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Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better

By Michael Straubel*

I. INTRODUCTION

Marion Jones, a three time Gold Medalist at the Sydney Olympic Games, referred to it as a kangaroo court.¹ Others have called it an innovative and efficient way to settle the sports world's disputes.²

Whatever one thinks of the Court of Arbitration for Sport ("CAS"), it is emerging as a major institution in the sports world, and as an example of the need for the unification of private international law.³ Because of this prominent role, it is necessary to understand and evaluate the complex and sometimes contradictory system employed by the CAS. The need for this analysis is heightened by the growing international profile of sport doping cases, and the center-stage that the CAS and its affiliates are likely to have in the adjudication of these cases. This

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1. Tom Weir & Jon Swartz, *Jones Wants To Go Public with Fight*, USA TODAY, June 17, 2004, at C1. Marion Jones won the 100 meters, 200 meters, and was on the winning 4 x 100 meter relay team at the 2000 Sydney Olympics. She has been questioned and investigated by the United States Anti-Doping Agency ("USADA"), but as of the date of drafting this Article, she has not been charged with a doping offense. The USADA has refused to comment further on Marion's case.

2. See Anthony T. Polvino, *Arbitration as Preventative Medicine for Olympic Ailments: The International Olympic Committee's Court of Arbitration for Sport and the Future for the Settlement of International Sporting Disputes*, 8 EMORY INT'L L. REV. 347, 347-48 (1994) (stating that the CAS is the "ideal vehicle for administering such disputes").

3. As will be discussed later in this Article, CAS has established itself as a single judicial entity with worldwide jurisdiction. In the world of doping adjudication, a single entity with consistent doctrines is very desirable. However, differences of opinion between decisions from CAS panels and AAA-CAS panels, and even between CAS panels themselves, has created confused doping case doctrine. One of the conclusions of this Article will be that this confusion of doctrine is harming the CAS, harming athletes' rights, and harming the Olympic Movement's fight against harmful performance enhancing drugs.

evaluation and analysis will illustrate that the CAS must shed its original commercial dispute settlement structure and adapt to the unique demands of adjudicating and settling doping accusations.

As the 2004 Olympics approached, the doping cases that came out of the Bay Area Laboratory Co-Operative (“BALCO”) investigation⁴ brought the CAS to the attention of the general public, and brought criticism aimed at the CAS. Star athletes preparing for the United States Olympic Trials and Athens Olympic Games were charged with doping violations that would ultimately be decided by the CAS.⁵ Suddenly, the future of these athletes and possibly the outcome of the Olympic Games would be decided by an obscure institution located in Lausanne, Switzerland. Consequently, the sports world, the media, the athletes and their lawyers, and the general public began to ask questions about the role, function, and ultimately the fairness of the previously anonymous CAS.⁶

In their subsequent investigation of the CAS, athletes and other interested parties learned that the CAS is the judicial institution (branch) of the Olympic Movement.⁷ The CAS—in addition to hearing private disputes among athletes, teams, and leagues—decides disciplinary claims brought by the enforcement agencies of the Olympic Movement.⁸ For instance, the United States Anti-Doping Agency,

4. The BALCO investigation is a United States Federal Government investigation of the Bay Area Laboratory Co-Operative for possible tax crimes. As a result of that investigation, a number of athletes, both professional and Olympic athletes, testified before a federal grand jury. Information has led to charges against four athletes for doping violations even though none of the four athletes have tested positive for banned drugs. Pete Carey, *Lifetime Ban Sought for Montgomery; Doping agency alleges use of illegal substances*, CHI. TRIB., June 24, 2004, at 3.

5. See Dick Patrick, *Going CAS Route Risky for Runner*, USA TODAY, June 29, 2004, at C12 (discussing athletes' decisions to seek CAS arbitration following USADA's push for lifetime bans).

6. See Liz Robbins, *Lower Standard of Proof Angers Athletes and Lawyers*, N.Y. TIMES, June 15, 2004, at D2 (noting USADA's desire to use the “comfortable satisfaction” standard instead of “beyond a reasonable doubt” when deciding whether to ban athletes for drug use against stiff opposition from athletes and their respective lawyers).

7. The “Olympic Movement” refers to an umbrella of international sport encompassing the Olympic games and other international competitions (e.g., World Championships), the governing bodies of those competitions, and related institutions (such as the World Anti-Doping Agency and the Court of Arbitration for Sport). For a detailed explanation of the Olympic Movement's governing structure, see Michael Straubel, *Doping Due Process: A Critique of the Doping Control Process In International Sport*, 106 DICK. L. REV. 523 *passim* (2002) (detailing and discussing the pre-Sydney doping control system, doping control, due process, and post-Sydney improvements).

8. See INT'L OLYMPIC COMM., COURT OF ARBITRATION FOR SPORT, STATUTES OF THE BODIES WORKING FOR THE SETTLEMENT OF SPORTS-RELATED DISPUTES S12 (June 30, 1984) [hereinafter CAS CODE] (arbitrating and mediating disputes arising within the field of sports in conformity with the Procedural Rules), available at <http://www.tas-cas.org>. These sorts of

(“USADA”), acted as the enforcement agency in investigating and bringing charges against athletes implicated in the BALCO controversy.⁹ Those athletes had the option of contesting the charges before the CAS or the North American Office of CAS, operating as the American Arbitration Association (“AAA-CAS”).¹⁰ Thus, the CAS acts as a surrogate court for the various sports bodies around the world that end up prosecuting doping claims against athletes.

