A New Order:

Athletes' Rights and the Court of Arbitration at the Olympic Games

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Sport, the viewing of it and participating in it, is one of the world's most sought after leisure activities. It is, therefore, not surprising that a body of sports related law is emerging. Sports law could be defined as the application of the general legal standard to disputes and social controversies relating to the playing, viewing, or organizing of sport. Sports law in itself is not a new subject. But arbitrating sports disputes is a relatively new phenomenon. John Barnes[1] has grouped issues in sports law into four interrelated themes to demonstrate the growth of the subject and its scope: Safety, Government Regulation, Athletes' Rights, and Commercial Aspects. The phenomenon of arbitration has made its greatest impact as a dispute resolution mechanism in the area of Athletes' Rights, as will become apparent subsequently in this essay.

For much of the history of organized sport, when disputes arose, sports organizations resolved them internally ("in-house"), that is, without the assistance or interference of judicial courts. Be that as it may, the emergence of Athletes' Rights has terminated such practices and brought with it a new response to the use of law in sport. This response has brought with it a burgeoning growth of law within the private structure of such sports organizations at the national, international, and Olympic levels.

Sport is, of course, also subject to the wider legal order.[2] Arbitration takes place most frequently when applied to disputes within the sports organization, although it can take place within the wider legal order.[3] The sports organisations in many countries of the world are undergoing a transition from the older model of dispute resolution ("in-house") without the law, to a more legally-based athletes' rights-focussed resolution of problems and disputes.

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Though sports organizations traditionally reserved all the power and authority for the management of the organization, the emerging focus on athlete's rights has changed the equation and brought dispute resolution to the fore. It is in this context that arbitration has been embraced by sport as a better way to resolve disputes than the litigation of matters in the courts. The focus of this article examines the emergence of the Court of Arbitration for Sport (CAS) and an analysis of its role at the Olympic Games.

History of the Court of Arbitration for Sport

The role perceived for an entity like a Court of Arbitration for Sport was to adjudicate sports-specific disputes. Sports-specific disputes, in the eyes of the IOC, were thought to require a separate forum for their arbitration, a forum distinct from the traditional method of resolution by litigation or sports organizations' "in-house" methods. Most sports organizations are private, voluntary associations, as opposed to being governed by public authorities or boards exercising statutory powers[4] and their relationships are governed by contractual principles. Within this exclusive realm, sport began to influence larger areas of society through commercialization, media impact and internationalization.[5]

Amidst society's growing demand for entertainment, the athletes of the 1970s began to realize the importance of their role at the hub of a segment of the entertainment industry. This recognition brought an increasing clamor by athletes demanding more rights within a larger social order.[6] In-house resolutions to disputes by sporting organizations were no longer satisfactory, and athletes began to assert their rights based on the law. As the business of sport emerged, the level of incentive for athletes changed. During the pre-CAS period amateurism, in the traditional sense, declined.[7] In 1925, the IOC eligibility rules were very clear: an athlete must not be a professional and must not have received compensation for lost salary. By the early 197Os, major liberalizations to the Olympic eligibility rules had occurred. Specifically, although the 1974 Code continued to exclude professionals, it made no reference to the word "amateur." In 1986, the inevitable occurred: the IOC finally agreed to accept those professionals who were recognized as eligible by various international sports federations.[8] The melding of the business realm with sport forever changed the dynamics of this area, and lent weight to the emergence of CAS as an exclusive forum for the resolution of sport-specific disputes.

In this brave new era when sport embraced a business dimension because of its entertainment value, traditional methods of dispute resolution through the courts are not always the most effective means of solving sports disputes. Court proceedings frequently are slow, time consuming and unresponsive when athletes require immediate decisions on, among other things, eligibility or selection to compete in a pending event. Arbitration can permit faster more immediate address of disputes and increase the chances of swift resolution.

While traditional litigation continues to have a role in a sports-related dispute, it is not the most effective means of resolution. Certain features of sports-related conflicts tend to make the need for alternative dispute resolution all the more necessary. First, sports-related disputes tend to rest on issues of fact rather than on complex issues of law. As such, a specific knowledge of sport is required which is frequently

lacking in traditional courts. Second, the conflicts can involve large amounts of money, which causes the costly system of litigation to become even less desirable. Third, sport-specific disputes tend to require fast decisions. Litigation can become moot if the athlete is forced to abide by a suspension while waiting to appear in court; the consequent award of damages may not be satisfying if the chance to compete has been lost. Fourth, contracts between international parties are common in sports, giving rise to cultural barriers, quarrels of jurisdiction, and whose law to apply. Fifth, there is a need for confidentiality. Sport commands much media attention, and traditional courts do not always dictate that the courtroom be closed to media. Thus, public pressure may hinder the dispute. Moreover, athletes may be ostracized by peers and labelled as "cheaters" in the athletic community before they have been found guilty of the allegation. Finally, there is an inherent resistance to traditional courts in the realm of sports where problems have traditionally been resolved internally. If individuals seek redress in judicial courts, they will often suffer the condemnation of their peers.[9] In light of the disadvantages of traditional courts, and in the face of a growing awareness of athletes' rights due to increased commercialization in sport, a specific forum for the resolution of disputes was thought to be necessary.

The IOC perceived the need for a formal tribunal which: (1) was removed from the supervision of any governing international sport federation; (2) brought a degree of detachment and impartiality to the dispute resolution process; and (3) served the needs of the sporting community. In light of the changing influences on sport and the perceived demand for improved dispute resolution mechanisms, and at the behest of Juan Antonio Samaranch, the Court of Arbitration for Sport was established on April 6, 1983 at an IOC session in New Delhi. At that time, the Court's statutes were officially ratified. Today, the CAS is headquartered in Lausanne, Switzerland.

Early Jurisdiction

The sports-specific disputes to be adjudicated by CAS fell into two basic categories: first, disputes arising out of decisions rendered by disciplinary tribunals or similar bodies of sports federations or associations; and secondly, disputes arising out of contracts embodying a CAS arbitration clause. The Court's jurisdiction to resolve such disputes arose out of the simple fact that both parties agreed to submit their dispute to CAS. It is upon this foundation that CAS developed a niche in the area of sports-specific dispute resolution.

Perception of Bias

Despite creating a court that was removed from the supervision of the International Sports Federations, the Court of Arbitration for Sport was not entirely removed from the perception of bias. Although members of the CAS were completely independent from the IOC in the exercise of their duties and jurisdiction, the CAS was funded by the IOC. There was concern that the independence of the court was compromised by this close association. In essence, the CAS "appeared to be the little sibling of the IOC rather than an independent tribunal."[10] This appearance led to a constitutional challenge to the independence of the Court of Arbitration for Sport, a challenge which was launched before the Switzerland's highest court, the Swiss Federal Tribunal.

