflict of interest in the commissioner acting as arbitrator. First, players asserted the commissioner would not be able to remain impartial if the grievance was against a decision he himself made. Second, the players claim that the commissioner of their professional sports league is hired and fired by the owners of that league and therefore is not an impartial entity but may have a bias for the owners. Players demanded a system whereby an independent party would act as final arbitrator. What eventually emerged was a grievance procedure for certain disputes that contained numerous steps, including a hearing with the commissioner, and ended with

³⁴⁴ <http://www.nhlcbnews.com/cba/exhibit1.html> (last visited August 14, 2004)

³⁴⁵ *Supra*, note 73, p. 521

a final and binding decision made by an impartial arbitrator ... [though] the commissioner retained jurisdiction for some disputes.”³⁴⁶

With respect to the jurisdiction of the various commissioners, there have been many criticisms of what can be termed “disrepute provisions” (those that provide sanctions for “bringing the game into disrepute” or “in the best interests” of the sport).³⁴⁷ Anderson specifically states:

A consistent problem throughout any scheme of player punishment is interpretation of the language of the UPC or CBA and applying the specific instance of violence to this language. The agreements and contracts use language like ‘moral turpitude’, ‘best interest’, ‘integrity of the game’, and against ‘public confidence’ in the game. Such language is vague and confusing.³⁴⁸

Arbitrator Nicolau tells a story of three New York Yankees who testified on Steve Howe’s behalf in his arbitration:

Each of them, in direct examination, have spoken highly of Howe and articulated what his spirit had brought to the team. Each was also asked by the commissioner’s counsel on cross-examination on what they thought of Baseball’s drug policy as it related to Howe. All expressed varying degrees of misgiving or uncertainty as to what the Commissioner had done.³⁴⁹

...

The morning of the very next day, on which the Yankees were to play a day game starting at 1:00 p.m., [Commissioner] Vincent ordered them to appear before him at 11:00 a.m. He then separately ordered the three of them into his office, and as the press dutifully reported, bluntly stated that through their testimony, they had all effectively resigned from baseball.³⁵⁰

³⁴⁶ *Ibid*, at p. 521

³⁴⁷ See McArdle, *supra*, note 159, pp. 31-39; and P.M. Anderson, “When Violence is Not Part of the Game: Regulating Sports Violence in Professional Team Sports” (1998) CIL 240

³⁴⁸ Anderson, *Ibid*, pp. 266-267

³⁴⁹ G. Nicolau, “Discipline in Sports” (1999) 17 Hofstra Lab and Emp J 145, at p. 157

³⁵⁰ *Ibid*, p. 157

As Nicolau concluded: "So much for where trust should reside."³⁵¹

The CAS-based system faces no such problems. In the CAS-based system, no one person, in theory at least, is vested with the extraordinary power of a pro sports commissioner. This should not however, be taken to mean that the Olympic Movement has nothing to learn from its north American professional counterparts. Perhaps the Olympic Movement indeed has little to learn from the mechanics of dispute resolution in MLB, the NBA, the NFL, and the NHL, save from perhaps the requirement that evidence be given under oath. But it has much to learn from the legitimacy of those mechanisms in the eyes of the athletes. In those leagues, the athletes, via collective bargaining, have played a vital role in the development of such mechanisms. The same is most definitely not true for the CAS-based system. Not only have athletes had no say in the structural development of the CAS, they continue to have no formal influence, and only little informal influence, over the roster of arbitrators.

It is not over-stating the situation to declare that the major difference between the CAS-based system and the systems in the MNAPS world is that, in the latter, the rights of the athlete are collectively bargained. This appears to be a distinction with a difference, as Maidie Olivieao, a CAS arbitrator, has observed: "The parties to collective bargaining agreements do not go to the Court of Arbitration for Sport, but pretty much everyone else does."³⁵² It would be a mistake, however, to view the CAS-based system as necessarily precluding collectively bargained appeal rights. Indeed, perhaps the CAS-based system, if legitimated to a certain extent by increased (and formal) athlete input, could solve some of the problems inherent in a purely collectively bargained system. Olivieao described the CAS-based procedure in 2002 as follows:

What that means is that the interpretation of the rules and how that interpretation is going to impact the athletes is now much more consistent. The procedure does not have the conflict inherent in the

³⁵¹ *Ibid*, p. 157

³⁵² Jurith et. al., *supra*, note 305, p. 359

past procedures. When you have the governing body of a sport which also is the promoter of, lets say, the world championships in that sport regulating the athletes, appointing the arbitrators, conducting the hearings, and issuing the ultimate ruling which may involve the suspension or sanction, there is a conflict. The federation may think 'my world championships are coming up next week and that is my star athlete that I have just advertised will appear. This has sold all my tickets and my TV, and I really do not want her not to be there, so I am going to suspend her sentence'. That is an obvious conflict. It also puts the governing body, the federation, in an uncomfortable position. So that kind of conflict is removed by CAS.³⁵³

Allowing collectively bargained input into the structure of a still independent CAS could well not only serve to eradicate political decisions which are sometimes made in the MNAPS world particularly by commissioners, but, and in part by doing so, it could also serve to increase the legitimacy of the CAS in the eyes of the athletes. Indeed, it is worth noting the level of support for collective bargaining in, for example, the NBA:

I have a lot of concern. It is a wonder that I sleep at night, I guess. I do sleep, thankfully, and the reason that I sleep is because of this champion of institutions, and that is the collective bargaining process. I am fortunate enough to be involved in an industry where we, on behalf of our players, can voice our concerns. We have a say in what is decided. If we want to go and limit the intrusion on one's privacy and try to make sure that we do not have false positives and take away some of these dangers, we can do that through the process of collective bargaining.³⁵⁴

In short, allowing athlete input into the CAS structure could well place the CAS even further ahead of the MNAPS systems.

Set against such a position is the argument that unions do not serve the good of the game. In the context of violence in sports, Anderson has written:

³⁵³ *Ibid*, p. 359-360

³⁵⁴ *Ibid*, pp. 348-349

As part of this [collective bargaining] relationship, the unions often fight for the rights of their players in the face of any and all punishment that may be imposed on them, regardless of the reprehensible conduct involved.

It often seems, then, that the unions really do not care about anything but allowing the players in the particular league to make the most money they can, and any actions that would affect this, such as termination of the player contract, are strongly contested.

It is then not a stretch to say that violent conduct which would easily and uncontestedly lead to termination in a normal work situation does not read to such an easy result in the collective bargaining situation.

Moreover, although the union always agrees to the language of punishment as put into the CBA or the UPC, it then has a hard time agreeing that certain types of conduct should actually be found to be in violation of the agreement wanting punishment.

Until the professional players unions learn to take responsibility for the violent conduct by their players, the problem will persist and most likely worsen.³⁵⁵

It is possible, however, that such arguments are based on a fundamental misperception of reality. As has been noted by Orza, the perception that players associations have had "a great deal of success in ameliorating club discipline of professional athletes ... differs somewhat from reality".³⁵⁶

³⁵⁵ Anderson, *supra*, note 347, p. 266

³⁵⁶ G. Orza, "Perception and Reality of Discipline and Sports," (1999) 17 Hofstra Lab and Emp J 139, at p. 139. Also: "hundreds of ordinary, every day disciplinary decisions are reached which do not generate substantial public clamour. Many more are settled than the public will ever know. Many more cases are withdrawn than are heard, even when a grievance or appeal is actually filed. There are also many kinds of potential grievances on all fronts that actually result in simple handshake agreements or notes to each other effectively saying 'okay, we'll treat it this way and in the future, we'll fight about it on a different day if we have to'. These cases, in which the club's degree of success is much, much higher, represent much more of what is actually done by attorneys for the league and attorneys for the players union in the area of discipline, actual and potential," at p. 143

VIII. THE NCAA

1. **Generally**

The National Collegiate Athletic Association ("NCAA") is a non-profit organization and is the largest out of the five national organizations which govern intercollegiate athletics in the United States. It is the primary governing body for more than 1,000 higher education institutions. Lest anyone think that the NCAA is insufficiently complex for the Olympic movement to learn anything from it, as Weiler has pointed out, by the mid-1990's, "the NCAA manual consists of 500 pages of intricate regulations authored, interpreted, and enforced by complex interplay of the legislative, executive, and judicial branches of the Association."³⁵⁷

The NCAA non-profit status should not lead one to believe that the NCAA does not generate revenue. In the years 2000 to 2001, the NCAA's budgeted total revenue was \$325,560,000 U.S., of which \$256,200,000 was budgeted to be generated from television.³⁵⁸ The NCAA is perhaps the closest relative of the IOC in north American sports, in that, unlike with respect to the professional sports, students are amateurs and do not bargain collectively.³⁵⁹ As such, can the NCAA's dispute resolution mechanisms inform the CAS-related debate?

Historically, as with the CAS and arbitration decisions in the MNAPS world, the Courts in the United States have given great deference to the NCAA's structure and procedures that deal with the rules of the NCAA. Accordingly, the NCAA's procedures have great importance for its athletes, just as those of the CAS have for Olympic athletes.