In *Gundell v. International Equestrian Federation,* Gundell challenged the independence of CAS; in particular its independence from the International Equestrian Federation. The Swiss Federal Tribunal noted a *prima facie* perception of bias in that the International Equestrian Federation is a member federation of the International Olympic Committee. This prompted further investigation, out of which the Tribunal recognized some "organic and economic" connections between CAS and the IOC. Specifically, the court held that "certain objections as to the independence of the CAS, in particular those relating to the organizational and financial links between the CAS and the IOC, cannot be removed without another form of procedure. Indeed, the IOC is competent to modify the Statutes of the CAS; moreover, it supports the operating costs of this tribunal and plays a considerable role in appointing its members."[11] Despite these connections, the Court was held to provide a sufficient guarantee of independence from the IOC so that the CAS award was upheld. [12]

The International Council of Arbitration for Sport (ICAS)

Although the challenge to the CAS award was upheld, the Swiss Federal Tribunal recommended in 1993 that the Court reduce its level of dependency on the IOC.[13] Thus, the IOC created a new body to act as the supervisor of CAS--The International Council of Arbitration for Sport (ICAS). It is a twenty-member council composed of high-level jurists.[14] It elects its own officers from its membership and appoints CAS division presidents and their deputies. [15] The members, consisting of representatives of the International Sports Federations, National Olympic Committees and the International Olympic Committee, must sign a declaration "undertaking to perform their functions in a personal capacity, with total objectivity and independence, and in conformity with the provisions of the Code of Sports-Related Arbitration."[16] Moreover, the ICAS members may not serve as CAS arbitrators nor act as counsel to any party appearing before the CAS. This restructuring has aided in the perception of independence of the Court of Arbitration for Sport. The decisions of the Ad Hoc division of the Court have reinforced that perception.[17]

The Olympic Jurisdiction

For the first time in Olympic history in connection with the Centennial Olympic Games in Atlanta, an Ad Hoc Division (AHD) of CAS was established. It was to provide for the resolution of sports disputes arising during the Games. In 1995 the IOC had amended the *Olympic Charter,* adding Rule 74[18] to permit the establishment of the AHD. The ICAS then undertook the necessary revisions of the CAS Code of Sports-Related Arbitration to include ad hoc Rules.[19]

The motivation behind the establishment of the AHD was to augment, and not to attenuate, athletes' rights.[20] Athletes did not give up their legal rights within their national and international governing bodies or their national courts, but had an immediate and additional adjudicative body to which reference of sports-specific disputes could be made during the Games. The AHD in effect acted somewhat akin to a Court of Appeal with respect to matters not resolvable through the internal processes of the National Olympic Committees (NOCs), the Olympic Games Organizing Committee (OGOC), or the executive board of the IOC. There is no appeal from the AHD.[21]

Thus, the international jurists who sat as arbitrators always did so in panels of three members appointed by the Co-Presidents of the CAS, AHD.

The sports-specific disputes to be adjudicated by the AHD of CAS could arise in four basic situations. The athletes were required to sign an entry form for the Olympics which required them to agree to arbitrate any disputes.[22] Some international sports federations (IFs) had CAS arbitration clauses in their by-laws.[23] If they did not, the IFs were still subject to the jurisdiction of the DH by Article 74 of the *Olympic Charter*. The host city contract between the IOC and the OGOC also had a CAS arbitration clause creating jurisdiction by contractual agreement. Finally, jurisdiction over the NOCs was achieved by their being bound by Article 74 of the *Charter* and is reinforced by an NOC's duty to ensure compliance with the *Olympic Charter* in its country by the duty of Article 31 paragraph two. It is upon this foundation that the AHD of CAS developed its jurisprudence in the area of sports-specific dispute settlement at the Olympics.

The Work of the Court

In order to comment on the subject of the inquiry of this essay with respect to arbitration at the Olympics, it is necessary to briefly examine the broader role and work of the CAS. The work of the Court is gradually generating a body of *lex sportiva* jurisprudence of general application.

The CAS Decisions 1983 to 1993

In the first decade, CAS dealt mainly with doping-related cases; such cases constituted a majority of those brought before CAS. The work of the court was slow to develop as interested parties had to learn about CAS and how it applied to their situations. Thus, the first decade was spent building a modest body of jurisprudence which is summarised in digest form.[24] Many of those decisions are confidential and make it difficult to assess the jurisprudential impact on the *lex sportiva.* The early years are difficult to analyse as a consequence.

CAS Decisions After the Creation of ICAS

The trend of the cases in the 1990s reveals a decline in the prominence of doping-related cases. While the number of doping-related cases remains approximately the same, the proportion of such cases relative to other cases has decreased to less than fifty percent.

Within the doping cases is the thorny issue of absolute, strict and fault[25] liability. IOC Medical Code provides an absolute ban in some cases. It also provides that once a banned substance is discovered in the urine or blood of an athlete, there is a presumption that a doping offence has been committed.[26] It is generally thought that if International Sporting Federations had to prove the intentional nature of the act, the *mens rea,* to establish the offence, then the controls over doping would in all likelihood be impossible to maintain. The trade-off in the loss of fault and intention in committing the offence is at the expense of athletes' rights. The CAS has endeavoured to maintain a balance in the doping offences by not literally applying the strict

liability concept in some cases requiring a degree of fault before upholding the imposition of a sanction. For example, fault seems to be irrelevant in defining when an offence involving steroids in competition has occurred under the IOC Medical Code; however, for positive tests involving ephedrine, no offence is committed if an athlete can prove that she/he was not at fault.[27]

One case was pivotal in outlining the policy behind the shifting burden of proof in doping offences. *Jessica K. Foschi v. FINA* was heard in New York in June 1997 before Dirk-Reiner Martens, Denis Oswald and Christopher Campbell. The appellant, a young swimmer, placed third in the 1500 metre freestyle at the United States Summer Nationals Swimming Championship. Following the routine post-event urine collection, the appellant tested positive for mesterolone metabolite, an explicitly-listed banned substance under FINA Guidelines. It is a small white pill, easily dissolvable in food or drink, and is tasteless, odorless, and colorless. The appellant, her parents, and her coach consistently denied knowingly taking or giving the substance to the appellant, or any product that may have contained mesterolone. They also denied having any knowledge of the reason why such a substance was found in the appellant's sample taken after the competition. Nine days after the positive test result, the appellant's family arranged for her to be tested by a forensic toxicologist. She tested negative for anabolic steroids. Approximately one month later, the appellant underwent a comprehensive physical examination by a paediatric endocrinologist, who stated that there was no evidence of past or present steroid use. The appellant, her parents and her coach all underwent a polygraph examination which demonstrated that there was no deception to any relevant questions. Lastly, the appellant underwent further drug testing on 15 other occasions since the orignal positive test result occurred. All tests were negative. She had gone to extensive lengths to attempt to demonstrate that she was not a drug user. Her basic submission stated that it was unfair to her, in all of the circumstances and post-testing information that she be suspended for two years when she apparently lacked a guilty conscience or mind.

She appeared before the United States Swimming (USS) National Board of Review who imposed a two year suspension. The national sporting body further ruled that if she ever tested positive for any banned substances she would receive a life-time ban from the sport of swimming. This was an apparent concession to the strict or absolute liability provision in their code.

Foschi appealed this decision unsuccessfully to the USS Board of Directors. She made a final appeal to the American Arbitration Association (AAA),[28] which reversed the previous decision. The panel established by the AAA held that the claimant and those connected with her were innocent and without fault. Thus, the panel stated that "Under the facts of this case, the sanctions imposed on Claimant by USS violate fundamental fairness[29] and are arbitrary and capricious."[30]

The International Swimming Federation (FINA), apparently not satisfied with the actions of the national body and the outcome of the AAA decision, acted shortly after the decision. The FINA executive found that the decision by the USS was not in accordance with FINA rules. The laboratory found a banned substance in Ms. Foschi's urine which constituted an offence under FINA Rules MED 4.3. Therefore, she could be sanctioned in accordance with FINA Rule MED 4.17.4.1. The two year suspension was reinstated, FINA having asserted its jurisdiction over its national sporting federation member.

The differing positions between the two sporting bodies demonstrate the magnitude of this contentious issue. Thus, the goal is to try to balance the need to punish wrongdoers from gaining an unfair advantage, and the desire to maintain athletes' rights by requiring fault before any punishment is warranted.

The appeal from the ruling of FINA was heard by CAS in June of 1997. The panel cited FINA Rules, MED 4.3 as a basis for its decision:

> MED 4.3 The identification of a banned substance and/or any of its metabolites in a competitor's urine or blood sample will constitute an offence, and the offender shall be sanctioned.[31] [...]