³⁵⁷ P.C. Weiler and G.R. Roberts, *Sports and the Law: Text, Cases, Problems*, 2nd ed., (Westgroup: St. Paul, 1998), at p. 648

³⁵⁸ *Supra*, note 73, at p. 19

³⁵⁹ For more information on the NCAA see: R. K. Smith's "Essay: A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics" (Fall 2000) 11 Marq Sports L Rev 9

2. Eligibility

Under the principle of *institutional control*, it is the responsibility of the member institution to determine which of their athletes meet the NCAA's eligibility standards.³⁶⁰ As such, it is the institution's athletic department - akin to both an IF and NOC - which typically enforces eligibility rules.³⁶¹

One of the main controversies surrounding NCAA eligibility criteria relates to the minimum academic standards necessary to participate in athletic competition on behalf of the particular member college. Obviously, there is no such parallel in the Olympic world. Other than with respect to academic criteria, however, the NCAA and Olympic Games experience many of the same problems related to eligibility concerns, such as doping and transfer rules (from school to school in the NCAA and from country to country in the context of the Olympics). In the case of the NCAA, college transfer rules have been upheld despite arguments of anti trust violations (see *Tanaka v. University of Southern California*³⁶²). According to Wong: "Transfer rules were created to deter: (1) the recruiting of student athletes by colleges that the student athlete does not attend; and (2) the shopping around by student athletes for institutions that seem to offer them the best opportunities for advancing their athletics careers".³⁶³

One can advance similar arguments in support of nationality restrictions within the Olympic movement. Indeed, transfer disputes and nationality disputes within the NCAA and Olympic movement respectively resemble each other in the sense that they invariably concern an athlete wishing to represent a new entity rather than an entity they have represented in the past. However,

³⁶⁰ *Supra*, note 73, p. 227

³⁶¹ *Ibid*, p. 228

³⁶² 252 F.3d 1059 (9th Cir. 2001)

³⁶³ *Supra*, note 73, p. 245

the arguments underlying such submissions differ markedly from the NCAA, where the arguments are rooted in anti trust law, whereas regarding the Olympics such arguments are dealt with on a conflict of laws basis.

3. History of due process rights

Notably, a student athlete at an NCAA school does not have the protection of the U.S. Constitution.³⁶⁴ However, as Weiler and Roberts have pointed out: "When considering legal challenges to NCAA revocation of the eligibility of student athletes, those courts that have treated the NCAA as a state actor have generally found the NCAA procedures to be adequate under the due process clause [under the 14th Amendment of the U.S. Constitution]."³⁶⁵ Indeed, although the U.S. Supreme Court has insulated the NCAA from direct constitutional constraints, the NCAA cannot be said to be free from any due process obligations with respect to its constituents.

It is worth considering the history of such obligations. Following two decades of rapid growth in its enforcement capacity, and in response to increased criticism for the alleged unfairness in the exercise of its authority in this area, the NCAA formed a committee and, in 1973, adopted its recommendations with respect to the division of the prosecutorial and investigative roles of the Committee on Infractions (the "COI").³⁶⁶

When, by 1976, the NCAA had been given additional enforcement authority which allowed it to penalize schools directly, criticism of the NCAA grew louder.³⁶⁷ After the NCAA began

³⁶⁴ *Ibid*, p. 198. See also *NCAA v. Tarkanian*, 109 S. Ct. 454 (1988), in which the NCAA was found to be not a State actor

³⁶⁵ *Supra*, note 357, p. 658

³⁶⁶ *Supra*, note 359, p. 15

³⁶⁷ *Ibid*, p. 15

proceedings against UNLV basketball coach Jerry Tarkanian in 1977, the U.S. Congress delivered a report, following a detailed inquiry into NCAA enforcement procedures, which threatened the NCAA with legislation, unless it voluntarily improved its procedures.³⁶⁸ The NCAA responded to this criticism by further changing its rules.

Despite the U.S. Supreme Court's decision in *NCAA v. Tarkanian*,³⁶⁹ in 1988, the NCAA's enforcement processes continued to come in for criticism, and a number of U.S. states legislatively mandated the NCAA to comply with federal and state due process principles.³⁷⁰ The case of the *NCAA v. Miller, Governor, State of Nevada, et al.*³⁷¹ arose out of another series of incidents involving Jerry Tarkanian. In 1990, the NCAA conducted investigations with respect to allegations that Tarkanian and his assistant had violated NCAA rules with respect to the recruiting of basketball player Lloyd Daniels. A hearing was scheduled before the NCAA COI for September 1991. However, the summer before the scheduled hearing, Tarkanian wrote to the NCAA requesting compliance with Nevada law, which detailed a number of procedural safeguards which the NCAA must follow. The NCAA responded by successfully seeking an injunction based on the argument that the Nevada law was unconstitutional. The governor of Nevada unsuccessfully appealed. In dismissing the appeal, Judge Fernandez concluded: "We appreciate Nevada's interest in assuring that its citizens and institutions will be treated fairly. However, the authority it seeks here goes to the heart of the NCAA and threatens to tear that heart out. Consistency amongst members must exist if an organization of this type is to thrive, or even exist."

³⁶⁸ *Ibid*, p. 16

³⁶⁹ 488 U.S. 179 (1988)

³⁷⁰ *Supra*, note 357, at p. 662

³⁷¹ U.S. Court of Appeals, 9th Cir., 1993 (10 F 3d 633)

In the early 1990's, legislation was introduced in Congress that would have required the NCAA to provide "due process" in all its enforcement proceedings.³⁷² The NCAA responded by striking a blue-ribbon committee to review its procedures, which issued its recommendations on October 28, 1991.³⁷³ This committee made a number of basic recommendations related to both logistical and rights-related matters.³⁷⁴ According to Smith, "these recommendations have been taken seriously and, as implemented, are helping to improve the enforcement processes."³⁷⁵

Today, "while the procedures used by the NCAA to interpret its rules and to resolve disagreements in their enforcement are a far cry from those required in public administrative or judicial proceedings, they nonetheless reflect an elaborate system of internal processes and committees that give more protections to involved parties than the general public realizes."³⁷⁶

4. The current system

The NCAA's system of resolving eligibility disputes is lengthy and complex (for the purpose of this thesis, I will only consider the Division I Manual³⁷⁷). However, the various provisions can be summarized thus:

³⁷² *Supra*, note 357, at p. 669

³⁷³ The National Collegiate Athletic Association Report and Recommendations of the Special Committee to review the NCAA enforcement and infractions process

³⁷⁴ The National Collegiate Athletic Association Report and Recommendations of the Special Committee to review the NCAA enforcement and infractions process, at pp. 3-8, as quoted in *supra*, note 359, pp. 18-19

³⁷⁵ *Ibid*, at p. 19

³⁷⁶ G.R. Roberts, "Resolution of Disputes in Intercollegiate Athletics" (Spring 2001) 35:2 Valparaiso Univ L Rev 431, at p. 431

³⁷⁷ http://www.ncaa.org/library/membership/division_i_manual/2003-04/2003-04_d1_manual.pdf (last visited August 14, 2004)

The NCAA rules provide for the reinstatement of a student athlete, after that athlete has been declared ineligible. In short, it is the responsibility of the student athlete's institution to investigate the circumstances and submit both the report of those circumstances and the petition for reinstatement to the NCAA student athlete reinstatement staff. The staff then has either grants the petition, grants the petition with conditions, or denies the petition. More particularly, the athlete's institution, but not the individual athlete, is allowed to appeal the decision to the Committee on Student-Athlete Reinstatement.³⁷⁸ The appeal is submitted in writing. The Athlete Reinstatement Committee, may allow an oral hearing, but it can only be conducted by telephone conference. As Roberts has noted, "procedures for such hearings are entirely informal and will be entirely within the discretion of the Committee."³⁷⁹ The decision of the Committee is final and is, as such, unappealable. The Committee "may restore the eligibility of a student involved in any violation only when circumstances clearly warrant restoration. The eligibility of a student-athlete involved in a major violation shall not be restored other than through an exception authorized by the Committee on Student-Athlete Reinstatement in a unique case on the basis of specifically stated reasons".³⁸⁰ The Committee also has residual "initial authority to determine all matters pertaining to the eligibility of student-athletes competing in the various NCAA championships and to act upon all appeals concerning the eligibility of student-athletes submitted by member institutions (see Bylaw 14.12)".³⁸¹

Article 19 sets out the NCAA enforcement program. The program's mission is to "eliminate violations of NCAA rules and impose appropriate penalties should violations occur". That said, "the

³⁷⁸ Article 14.12.1

³⁷⁹ *Supra*, note 376, at p. 442

³⁸⁰ Article 14.12.3

³⁸¹ Article 18.4.1.2

program is committed to fairness of procedures and the timely and equitable resolution of infractions cases”.³⁸² Each NCAA member has a duty to cooperate with the NCAA’s enforcement bodies.³⁸³

The NCAA sets out two types of violation: secondary and major.³⁸⁴ A secondary violation is: “a violation that is isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant recruiting inducement or extra benefit. Multiple secondary violations by a member institution may collectively be considered as a major violation.”³⁸⁵ All other violations are considered major.³⁸⁶

The vast majority of the infractions which the NCAA deals with are secondary and are considered minor. Roberts describes such infractions as having “little impact on the system, attract[ing] virtually no public attention and [they] seldom instigate legal issues or controversy.”³⁸⁷ The same cannot be said for major violations, which are considered more serious breaches of the rules. This difference is reflected in the rights that attach to the accused in either situation, which is dealt with below.