Thus, the panel noted that an offence has been committed as soon as it has been established that a banned substance was present in the competitor's urine. The burden of proof upon FINA is not to show that the athlete is guilty, but rather to merely establish that a banned substance that has been properly identified is present in the competitor's urine. This is not an absolute liability offence, in that the athlete can do nothing to exculpate herself once the banned substance has been identified in her system. Instead, it is an offence of strict liability, meaning that the proof of these elements results in a legal presumption that the swimmer is guilty of a doping offence. The burden then shifts to the swimmer to rebut the presumption. The policy behind the reversal of onus is stated by the panel:

> In doping cases it would be practically impossible for a sports federation to prove how a banned substance arrived in the athlete's body or that the athlete had knowingly ingested the banned substance. Any such requirement would be the end of any meaningful fight against doping. This approach may seem harsh on a morally innocent athlete found to have a banned substance in his/her body but in order to ensure fairness towards all competitors and to protect their health and well-being, sports federations must have strict and workable doping regulations.[32]

The Foschi case seems to contradict an earlier decision by CAS, *Chagnaud v. FINA,* in April 1996, whereby the panel stated that:

> The system of strict liability of the athlete must prevail when sporting fairness is at stake. This means that, once a banned substance is discovered in the urine or blood of an athlete, he must automatically be disqualified from the competition in question, without any possibility for him to rebut this presumption of guilt (irrebuttable presumption). It would indeed be shocking to include in a ranking, an athlete who had not competed using the same means as his opponents, for whatever reasons.[33]

However, the panel further stated that subjective elements of fault may be considered in connection with applying the appropriate sanction.[34]

Thus, the issue of strict liability has yet to be definitively established. However, the fault of the athlete is not totally disregarded in doping cases. The moral innocence may prove to be a mitigating factor in assessing the appropriate sanction. In this case, the panel upheld the decision to sanction Ms. Foschi, but reduced her suspension from

two years to six months. There were many mitigating factors cited by the panel which led to the reduction in her suspension: the Appellant was only 13 years old;[35] she was found to be an "honest, dedicated athlete of integrity;" the evidence established that at the time of the positive test the appellant was not a chronic user of steroids; and finally, the evidence showed and it was agreed that the appellant's performance was not enhanced by her ingestion of the banned substance.

Given the readiness of CAS and other sporting bodies to reduce athletes' sanctions in the absence of fault or in the absence of performance enhancement, it is unclear why the first doping offence should translate into an "automatic" two-year suspension. This suspension has been reduced by CAS on various occasions (including the Foschi and Chagnaud cases). Although there may be strict liability in terms of a sanction in theory, the practice of applying sanctions has suggested otherwise. Perhaps there needs to be a discretion in order to take such factors into account. Moreover, the effectiveness of the testing methods is the true deterrent, and not the quantum of the sanction. This is especially true when the case involves doping without fault.

The principles of strict liability were enunciated in an earlier CAS case, *USA Shooting and George M. Quigley, Jr: v. UIT* heard in May 1995. In that case a competitor on the USA Shooting Team staying in Cairo for the World Cup was ill and could not sleep. The hotel doctor was summoned, and the athlete was diagnosed with bronchitis and a chest infection. The athlete and his coach showed the doctor a list of banned substances, and told the doctor that he would likely be tested the next day and could not take any medication containing substances on the list. The doctor had a good command of English, and he examined the list with considerable care. The doctor gave Mr. Quigley some cough syrup, but the syrup contained Ephedrine, a banned substance. The athlete and his coach relied on the doctor in good faith, and did not take the syrup for the purposes of gaining an unfair advantage in competition. The CAS panel articulated the policy behind strict liability:

> It appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations - particularly those run on modest budgets - in their fight against doping.[36]

In the end, the athlete was entitled to retain his gold medal because of the wording in the UIT Anti- Doping Regulations: "Doping means the use of one or more substances mentioned in the official UIT Anti-Doping List *with the aim of attaining an increase in performance . . .* "[37] UIT admitted that there may be a need to alter the definition of doping in its regulations. However, CAS could not apply a sanction to Quigley under this definition when there was clearly no intention by the athlete to use forbidden medication to improve his performance and obtain an advantage over his competitors.

Although the area of strict liability for doping offences was discussed by CAS in the context of cases heard in the 1990s, it was not the only issue before them. In fact,

a review of the decisions reveals that doping cases represented only half of the cases heard by CAS. The other cases deal with various issues, such as eligibility, contractual interpretation, sponsorship, fighting, interlocutory rulings, and cruelty to horses. This demonstrates the decline in prominence of doping cases, and also highlights the increasingly popular commercial and business aspects of sports.

The case of, *FFSA, FIC, FNSA v. FISA* demonstrates the commercialization of sport. In that case, the French, Italian, and Dutch rowing federations opposed the validity of a decision by the FISA Congress to change the rules on sponsorship. The change would allow new spaces for advertising on the rowers' shirts and on the boats. CAS overruled the vote by the FISA Congress, and authorized the applicants to submit a request to FISA to consider this addition.

There is a case further demonstrating the business aspects of sport which under the CAS rules must be kept confidential. It involved contractual rights between an athlete and another contracting party, again demonstrating the emerging incidence of commercial-related cases that CAS most probably will have to deal with in the future.

The Ad Hoc Decisions

At the two Olympic Games at which the AHD has been present it has heard a total of 10 cases, five in Atlanta and five in Nagano. The cases have covered athlete eligibility;[38] challenges to sporting decisions by officials;[39] authority of the NOC[40] and issues of business law.[41] The issue of doping control appeared to be headed for a confrontational showdown in Atlanta when it was announced that the Australian sprinter, Capobianco, and a female Italian high jumper, Bevilacqui had tested positive for prohibited substances at events prior to the Olympics. The IAAF stayed any decision to discipline the athletes until after the Games. The cases were processed through IAAF internal systems. The IAAF cleared Bevilacqui on the grounds that she took the drug by mistake. Capobianco was cleared on a technicality. Predictably, the use of drugs have been an issue before the AHD but not to the extent that it might widely have been expected, constituting only two cases out of 10.[42] Neither of those cases involved a directly prohibited substance.

Atlanta

The inaugural sitting of the AHD illustrated the need for the adjudicative process and established that it could deal quickly and effectively with disputes. None of the proceedings required protracted contestations of fact.

Of those cases heard by the AHD in Atlanta, two dealt with doping. *Andrei Korneev v. IOC and Zakhar Gouliev v. IOC* involved challenges by two athletes to the decision of the IOC board to strip them of their bronze medals. The two athletes, a Russian wrestler and a Russian swimmer, respectively, tested positive for the use of Bromantan. The interesting aspect of this case was that both athletes admitted to taking the drug. The issue became whether the substance itself was a prohibited stimulant.

Bromantan was not on the banned list at the time of the Games in Atlanta, nor was it on the list in Nagano two years later. However, the list of prohibited substances is not exhaustive. Thus, Bromantan was prohibited under the term "...and

related substances." This allowed CAS to by-pass the issue of absolute or strict liability, as the drug was admittedly present in the athletes' systems, and deal with defining the scope of the banned substances list. As Bromantan was not specifically named as a prohibited substance in the Medical Code, it was necessary to determine whether Bromantan was a stimulant within the meaning of the Medical Code. If it were determined that the substance was a stimulant, its use would be prohibited by the Medical Code regardless of the fact that it was not specifically listed. The Court acknowledged that the fight against doping would be hampered if there was an exclusive list of substances within the Medical Code, and thereby justified the exercise in statutory interpretation. The transcripts of the proceeding amount to 337 pages, wherein the Court considered evidence that suggested that Bromantan may well be a stimulant within the meaning of the Medical Code. However, the court held that "while further study may establish that Bromantan is a prohibited substance, the totality of the material before us does not allow us to reach that conclusion."[43]

The Bromantan decision was the most highly publicized decision in Atlanta. Yet, it did very little to define the jurisdiction of CAS. Despite this, it somewhat parallels the one drug-related case in Nagano (Rebagliati, to be discussed below), in that it demonstrates the independence of CAS from the IOC.