The NCAA enforcement program is administered by the COI.³⁸⁸ A unique feature of the COI is that it mandates the input of the general public (though this is perhaps not instructive for the AHD due to reasons of its transnational nature):

³⁸² Article 19.01.1

³⁸³ Article 19.01.3

³⁸⁴ Article 19.02.2

³⁸⁵ Article 19.02.2.1

³⁸⁶ Article 19.02.2.2

³⁸⁷ *Supra*, note 376, at p. 436

³⁸⁸ Article 19.1. For its duties, see Article 19.1.3

The committee shall be composed of ten members, seven of whom shall be at present or previously on the staff of an active member institution or member conference of the Association, no more than three and no less than two of whom shall be from the general public and shall not be associated with a collegiate institution, conference, or professional or similar sports organization, or represent coaches or athletes in any capacity. One of the members shall serve as chair and one member shall serve as vice-chair. Two members shall be elected as coordinators of appeals, one of whom may be a public member. Two positions shall be allocated for men, two allocated for women and six unallocated. There shall be no subdivision restrictions except that all nonpublic members may not be from the same subdivision; however, the coordinators of appeals shall not be considered in determining whether such a requirement is satisfied.³⁸⁹ The Committee may impose disciplinary or corrective actions short of suspension or termination of membership.³⁹⁰

With respect to notice of charges and opportunity to appear, Article 19.4 provides for notice for both major and secondary violations, but a right to appear only for major violations.

Under Article 19.7, an otherwise ineligible student-athlete who is permitted to compete as a result of a court order / injunction may face severe penalties if said order is vacated, stayed, reversed or finally determined to the contrary.

Article 32 deals with enforcement policies and procedures. Cases are confidential until they have been announced as prescribed.³⁹¹

Article 32.3.8 is worth quoting in full:

32.3.8 Limited Immunity. At the request of the enforcement staff, the committee may grant limited immunity to a student-athlete who provides information when such individual otherwise might be declared ineligible for intercollegiate competition based on the information that he or she reports and an institutional employee with responsibilities related to athletics when such an individual otherwise would be subject to disciplinary action as described in Bylaws 19.5.1-(c) and 19.5.2.2-(l) based upon the information that

³⁸⁹ Article 19.1.1

³⁹⁰ Article 19.1.2

³⁹¹ Article 32.1.1

individual reports. Such immunity shall not apply to the individual's involvement in violations of NCAA regulations not reported or to future involvement in violations of NCAA legislation by the individual or to any actions that an institution imposes. In any case, such immunity shall not be granted unless the individual provides information not otherwise available to the enforcement staff.

This process, in essence, allows for a plea bargain, which albeit must pass scrutiny of the COI, which is similar to the WADA process under Article 10.5.3 of the World Anti-Doping Code.

Article 32.7 sets out the procedure for summary dispositions and expedited hearings. Hearings by the COI are governed by Article 32.8. Generally, if one's attendance is requested at the hearing, one must attend.³⁹² Set against this are provisions dealing with the exclusion of certain individuals.³⁹³ Although Article 32.8.7 allows the COI to determine its exact procedure, provision is made, *inter alia*, for the receipt of evidence,³⁹⁴ information from confidential sources,³⁹⁵ the scope of enquiry,³⁹⁶ and questioning by the COI.³⁹⁷ Importantly, "questions and information may be exchanged between and among all parties participating in the hearing" only "under the direction of the committee".

The COI does not have to respect the formal rules of evidence and the testimony of witnesses before it is not taken under oath. Accordingly, there are major differences between the NCAA's enforcement process and the norms recognized in most judicial processes. Accordingly, although the IAC has an obligation to ensure that a COI hearing is fair, including parties being allowed to present questions to witnesses and offer rebuttal evidence, the standard of proof is only "credible and

³⁹² Article 32.8.6.1

³⁹³ Article 32.8.6.3

³⁹⁴ Article 32.8.7.4

³⁹⁵ Article 32.8.7.4.1

³⁹⁶ Article 32.8.7.5

³⁹⁷ Article 32.8.7.6

persuasive” and cross-examination of witnesses and rebuttal witnesses are “not the standard practice”.³⁹⁸

The appeal procedure is set out in Article 32.10. According to Article 32.10.2:

32.10.2 Bases for Granting an Appeal. A penalty determined by the Committee on Infractions may be set aside on appeal if the Infractions Appeals Committee determines that the penalty is excessive or inappropriate based on all the evidence and circumstances. Determinations of fact and violations arrived at by the Committee on Infractions shall not be set aside on appeal, except upon a showing that:

- (a) The Committee on Infractions finding clearly is contrary to the evidence presented to the committee;
- (b) The facts found by the Committee on Infractions do not constitute a violation of the Association’s rules; or
- (c) A procedural error affected the reliability of the information that was utilized to support the Committee on Infractions’ finding.

Under Article 32.10.5, the COI, ie, the decision-maker at first instance, is a Respondent in any appeal.

Appeal hearings are conducted pursuant to Article 32.11. The appeal is a hybrid between a true appeal and a hearing *de novo*.³⁹⁹ Articles 32.11.4 and 32.11.5 preclude any additional review.

The Infraction Appeals Committee (the “IAC”) for Division I schools was set by the NCAA in January 1993. As stated, around that time, the NCAA enforcement process was beset by controversy - four states, Florida, Illinois, Nebraska and Nevada, had passed state legislation requiring the NCAA to meet the requirements of due process in their discipline related procedures. As Martin has pointed out, “prior to the implementation of the IAC, many schools were upset with the appellate process

³⁹⁸ K..J. Martin, “The NCAA Infractions Appeals Committee: Procedure, Precedent and Penalties” (1999) 9 Seton Hall J Sport L 123, at p. 159

³⁹⁹ Articles 32.11.1-32.11.3

because they felt there was little chance of an institution getting relief through the appeals process because the appeal was adjudicated by the NCAA Council, the NCAA's policy making body."⁴⁰⁰ Accordingly, the IAC was created in part to provide a meaningful appellate procedure for the member institutions.

In summary, after receiving notice of an alleged major infraction, from whatever source, the NCAA sets in motion an investigation conducted by either its own investigator and/or the subject institution. If there is sufficient evidence, the NCAA will issue a "letter of official inquiry" ("LOI") - which Roberts has termed "the equivalent of a criminal indictment".⁴⁰¹ The first port of call for an institution subject to an LOI is a hearing before the COI. At such a hearing, the institution is entitled to be represented by counsel, as are any affected coaches and/or athletes. No witnesses are allowed except the parties and evidence is solely written. Cross-examination is not allowed and rules of evidence are not followed. According to Roberts, "the proceeding is quite informal by judicial standards"⁴⁰²

Unlike a typical Court proceeding, the COI is not limited to finding violations that are alleged in the LOI. This is akin to a criminal defendant being convicted of a crime of which he had not been charged.

After the hearing, the COI issues its written findings and penalties. If the institution chooses not to accept the decision and penalties, it may appeal to the IAC. The decision of this body is final and unappealable.

⁴⁰⁰ *Supra*, note 398, p. 124

⁴⁰¹ *Supra*, note 376, at p. 437

⁴⁰² *Ibid*, p. 438

In contrast, decisions on secondary violations can be appealed to the COI.⁴⁰³

5. Drugs

After difficult negotiations, the NCAA agreed, in January 1986, to begin a drug testing program. The NCAA has a different procedure entirely for doping cases.

In summary, the NCAA rules provide for an (a) and (b) sample. If the (a) sample tests positive, then there is a need to test a (b) sample. The student athlete in question, although represented, is entitled to be present at the opening and testing of the (b) sample. The results of the (b) sample tests are deemed conclusive and final and are immediately reported to the student athlete and their institution. In the event of a positive test, the student athlete is advised of their right of appeal. That said, only the institution may appeal the positive test, but it must do so upon the request of the student athlete. The appeal is filed with the NCAA's staff liaison to the Committee on Competitive Safeguards and Medical Aspects of Sports, which has delegated all authority with respect to drug cases to its drug education and drug testing subcommittee.⁴⁰⁴

Unless both the institution and the NCAA agrees otherwise, the appeal must be heard by a panel of the subcommittee before the student athlete's next scheduled competition. The hearing is conducted by telephone conference calls. The student athletes must participate in the appeal, though they are entitled to be represented by counsel. Typically, NCAA staff and legal counsel are involved in the conference call, but they have no say into the position of the appeal. Additional participants are usually technical experts and the relevant laboratory personnel. Witnesses are allowed to testify but they are neither under oath nor subject to charges of perjury for giving false evidence. Further, neither the identity of the student athlete nor the institution is disclosed to the voting members of the

⁴⁰³ Article 19.6.1

⁴⁰⁴ *Supra*, note 376, p. 443-444

subcommittee. The subcommittee can only either allow or dismiss the appeal. In the event that the appeal is dismissed, there follows an automatic one year suspension, with which the subcommittee cannot interfere.

According to Wong: "Critics of the NCAA's drug testing program claims it does not: (1) safeguard student athletes as procedural rights, especially in regards to the appeal process for a positive test; (2) safeguard the students privacy rights, especially when the media become aware of a test result; (3) give the student athlete sufficient information before they sign the mandatory consent form; and (4) ensure that the school will represent the student athlete's interests and rights when an athlete tests positive."⁴⁰⁵

As one might expect, any athlete testing positive will be subject to disciplinary action, including a declaration of ineligibility.