The other cases in Atlanta dealt with issues other than doping. One case, *Henry Andrade v. Cape Verde NOC,* involved whether or not an athlete who seized the flag from the *Chief de Mission* during the opening ceremonies would be allowed to remain in the Olympic Village. After the incident, Cape Verde NOC banned the athlete from the Olympic Village, but it did so without obtaining consent from the IOC executive board. Thus, the action by Cape Verde NOC was *ultra vires.* However, it subsequently obtained the consent of the IOC board, and the ban was maintained.

Before AHD, the NOC admitted that neither they, nor anyone from the IOC board, had stated to the athlete any of the allegations made against him; nor had they offered him a chance to respond to those allegations. Specifically, the Court stated that "the sixth principle of the *Olympic Charter* stresses the importance of 'fair play', which, in the view of the Panel, is as pertinent to the disciplinary process as it is to competitive sport."[44] Furthermore, the AHD of CAS awarded interim relief to the athlete so that he was able to remain in the Olympic Village during the decision making. This decision is significant in that it demonstrates a clear independence of CAS from the IOC. Moreover, to a certain degree, it shows the beginning of a movement towards valuing proper procedure in the interest of protecting the rights of the athlete. It is also, to a degree, further support for the independence of the AHD and CAS, as it strikes at the action of the IOC in providing its consent to the banning of the athlete from the Olympic Village, which gave rise to the second case involving the same parties.

The case of *Christopher Mendy v. International Amateur Boxing Association* (AIBA) established the principle of non-interference in the decisions of officials made in the course of competition. It involved a French boxer who had been disqualified for punching below the belt. He claimed that upon reviewing the video replay, the punch was not below the belt, and consequently, his disqualification should be overturned. The panel held that it is beyond the jurisdiction of the AHD tribunal to review the application of the technical rules of a sport. Such rules are the responsibility of the federation concerned, and the judges and referees are in a far better position

to determine the application of such rules. Accordingly, the action was dismissed. It is likely that the principle developed in this case will require refinement in the future as there will undoubtedly be occasions when it may be appropriate for the AHD to intervene. However, the primary starting point of non-interference being presumed was established in this case.

The *United States Swimming v. FINA* case was the first decision of the AHD in Atlanta. It also evinces the most parallels to the decisions made in Nagano (namely the Puerto Rican ski case and the Samuelson case, to be discussed below). The German and Netherlands swimming teams supported an application by United States Swimming which sought a ruling to prohibit Irish swimmer Michelle Smith's entry in the 400 metres freestyle. The parties alleged that Michelle Smith's application had been submitted out of time. She was entered into the Olympic Games before July 5, but the Irish NOC substituted her in place of another Irish swimmer on July 17, which was after the deadline. AHD decided that, despite the strict interpretation of the rules, it was common practice for competitors to switch between events if they were already entered in the Games. This is an unusual case because it demonstrates an obvious move to eliminate Michelle Smith from the competition so that she would not compete against rival swimmer Janet Evans. As the arbitration process becomes more popular in sport, this case could prove to be the inchoate attempt of NOCs to look for a strategic advantage by strict application of sporting rules. As lawyers have long been involved in testing and applying the rules of administration in order to gain an advantage, this possible trend demonstrates a move in the realm of athletes' rights towards a more legalized system of rights.

Nagano

Like Atlanta, only one "possible" doping case arose out of the five total cases occurring in Nagano. Similar to its Atlanta counterpart the case itself never really addressed the issue of doping. Instead, it addressed whether the IOC Medical Code provided a basis for treating marijuana as a prohibited or restricted substance. In this way, it parallels the Bromantan case in Atlanta. The case involved Canadian Snowboarder Ross Rebagliati. Upon being awarded the gold medal on February 8, Rebagliati was subsequently notified that the award had been rescinded because the urine sample which he provided contained a metabolite of marijuana. On appeal before the AHD of CAS, Rebagliati alleged that he had not actively used marijuana since April 1997, and as such, he had not committed a doping offence. He stated that he attended parties in January 1998 in Whistler, British Columbia at which other people smoked marijuana, and argued that the presence of marijuana metabolites in his urine must have come from his exposure to second-hand marijuana smoke. Rebagliati offered to provide evidence that marijuana metabolites remain in the urine for a lengthy period of time.

The IOC made its decision on the basis of strict liability: the mere finding of marijuana in Rebagliati's system constituted an offence. This was based on Chapter II, Article III, paragraph B of the IOC Medical Code which states, in part, that "tests may be conducted for cannabinoids (e.g. marijuana, hashish). The results may lead to sanctions." Thus, the issue before the AHD of CAS was whether the detection of marijuana metabolites in Rebagliati's urine in and of itself proves to be an offence. IOC

representatives at the hearing conceded that marijuana was not a prohibited substance under the terms of the Medical Code, but was rather subject to "certain restrictions." Moreover, such restrictions were dependent upon an agreement between the IOC and the relevant international sports federation (FIS).

The AHD panel concluded that the IOC Medical Code itself did not provide a basis for treating marijuana as a prohibited substance, such that it would justify the sanction. Next, the panel examined whether an agreement to test for marijuana and impose sanctions in that regard was in effect between the IOC and the relevant international sports federation: FIS. The FIS had adopted the IOC Medical Code in its entirety, and as such, the only basis to impose a sanction on Rebagliati was under "Paragraph B." As the IOC Medical Code did not provide a basis for treating marijuana as a prohibited substance, the sanction imposed against Mr. Rebagliati lacked the proper foundation. This case was important because, although it did little to address the issue of doping in sport, it underscored CAS' independence from the IOC.

The other cases, like those in Atlanta, involved a variety of matters. Perhaps, with regard to the test of time, the most important may be that involving the German Speed-Skating Federation. The German Speed-Skating Federation and the Puerto Rico Ski Federation cases began to define the jurisdiction of the Ad Hoc Tribunal. The jurisdiction of the AHD was carefully circumscribed in its rules so that the athlete did not totally lose access to the courts of their countries or other appropriate forums. The rules provided that the AHD only had jurisdiction during the currency of the Summer [and lately the winter] Olympic Games and only with respect to disputes "arising on the occasion of, or in connection with, the Olympic Games . . ."[45]

It is not surprising that one case before the AHD was more in the nature of a commercial dispute than a sports-related dispute, thereby serving to underscore the commercialism which underlies the Olympic Games. In *Schaatsefabriek Viking B. V. v. German Speed-Skating Association*, a challenge was brought by a corporation which manufactures speed skates. The Claimant brought an application for preliminary injunctive relief to prevent the members of a national skating federation from wearing a skate cover over their skates which was manufactured by a rival firm. The Claimant argued that this created the impression that the rival was the manufacturer of the ice skate boot, and this deprived the manufacturer of the promotional effect of the display of its logo. It claimed that this was in violation of Article 61 of the *Olympic Charter* [46] and the Japanese Unfair Competition Law.

The panel decided that Article 61 of the *Olympic Charter* does not address the problems of competition, but merely regulates the size and position of commercial identification on equipment. In absence of a violation of the *Charter*, the panel had no basis upon which to issue the requested injunction. However, the panel noted that the decision was based only on the application of the *Olympic Charter*, and that "it makes no finding as to the violation of the applicable unfair competition laws and has taken due notice that the Claimant has reserved its right to act in another forum on legal grounds other than the violation of the *Olympic Charter.*" This is an important decision as it emphasizes the limited jurisdiction of CAS in its AHD capacity to resolve disputes. In other words, although the awards are final and binding, the parties do not completely lose the means to raise the dispute in an appropriate forum if such resolution is warranted. The panel is bound by article 74 of the *Olympic Charter;* thus, CAS can only resolve disputes "arising on the occasion of, or in connection with, the

Olympic Games . . .” This has been taken to mean the period from the opening ceremonies to the closing ceremonies. One disadvantage of this limited jurisdiction is that certain types of disputes will be excluded from the ambit of the Tribunal’s jurisdiction. For example, those athletes who raise an issue regarding ineligibility cannot properly bring the dispute before the panel. Perhaps the jurisdiction of CAS in its AHD capacity needs to be expanded such that it may account for these important kinds of disputes.

The other case that began to define the jurisdiction of the AHD was *Steele v. CIO*. David Q. Steele alleged that the IOC document entitled “XVIII Olympic Winter Games Nagano, 1998: Participation and qualification criteria” violated *Olympic Charter* Rules 54, 56, and 57 and related by-laws. Steele submitted that he was improperly excluded from competition because the International Ski Federation had not published its selection criteria for the Games sufficiently early. He requested “injunctive relief’ in order to participate in the men’s downhill (Alpine skiing) event. According to Article 14 of the CAS Rules for the Resolution of Disputes Arising During the Olympic Games (the “CAS ad hoc Rules”), the President of the AHD or the Panel of Arbitrators may rule on an application for a stay of the effects of a decision which is being challenged before the AHD, without hearing the Respondent first. The order dismissed the application for preliminary relief. A hearing was then duly and properly constituted by the President under the CAS ad hoc rules.[47]

Before the panel, Steele relied upon a copy of the purported by-laws of the Puerto Rican Ski Federation. However, the president of the NOC Puerto Rico (COPUR) testified that COPUR recognized the Puerto Rican Winter Sport Federation as the official winter sports body, and not the Puerto Rican Ski Federation. COPUR had refused to enter Steele for competition, as Puerto Rico was only entitled to enter one male athlete in the skiing competition.

The panel decided that Steele was not an accredited athlete at the Winter Olympic Games. Thus, his challenge was brought not as an athlete, but as a member of the public with an interest in skiing. As such, Steele did not have standing to bring the dispute to the panel, and AHD consequently lacked the jurisdiction to hear the case. Furthermore, the second claimant, the Puerto Rican Ski Federation, could not establish its legal existence before the panel, as it was not recognized by COPUR as a national federation. Despite this, Steele did not establish that he had the authority to act on behalf of the Puerto Rican Ski Federation even if its existence was found to be valid. Thus, pursuant to article 74 of the Olympic Charter, AHD could not hear the case, and it was dismissed.[48]

This case parallels the Michelle Smith case in Atlanta. While the Smith case involved a sports federation bringing a challenge against an athlete in order to gain an advantage, the Puerto Rican Ski case involved an athlete bringing a challenge against a sport federation in order to be able to compete in the Games. He brought this challenge against eligibility, despite the fact that he did not qualify for his own team, and he did not have enough “FIS” points in order to compete in the down-hill skiing events.

The other Nagano case which parallels the Michelle Smith case is *Ulf Samuelson, the Swedish Olympic Committee and the Czech National Olympic Committee v. International Ice Hockey Federation.* The National Hockey League[49] player Ulf Samuelson competed for Sweden in the Olympic hockey tournament. After the first three

qualifying games, the International Ice Hockey Federation (IIHF) discovered that by operation of Swedish law, Samuelson had automatically lost his Swedish citizenship when he became an American citizen. He had acquired U.S. citizenship by way of naturalization in 1995. The IIHF decided to exclude Mr. Samuelson from the remainder of the Olympic tournament, while allowing the results obtained by Sweden in its games to stand. Sweden had won two of the three qualifying games, and lost the other.

The Swedish Olympic Committee submitted an appeal of the international sporting federation's ruling to allow Samuelson to continue to participate in the Olympic hockey tournament.[50] On the same day, the Czech Olympic Committee submitted an appeal for a different reason: to invalidate the games in which Samuelson took part, and thereby forfeit Sweden's two wins. This case parallels the Michelle Smith case in Atlanta, because it is a clear attempt by an NOC to gain a strategic advantage through the manipulation of the rules. The forfeiture would have caused a reordering of the quarter final play-off round. The reordering would have been advantageous to the Czech Republic and disadvantageous to the Russian team. They would have had to play a much stronger opponent in the form of Sweden who would be at the bottom of one division and therefore, have to play Russia at the top of another division in the quarter final round.

AHD upheld the decision of the IIHF, stating that "this is not a case of dual nationality. This is a situation of a national of one country playing for another country, and constitutes an undisputed instance of ineligibility."[51] The panel also upheld the decision of IIHF to allow the three qualifying games of Sweden to stand. The panel stated that the Czech Olympic Committee lacked sufficient involvement in order to challenge this decision. They further stated that:

> the case would be different if an appeal had been brought by Belarus or the U.S. These were the two teams that lost to Sweden. They would have been in a position to say that they were the direct victims of having had to face an opponent using an ineligible player, and that their chances of winning were adversely affected by the violation of the rules.[52]

Furthermore, AHD held that to modify the order of the qualifying groups would mean to alter the remainder of the competition considerably. This would have been disadvantageous to the majority of teams involved in the remainder of the tournament. Specifically, the panel stated that "the forfeiture of Sweden's wins would not only sanction that team but also adversely affect others participating in the competition."[53] Thus, this decision emphasizes the attempt to gain an advantage by challenging one's opponents under existing Olympic rules. Although it failed in this instance, the door was left open to bring these types of issues before a panel in the future, if there was a more direct stake by an applicant in the outcome as there would be if the two teams had played each other.

Trends from the AHD Decisions

As the work of the Court receives more publicity its existence becomes more broadly known. At Atlanta there were 10,000 participating athletes and six cases.

The AHD work load was one case less in Nagano but was generated from fewer than 3,000 athletes competing at the Winter Games. Knowledge of its existence and growing familiarity with the work of CAS and the AHD will undoubtedly increase the use of this adjudicative body. The jurisprudence approach and the Court's demonstrated independence from the IOC will also encourage its use in the future. The trend at future Olympics is likely to be greater and expanding utilization of CAS. What cases are likely to comprise this increasing work load?

Undoubtedly there will be an increase in the type of case where the AHD is used to achieve strategical advantages not obtainable in the sports competition. The three cases: *United States Swimming v. FINA, Steele v. IOC,* and the *Czech National Olympic Committee v. IIHF* are illustrations. They represent the use of an IF's rules to attempt to gain a strategic advantage not achievable in the sporting competition. In the swimming case the rules were being used to try and eliminate a late applicant from the field of competition.[54] In the ice-hockey case the effect of the enforcement of the forfeiture rule would have been to reorder the quarter final playoff round in terms of match-ups that were very different than the results established at the hockey arena. Both attempts at strategic advantage were denied by the AHD. In the latter decision the panel did qualify its reasons by suggesting that if teams who had actually lost to the Swedish team had been the applicants then the forfeiture rule would have different consequences because it could be argued, at least, that the loss of the game was as a result of the use of an ineligible player or their chance of winning was adversely affected. Those comments reveal that it will not always be possible for the AHD to deny the applicant making a request on the basis of strategic advantage. This will likely be a burgeoning area of activity in the future.