6. Commentary

In short, it is suggested that the criticisms of the NCAA system are so strong so as to mean there is little to be learned by the CAS from the NCAA. Such criticisms are put most eloquently by Roberts:

There are no truly neutral third parties who resolve disagreements between member institutions or student athletes and the NCAA. Rather, one internally established person or committee decides whether to support, modify or reverse a decision of another internally established staff person or body. Procedures used by such appellate committees are either set by internal NCAA rules or, most often, by the committee itself. There is no requirement that the committee adopt procedures that conform to anything close to the due process required of public officials and bodies under the laws and constitutions of the US or the individual states. Furthermore, the facts or findings and

⁴⁰⁵ *Supra*, note 73, p. 292

conclusions of these bodies are given great deference and will given rarely, if ever, be overturned by the courts.⁴⁰⁶

Roberts continues:

While the numerous internal appellate committees within the NCAA undoubtedly carry out their duties and make decisions in good faith in virtually all cases, the complex and confusing nature of the rules they interpret and apply, and the confidential and often mysterious ways in which they operate, often give rise to public suspicions of bias, unfairness and arbitrariness. Furthermore, because the members who sit on these committees always come from within the athletic programs of the NCAA member institutions, they necessarily come with a mind set that assumes the legitimacy of the existing system and are incapable of bringing the truly fresh perspective to bear on cases that often raise troubling issues about that system.

One can appreciate the difficulty of the job the NCAA's staff and its internal committees have in trying to enforce complex rules for which there are often great incentives to cheat, and having to do so without the benefit of public authority (no subpoena power or ability to obtain search warrants). This task will be made even more difficult, and perhaps downright messy, if internal decisions were ultimately appealable to truly neutral outside 'judges' or arbitrators who are not tied to the NCAA or any of its member institutions. However, in the long run, the image, integrity and mission of the NCAA might well be better served if such neutral outside dispute resolution mechanisms were utilized.⁴⁰⁷

⁴⁰⁶ *Supra*, note 376, p. 446

⁴⁰⁷ *Ibid*, p. 446-447

Indeed, the CAS may have much to teach the NCAA.⁴⁰⁸ And both may be instructed by the MNAPS in the limited regard of collective bargaining.⁴⁰⁹

IX. ROOM FOR IMPROVEMENT?

This thesis is largely concerned with the procedural protections which are afforded to athletes in the context of the Olympic Games. That said, despite their obvious importance, the need for such procedural protections will be reduced if the rules which govern the conduct and status of athletes are “carefully drafted” and the discretion possessed by executives and coaches is “carefully

⁴⁰⁸ Smith has warned: “Over the past 150 years, the desire to win at virtually any cost, combined with the increases in public interest in intercollegiate athletics, in a consumer sense, have led inexorably to a highly commercialized world of intercollegiate athletics. These factors have created new incentives for universities and conferences to find new ways to obtain an advantage over their competitors. This desire to gain an unfair competitive advantage has necessarily led to an expansion of rules and regulations. This proliferation of rules and the development of increasingly sophisticated regulatory systems is necessary to enforce those rules, together with the importance that attaches to enforcement decisions, both economically and in terms of an institution’s reputation (and derivatively its chief executive officer’s career), places great strain on the capacity of the NCAA to govern intercollegiate athletics. This strain is unlikely to dissipate in the future because the pressures that have created the strain do not appear to be susceptible, in a practical sense, to amelioration. Indeed, the one certainty in the future of the NCAA is the likelihood that big time intercollegiate athletics will be engaged in the same point-counterpoint that has characterized its history: increased commercialization and public pressure leading to more sophisticated rules and regulatory systems.

As rules and regulatory systems continue along the road of increased sophistication, the NCAA will more closely resemble its industry counterparts. It will develop an enforcement system that is more legalistic in its nature, as regulatory proliferation leads to increasing demands for fairness. In such a milieu, chief executive officers will have to take their responsibilities for intercollegiate athletics even more seriously. It can be held, as well, that their involvement, and the increased involvement on the part of the faculty and staff, through the certification process and otherwise, will lead to a more responsible system in terms of the maintenance of academic values. If the NCAA and those who lead at the institutional and conference level are unable to maintain academic values in the face of economics and related pressures, the government may be less than a proverbial step away.”