The doping-related jurisprudence of the Court is extensive, particularly in the period since ICAS has been the overseeing body. The AHD jurisprudence has yet to directly deal with a prohibited substance and the issues which surround strict liability.[55] The Bromantan decision revealed the potential problems which could arise if a full blown challenge to the whole doping control procedure and its legal principles were to be taken up at an AHD hearing. In deciding that the substance was not a banned one, the matter never had to address other potential issues. The Rebagliati case is not really a drug case as the substance was not a restricted one under the ruling of the panel. There is no doubt that doping control will be a growing area of adjudication in the future. A brief look at the doping issue in the balance of 1998 following the Nagano winter games is instructive of the breadth of the issue. There was the doping scandal at the Tour de France, Mark McGwire, Michelle Smith, and the NBA's problems with marijuana. One would venture to speculate that the AHD has not even seen the tip of the iceberg in this area of its jurisdiction. No doubt, this will be an expanding area of adjudication.[56]

One of the great difficulties in the doping control area is the issue of absolute liability when a banned substance has been found to be present in the urine. The concept of strict liability has within it the seeds of discretionary application of a sanction for the offence. Several panels of CAS have struggled with the use of discretion for inadvertent use,[57] or the application of a penalty which is less than that provided for in the IF's own rules.[58] Such cases reveal the tensions pulling panels of arbitrators in different directions. The concept of absolute liability is thought to be necessary in order to ensure that IFs or the IOC do not have to prove intention to use performance-

enhancing drugs. On the other hand legal systems like that of the United States which value and go to extensive lengths to protect individual rights place emphasis on the loss of such rights when severe penalties are imposed. For example, in the Foschi case, the American Arbitration Association panel held that a rule of strict liability which imposes sanctions on an innocent athlete "so offends our deeply rooted and historical concepts of fundamental fairness so as to be arbitrary and capricious."[59] Still others look to the field of competitors and say that when just one athlete is caught using a banned substance it has had an effect on the entire field of competition and the individual's rights should not over-ride the collective rights of the other competitors by ameliorating the penalty. The differing approaches to the issue are well illustrated in the US Swimming case of Jessica Foschi and the subsequent case by FINA involving the same athlete in the turf war between the national and the international sports bodies. There appears to be no satisfactory resolution to the dilemma of absolute liability and the desire to have discretionary mitigation of particular offences. This challenge will undoubtedly continue to face both the AHD and the CAS. It will be difficult for the AHD to deal with such a case in the limited time frame which it gives itself to decide such matters.

The absence of a clear statement of strict liability principles in the jurisprudence may prove costly for the fight against doping. Even when strict liability principles are articulated, mitigating factors, such as the fault of the athlete or the absence of performance-enhancing effect, serve to reduce the level of sanction, thereby injecting a degree of *mens rea* back into the equation. The desire to mitigate within a strict liability regime has been quite evident in CAS decisions in the last decade. However, where there is discretion, there is no strict liability.[60] Perhaps the first doping offence should not translate into an "automatic" two year suspension. A discretion allotted to the panel may coincide more clearly with the notion of mitigation in the absence of fault. Furthermore, the penalty is not the true deterrent. Instead, athletes are deterred by the effectiveness of the testing system. If an athlete knows he or she is certain to be caught, this is a much more effective deterrent than using a faulty system with harsh penalties. Presently, the IOC Medical Code is unclear on the principles of its testing regime. Article II of Chapter X states that "Laboratories accredited by the IOC shall conclusively be deemed to have conducted tests and analyses of samples in accordance with the highest scientific standards and the results of such analysis *shall be conclusively deemed to be scientifically correct"* [Emphasis added]. However, the following section, Article III of Chapter X, contradicts the conclusive nature of the testing: "Laboratories accredited by the IOC are presumed to have conducted testing and custodial procedures in accordance with prevailing and acceptable standards of care. *This presumption can be rebutted by evidence to the contrary . . .*" [Emphasis added].[61] Thus, until the method of testing can indeed be deemed "conclusively correct" (if at all possible), there may be little reason for athletes to fear the potentially harsh sanctions.

Earlier, this essay traced some of the impacts upon sport that are occurring as a result of its increasing commercialization. It was not surprising therefore, that the first ever commercial case should emerge at the Nagano games in the form of the application by Viking with respect to the taping over of its name on the skate boot of certain members of the German Speed-Skating athletes. The AHD in defining jurisdiction ruled that the matter was one which could be dealt with in the ordinary civil

courts in the usual fashion. A case which had more direct athlete involvement, but centered upon commercial issues like misrepresentation and loss of advertising opportunity (the actual issues in the case), may well have had a different result. The exploding role of business in sport is likely to clash with the interest of athletes and result in more cases which are of a commercial nature than of the law associated with sport. The reduction of the doping cases, as part of the work load of CAS, is directly related to the growing number of commercial matters coming before the panels. The AHD can expect that there will be more commercial issues in the future. Nagano was but a harbinger of things to come.

No doubt the core area of athletes' rights and the law sportif will continue to be central ones in the evolving jurisprudence of the AHD as they have been to date. The original concept of the AHD was to afford athletes a forum for quick and effective resolution of disputes while the Games are taking place. The quick response of the AHD in the Rebagliati case illustrates the point. Once the IOC Executive Board had confirmed the IOC Medical Commissioners' recommendation to strip the Canadian snow boarder of the gold medal there would have been no recourse at the Games without the AHD.[62] The famous case of Sylvia Freshette illustrates the tortuous path that might have to have been undertaken to have the matter rectified. The AHD had the matter sorted out by February 12th and the medal had been awarded on the 8th and stripped from the athlete on the 1lth. It is in this core area that the AHD and its readily available pool of experienced arbitrators from the world-wide panel of CAS may well play a valuable role and make an indelible contribution to the Olympic Games and the ideal of fairness and justice. The AHD will continue to have a pivotal role in the area of athletes' rights. It will always be at the core of their work.

Conclusion

Returning to the question posed at the outset, arbitration at the Olympics is a reflection of our times. The mix of sport with business coupled with its entertainment value is changing the way in which sport is governed and played. The evolving changes are being influenced by legal contracts; the need for speedy resolution of sporting issues; and, the protection of the rights of participants: be they IFs, NOCs, or, more particularly, athletes. The result is a pent up demand for adjudicative services which are responsive to the forces at work in sport today. The AHD, although but one of the responses to the pressures, is emerging as an innovative, forward thinking process within the Olympic movement.

Endnotes

The author would like to thank Mathieu Reeb, Counsel to the CAS, for reviewing a draft of this essay. Deep appreciation is also extended to Nicole Chrolavicius, University of Western Ontario, Faculty of Law Class of 2000, for her research assistance in matters pertaining to this essay.

1. John Barnes, *Sports and the Law in Canada* (Toronto: Butterworths) 3rd ed. 1996.

2. The controversy over rampant drug use at the 1998 Tour de France provides one such example where sports are subject to the wider legal order. For example, Rodolfo Massi, a cyclist from Italy and competitor at the Tour was accused of using cortisone nose drops and supplying them to other competitors. Under judicial examination in France, this is one formal step short of criminal indictment. Furthermore, the police took riders of the TVM team to the hospital for extensive examinations, including blood, urine, and hair tests.

3. One such forum for the resolution of disputes is the Canadian Center of Ethics in Sports, located in Gloucester, Ontario. For more information, visit their website at <http://www.cces.ca>.

4. John Barnes, *Sports and the Law in Canada* (Toronto: Butterworths) 3rd ed. 1996, p. 143.

5. See International Olympic Committee, Arbitration and the Olympic Movement <http://www.olympic.org/fetas.html>.

6. Bruce Kidd, *The Struggle for Canadian Sport* (Toronto: University of Toronto Press) 1996. [See Chapter 7: "The Triumph of Capitalist Sport"].

7. Webster's dictionary defines 'amateur" as "an athlete who has never used any athletic art professionally or as a means of livelihood; one who has not taken part in contests open to professionals." *Webster's New 20th Century Dictionary* 55 (2nd ed. 1979)

8. John Barnes, *Sports and the Law in Canada* (Toronto: Butterworths) 3rd ed. 1996, p. 140.

9. Jean-Pierre Morand, "Dispute Resolution by the CAS: A Practical View," *Sports Marketing: Law, Tax and Finance* [Conference Documentation], IOC Musem, Lausanne, 1994).

10. Gabrielle Kaufmann, *Sports Marketing: Law, Tax and Finance* [Conference Documentation] IOC Musem, Lausanne, 1994.

11. From *Gundell,* as quoted in CAS president Judge KÉba Mbaye's speech at the International Law and Sport Conference in Lausanne, September 1993, *International Conference: Law and Sport*, Tribunal Arbitral du Sport, 1994, p. 100.

12. The material on the Gundell case was taken from: Tim Castle, "The International Court of Arbitration for Sport," *New Zealand Law Journal*, Nov. 1994, pp. 400-403. It was at the International "Law and Sport" Conference, held at the Olympic Museum in Lausanne on the 13th and 14th of September, 1993, that the new structure envisaged for the CAS was advanced for the first time. The goals and operations of a new body, which was to be independent of the IOC, were pre-

sented to and approved by the 102nd IOC Session in February 1994 in Lillehammer, Norway. On June 22, 1994 in Paris, the vision was realized: the IOC approved the creation of a new body to act as supervisor and financier of CAS. That body is called the International Council of Arbitration for Sport (ICAS). The result was to transfer the responsibility of guaranteeing the total autonomy of CAS from the IOC to a new, high-level body.

13. Nancy K. Raber, "Dispute Resolution in Olympic Sport: The Court of Arbitration for Sport," 8 *Seton Hall Journal of Sport Law*, pp. 75-88.

14. Gabrielle Kauffman and Pathak Raghunandan are members of the ICAS and were the President and the Co-President, respectively, of the CAS Ad Hoc Division in Atlanta and Nagano.

15. Article S6(2). The ICAS elects the ICAS president, proposed by the IOC. The ICAS president is also the CAS president (Article S9). This constitutes an improvement over the initial CAS rule where the IOC president was also the CAS president, and the amended CAS rule providing that the IOC president chooses the CAS president from among the members of the CAS. This footnote and corresponding text taken from Nancy K. Raber, "Dispute Resolution in Olympic Sport: The Court of Arbitration for Sport," *Seton Hall Journal of Sport Law*. 75, p. 89.

16. Melissa R. Bitting, "Mandatory, Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for Job Security?" *Florida State University Law Review*, 1998, Vol. 25, p. 674.

17. At the Atlanta Centennial Games, CAS reversed a decision of the IOC Medical Commission confirmed by the Executive Board of the IOC. Known as the Bromantan decision. The same thing occurred at the Nagano Winter Games in the decision to reinstate the Gold Medal of Canadian Snowboarder, Ross Rebagliati. See: *Andrei Korneev v IOC* and *Zakhar Gouliev v. IOC*, and *Ross Rebagliati v. IOC.*

18. The Rule reads: 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. This Rule was the subject of comment in decisions in Atlanta of Mr. Christopher Mendy and AIBA and in Puerto Rican Ski Federation and David Quinn Steele, Jr. and IOC (CAS/187) in Nagano.

19. Proceedings at Nagano, similar to those at Atlanta, were governed by the Rules for the Resolution of Disputes Arising During the XVIII Olympic Winter Games in Nagano (the "ad hoc Rules") of CAS enacted by the ICAS on April 9, 1997. Each decision states the proceedings are further "...governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (PIL Act). The PIL Act applies to arbitration because the seat of the ad hoc Division and of its panels of Arbitrators is established at Lausanne, Switzerland, pursuant to Art. 7 of the ad

hoc Rules." To the extent that the Code was relied upon, the guidance of the provisions for an appeal arbitration to CAS were utilized rather than the provision for ordinary arbitration. For this reason the CAS makes the award public pursuant to Article R59 unless both parties agree that the matter should remain confidential.

20. See Michael J. Beloff, "The Court of Arbitration for Sport at the Olympics (1996)," *Sport and the Law Journal of the British Association for Sport and the Law.* Michael J. Beloff, Q.C., is the President of Trinity College-Oxford and is a member of the Court of Arbitration for Sport.

21. This became obvious in *Andrei Komeev v. IOC* and *Zakhar Gouliev v. IOC.* The AHD panel held that "While it may be that further study may establish that Bromantan is a prohibited substance the totality of material before us does not allow us to reach that conclusion". The British Olympic Association announced on the 15th of September 1996 that they ti was not pursuing a further challenge to the decision, there being an obvious lack of a forum in which to challenge it. Had it found such a forum and been successful, it could have resulted in Nick Gillinghame being awarded a third Olympic medal. Medically, the decision is still a controversial one today.

22. The arbitration clause in the entry form reads: "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." This rule has been the subject of comment in two decisions of the Ad Hoc Tribunal in the Atlanta case, *Christopher Mendy v. AIBA* and in *Puerto Rican Ski Federation and David Quinn Steele, Jr. v. IOC* (CAS/187) in Nagano. Aside from this contractually agreed-upon jurisdiction from the arbitration clause, arbitration for athletes can be further supported by Article 74 of the Olympic Charter. In doping cases it can be supported by Articles I and VI of Chapter X of the Medical Code.

23. For example, at the Winter Games the World Curling Federation, International Skating Union, and Federation Internationale du Ski, with respect to civil liability, only had such by-laws.

24. There is to be a publication by Butterworths in late 1998.

25. Richard R. Young, "Problems With the Definition of Doping: Does Lack of Fault or the Absence of Performance-Enhancing Effect Matter?" *Sports Marketing: Law, Tax and Finance* [Conference Documentation], IOC Museum, Lausanne, 1994.

26. Article 4 of the IOC Medical Code states: "Except as specifically otherwise provided in the IOC Medical Code, the detected presence of any amount of substances in classes (a), (b), (c), (d) and (e) in respect of a test conducted in connection with a competition shall constitute a definitive case of doping."

27. Richard R. Young, "Problems With the Definition of Doping: Does Lack of Fault or the Absence of Performance-Enhancing Effect Matter?" op. cit. See also the IOC Medical Code Chapter II, Articles IV (steroids) and V (ephedrine).

28. The appellant invoked her right under the USS and USOC rules to make an appeal to the American Arbitration Association ("AAA").

29. For a discussion of fundamental fairness in the context of random drug testing of high school athletes see J. S. Dressner, "Guilty Until Proven Innocent: Random Urinalysis Drug Testing Upheld in Vernonia School District 47J v. Acton," 4 *The Sports Lawyers Journal* 115 (1997).

30. *Ms. Jessica J. Foschi v. FINA* (CAS/156), p. 14.

31. *Ms. Jessica J. Foschi v. FINA* (CAS/156), p. 40.

32. *Ms. Jessica J. Foschi v. FINA* (CAS/156), p. 41-42.

33. *Ms. Jessica J. Foschi v. FINA* (CAS/156), p. 9.

34. It is interesting to note that such a principle has been taken to an extreme in the case of the Canadian 100 meter sprinter Ben Johnson. He had tested positive for the anabolic steroid stanozolol after wining the 100 metre race at the Seoul Olympics in world record time. He was banned from IAAF competition for two years and stripped of his Gold medal by the IOC. The athlete's claim of innocence resulted in the Canadian Government setting up a Commission of Inquiry into the use of drugs in Canadian sport. At that inquiry he admitted to having taken drugs. In 1993 at an IAAF competition in Montreal he again had a positive test revealing a testosterone to epitestosterone ration of 10.3:1. No internal appeals of that positive test were ever undertaken by the athlete. The IAAF Doping Commission held a special meeting in Paris on March 5, 1993 to consider the results of the test. The athlete could have been present but chose not to be. The Commission declared an immediate suspension pending a hearing before the relevant tribunal of Athletes Canada. Ben Johnson never requested a hearing; he announced his retirement. In accordance with IAAF Rules he was deemed to have waived his right to a hearing and accordingly, was declared ineligible from competition for life. In 1997 Ben Johnson brought an application before the Ontario Court General Division that the ban was contrary to the common law doctrine of restraint of trade and seeking reinstatement to events governed by the IAAF. He lost the trial case in a decision by Madam Justice Caswell dated July 25, 1997 *(Johnson v. Athletics Canada* [1997] O.J. No. 5419). An appeal was dismissed on September 1998 by the Ontario Court of Appeal. The information in this note is taken form the Factum of the Respondents to that proceeding. The events of the Ben Johnson story illustrate the severity of the doping control procedures penalties when the internal and other processes are not utilized.