[*Supra*, note 359, pp. 21-22]

⁴⁰⁹ At least one commentator has called for Division 1 NCAA athletes to unionize. [L. Chenoweth Esteveao, “Student-Athletes Must Find New Ways to Pierce the NCAA’s Legal Armor” (2002) 12 Seton Hall J Sport L 243, at p. 280]

confined”.⁴¹⁰ Relatedly, as the CAS can only operate within the parameters provided by the rules before it, any amendments to the CAS-based system will have only limited positive effect if the rules on which any decisions are based are themselves “fair”. The *Samuelsson* case is a good illustration of an avoidable problem. In other words, the best CAS can hope to achieve is to solve all disputes quickly, fairly, and inexpensively. Avoiding eligibility problems to begin with would assist potential parties to a CAS dispute.

It is in this context - that the CAS plays only a limited role in eligibility matters - that my suggestions for reform ought to be viewed. The suggestions can be separated into two categories: 1) operational, and 2) structural.

1. Operational

The CAS has no shortage of supporters,⁴¹¹ and it is submitted that it is indeed an example of an excellent arbitration system. It is, though, not perfect, and can be improved. Below, in list form, is a summary of the reforms that have been suggested throughout this thesis:

1. Each participant in the Olympic Games must provide a means of contact for the AHD, in the event of a dispute.
2. All parties who could be materially affected by the outcome of a hearing must be notified and offered an opportunity to be heard. In this regard, it is suggested that all athletes who could achieve a medal as result of a decision must be so notified.

⁴¹⁰ *Supra*, note 4, p. 32

⁴¹¹ For example, *supra*, note 285, p. 164, *supra*, note 200, pp. 516 and 542, and *supra*, note 275, p. 405

3. For the benefit of predictability, the AHD must apply the rules before it, however unpalatable they may be.
4. The discretion to alter the 24 hour limit for the WADA Disciplinary Commission must be removed.
5. Party-chosen arbitrators must be allowed before the AHD. Each prospective arbitrator must be identified by category under which they chosen. The ICAS must ensure that all categories are represented at each instalment of the Games.
6. The AHD must require that evidence be given under oath.

2. Structural

It is uncontroversial that the goal of the international sports community should be to find and punish not only the drug cheats, but also those who contravene well established sporting rules and principles. Similarly, it should be the goal of the international sports community to clear those innocent of any wrongdoing.

In sports, as in life, there will always be good and bad eggs. The goal of the Olympic arbitration system must be separate the two. At present, the ad hoc CAS system does a very good job. A solid B+, if you will. It is unquestionably quick and cheap, but there remain unanswered questions about its legitimacy. These questions could be addressed by formalizing the role of the athletes in the Olympic Movement. Although the dispute resolution mechanisms in place in the MNAPS are arguably not as sophisticated as their CAS counterparts, they have one major benefit - they are the product of a bargaining process.

When too much power is vested in the IOC, in short, there are problems. The era before WADA was not the finest period in the IOC's history. There are surely lessons to be learned from such concentration of power, without a counterbalancing force. Up to now, the success of the CAS has been due to its demonstrable operational independence from the IOC. But, as the system currently operates, there is little standing in the way of the IOC seizing control, although such a coup would almost certainly pass unnoticed given the way the ICAS currently operates. Unnoticed, that is, until the Swiss Federal Court saw a need to intervene. However, it would only do so on the basis that the CAS was no longer independent and/or it had violated the *ordre public*. Obviously, the consequences of such intervention would be disastrous for the CAS and would almost certainly lead to its demise, though the gap it created would almost certainly be filled by another organ. It is highly likely that this is unduly pessimistic, but, while ever it remains a possibility, there will be those among the athletes who view the CAS as lacking legitimacy.

Carl Lewis, for one, has stressed his desire for athletes to "have much greater input into major Olympic decisions".⁴¹² He continued: "We need to put current athletes, the people most affected by all these decisions, on all key committees". With respect to the CAS, I would go further. Despite the independent streak the CAS has shown, as noted, there is still a question-mark over the legitimacy of its make-up. While it is beyond the scope of this thesis to suggest other areas where formal athlete input could be of value, the time has come for the issue of the legitimacy of the CAS to be dealt with. It should be the goal of the Olympic Movement to elevate the Athletes' Commission to the position of formal bargaining unit at least with respect to issues such as the CAS - an institution which, since inception, has had a powerful impact on the lives of many athletes.

The Olympic Games are about participation. It is not an overstatement to say that eligibility to play is the most important issue in the Olympic Movement. The Games would not exist if individual athletes did not wish to compete against each other. Everything else - the construction, the licensing, the television - is dependent on this wish which is shared by the world's athletes. Accordingly, to

⁴¹² *Supra*, note 86

interfere with an athlete's eligibility is an act which strikes at the heart of the Olympic ideal. More respect for the role of the athlete in such decision-making would, therefore, seem only right.

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