35. The panel made reference to Dr. Joachim Linck's article on "Doping and State Law" in the German law journal *Neue Juristische Wochenschrift*, No. 41 of 7

October 1987 in which he states on page 2550 that "the minor's capacity to consent [to being administered doping substances] depends on his/her maturity but that generally it is assumed that an athlete who is under the age of 14 does not have the capacity to consent."

36. *Ms. Jessica J. Foschi v. FINA* (CAS/156), p. 9.

37. Ibid., emphasis added.

38. See *USA Swimming v. FINA,* where United States Swimming sought a ruling to prohibit Smith's entry into the 400 meter freestyle event. Eligibility was also an issue in *Steele v. IOC,* where Steele submitted that he was improperly excluded from competition because the International Ski federation had not published its selection criteria sufficiently early. Lastly, *Samuelsson & SOC and Czech NOC v. IIHF* involved an issue of edibility on the basis of citizenship, after hockey player Ulf Samuelsson had lost his Swedish citizenship upon becoming an American citizen.

39. See *Christopher Mendy v. AIBA.* A French boxer disqualified for a low blow sought to have the officials' ruling subsequently reversed by the video replay which revealed the blow was not too low.

40. See *Henry Andrade v. Cape Verde NOC.* The Olympic committee of Cap Verde, who were represented in the Olympic Games for the first time, had decided to have its national flag carried at the opening ceremonies by their *Chef de Mission.* Andrade, an ex-partriate hurdler residing in California had seized the national flag and paraded it at the opening ceremonies to a world wide audience. The committee, considering the act one of gross insubordination, banned the athlete from the Olympic Village and removed him from his event, the 110 metre hurdles. This dispute resulted in two decisions of the AHD. The first determined that the committee decision was *ultra vires* in that the consent of the IOC board for the withdrawal of a duly entered competitor had not been obtained. The second decision followed after the IOC consent but found that the opportunity to be able to respond to the allegations had never been extended to the athlete thereby breaching elementary principles of fairness. There was no equivalent type of case at Nagano.

41. See *Schaatsefabriek Viking B.V. v. German Speed Skating Association.* The claimant brought an application for preliminary injunctive relief to prevent the members of a national skating federation from wearing a skate cover over their skates which was manufactured by a rival firm.

42. See the highly publicized cases of Korneev the Russian swimmer and Goutliev a Russian wrestler who tested positive for Bromantan and were stripped of their respective Bronze medals. (Andrei Korneev v. IOC and Zakhar Gouliev v. IOC). See further the case of Rebagliati where the Canadian snowboarder tested positive for marijuana and was stripped of his gold medal by the IOC on the basis of strict liability under Chapter II, Article III, paragraph B of the IOC Medical

Code. AHD reversed this decision because the FIS had adopted the IOC Medical Code in its entirety, and the Code itself did not provide a basis for treating marijuana as a prohibited substance. Thus, this case was not really about doping at all, because the substance was not a banned one, but was only subject to "certain restrictions" (Ross Rebagliati v. IOC).

43. *Andrei Korneev v. IOC* and *Zakhar Gouliev v. IOC,* p. 19.

44. Ibid., p. 5.

45. *Olympic Charter,* Article 74 (in force as of July 18, 1996).

46. Article 61(l) of the *Olympic Charter* states that "No kind of demonstration or political, religious or racial propaganda is permitted in the Olympic areas. No form of publicity shall be allowed in and above the stadium and other competition areas which are considered as part of the Olympic sites. Commercial installations and advertising signs shall not be allowed in the stadia, nor in the other sports grounds." Article 61(2) states that "The IOC Executive Board alone has the competence to determine the principles and conditions under which any form of publicity may be authorized."

47. This order was made by the President of the ad hoc Division, Gabrielle Kaufmann-Kohler.

48. The panel was comprised of Jacques Baumgartner (Panel President), Akira Kotera, and Richard H. McLaren.

49. Professional ice hockey players from the National Hockey League (NHL) in North America had been allowed to compete for the first time ever at the Winter Olympics due to an agreement between the IIHF and the NHL. Another indication of the trend referred to at the outset of this paper concerning the increasing professionalism at the Olympics . See endnotes 1 and 6.

50. Ulf Samuelson is considered to be as Swedish as Wayne Gretsky is Canadian despite the fact that both players play for American NHL teams. The AHD lost an opportunity to have used mediation as a form of alternative dispute resolution in this case. It was likely possible that the AHD could have obtained the consent of each national team to permit Samuelson to remain in the competition by agreeing to waive the rule which made him indelible. However, ADR techniques are not as yet a part of the dispute resolution processes utilized by CAS or the AHD.

51. *Ulf Samuelson, the Swedish Olympic Committee, and the Czech National Olympic Committee v. International Ice Hockey Federation,* p. 7.

52. *Supra* note 51, p. 10.

53. *Supra* note 51, p. 9.

54. The application by the Puerto Rican Skier had a reverse element of the same

approach in it. There, an applicant who had been excluded was trying to be inserted into the roster by alleging that the FIS had not followed its own rules in establishing the field for the men's downhill skiing event. See Steele v. CIO.

55. For some discussion of strict liability principles, see *Jessica K. Foschi v. FINA.*

56. The forthcoming conference sponsored by the IOC on the future direction of the IOC Medical Code and the possibility of an International Doping Control Agency are but two of the many topics to be discussed at the up coming conference in Lausanne Switzerland in February, 1999. The implications of decisions taken at that conference will likely influence considerably the agenda of the AHD and also CAS in the future.

57. See *USA Shooting v. UIT* where an athlete tested positive for ephedrine at the World Cup in Cairo because a hotel physician mistakenly assured him that the cough medicine contained no banned substances. CAS restated the principles of strict liability, but held that this athlete could not be sanctioned because the particular rules of International Shooting required intent to enhance performance as an element of a doping offence. See also the case of Silken Laumann where the Canadian rower tested positive for pseudoephedrine contained in cold medicine. The team physician had mistakenly advised her that there were no banned substances in the medication. Although the Pan American Sports Organization stripped gold medals from her team, International Rowing imposed no sanction because her use of the substance had been neither intentional nor negligent.

58. See *Chagnaud v. FINA* and *Foschi v. FINA.* In both cases, the sanction was reduced to less than the 2 year suspension provided for by FINA Rules. The reasons for this reduction is that the absence of fault and the lack of performance enhancement were mitigating factors for CAS when determining the appropriate sanction.

59. See the article by Richard R. Young, "Problems With the Definition of Doping: Does Lack of Fault or the Absence of Performance-Enhancing Effect Matter?" op. cit.

60. *Supra* note 59, p. 15.

61. *Supra*, note 36, p. 15.

62. Contrast the speedy resolution of the Ross Rebagliati case with that of Sylvie Frechette. The Canadian synchronized swimmer lost the gold medal because the Brazilian judge admittedly pressed the wrong button in the scoring. It took Frechette 16 months of struggling to recover the gold medal in an anti-climactic and exhausting battle (led by Dick Pound, IOC Vice President). By way of contrast, Ross Rebagliati earned, lost and recovered his gold medal in a matter of only live days.