However, Olympic athletes are not the only athletes wondering about the CAS and its affiliates. As the BALCO investigation implicated professional sports like baseball and football, some began to wonder if professional athletes should be treated like Olympic athletes. Many saw the efforts of the USADA and the doping rules of the Olympic Movement to be much more effective than the relatively weak rules and enforcement efforts of the professional sports leagues.¹¹ Members of Congress and others discussed applying the Olympic Movement’s doping rules and enforcement measures to professional athletes.¹² If changes such as these were effected, the CAS and the AAA-CAS would begin hearing professional athletes’ cases, and would influence the sports world on an even larger stage.

The purpose of this Article is to examine the structure, operation, and practice of the CAS and the AAA-CAS to determine if they are fair, impartial, and independent institutions that are achieving their stated goal of creating a system of jurisprudence that harmonizes and fairly applies the principles of the sports world.¹³ While the CAS will be examined in its entirety, the primary focus will be on how the CAS is equipped to handle doping cases, which seem to be the future of CAS arbitrations. Additionally, though the CAS family includes a

charges can be brought by any International Federation, National Olympic Committee, the IOC, or any body acting on behalf of those entities such as the USADA and the World Anti-Doping Agency (“WADA”).

9. See Carey, *supra* note 4, at 3 (discussing the anti-doping agency’s proposed bans against several track athletes).

10. AM. ARBITRATION ASS’N, SUPPLEMENTARY PROCEDURES FOR ARBITRATION INITIATED BY THE UNITED STATES ANTI-DOPING AGENCY R-57 (2004) [hereinafter AAA-CAS SUPPLEMENTARY PROCEDURES], available at <http://www.adr.org/sp.asp?id=22251>; Patrick, *supra* note 5, at C12.

11. James Kuhnenn, *Senators Rip Union’s Steroids Stance*, CHI. TRIB., Mar. 11, 2004, at § 4 p.1 (quoting Senator John McCain as warning that baseball was “about to become fraud”); *Congress, Officials Seek Steroid Laws*, CHI. TRIB., July 14, 2004, at 7.

12. Kuhnenn, *supra* note 11, at § 4 p.1.

13. See COURT OF ARBITRATION FOR SPORT, DIGEST OF CAS AWARDS II 1998–2000, at xxx (Mathieu Reeb, ed. 2002) (noting that in more than fifteen years of existence, the CAS has continued to evolve by the creation of a new structure, an increase in the number of arbitrators, and through the expansion of new offices in North America and Oceania).

decentralized office headquartered in Australia, only the CAS and the AAA-CAS will be examined.¹⁴

To further this examination, this Article will first lay a foundation by examining the history and development of the CAS and the AAA-CAS.¹⁵ The next Section will take an in-depth look at the operating rules and procedures as they now stand.¹⁶ This Article will then examine and make suggestions for improvement on the various controversial questions of CAS operations: (1) how CAS and AAA-CAS arbitrators are selected;¹⁷ (2) whether the two institutions are indeed impartial and independent;¹⁸ (3) whether CAS panels have an adequate choice of laws to adjudicate fairly and correctly;¹⁹ (4) how the lack of available precedent affects the arbitration process;²⁰ and finally (5) what standards ought to be employed considering the varied and undefined nature of CAS cases.²¹ This Article then concludes by suggesting that the CAS, in doping cases, cannot conduct business as usual and should create a second chamber to exclusively hear doping cases and specifically tailor new practices for that second chamber.²²

II. BACKGROUND

The CAS and its offspring, the AAA-CAS, were both conceived to deal with crises of legitimacy in the sports world. They arose from commercial dispute resolution parentage beginning with answering tough questions concerning their legitimacy, and more recently, about

14. A helpful (if mixed) analogy is to think of the CAS as a parent corporation with its headquarters and primary place of operations in Switzerland, and two branch offices in the United States and Australia. Although these two offices operate relatively autonomously, the headquarters in Switzerland has ultimate authority, serving as a "supreme court" with appellate jurisdiction.

15. See *infra* Part II.A (discussing the origins of the CAS, challenges faced by the CAS in 1994 and the addition made to the CAS in 1996).

16. See *infra* Part II.B (discussing the application, jurisdiction, and administration of the Ordinary Division Rules and the Appeals Division as well as the AAA-CAS North American Rules).

17. See *infra* Part III.A (discussing the process of creating a master list of arbitrators as well as the selection process for panel members).

18. See *infra* Part III.B (examining the institutional independence of the CAS from the IOC and other bodies of the Olympic Movement).

19. See *infra* Part III.C (evaluating whether participants have an adequate choice of laws when gaps occur in the CAS Code).

20. See *infra* Part III.D (analyzing the effect of unclear or unavailable precedent in CAS panel decisions).

21. See *infra* Part III.E (appraising the appropriateness of the use of either a strict liability standard, a 'comfortable satisfaction' standard or a 'beyond a reasonable doubt' standard).

22. See *infra* Part IV (concluding that the CAS's current structure is appropriate for deciding contract cases, but not sufficient for dealing with doping cases).

their fitness to address doping accusations. Thus, it is important to understand their parallel development and the various influences that have shaped their dispute resolution procedure and doctrine. This understanding is also crucial to appreciate what the two have achieved, and have yet to achieve.

The CAS was created to bring order to the chaotic and inconsistent world of international sports adjudications. These had previously been handled by various bodies with different ideologies and far-ranging adjudication and settlement methodologies. Similarly, the AAA-CAS was created to deal with the chaotic, inconsistent, and perhaps even corrupt adjudication system administered by United States national governing bodies (“NGBs”).²³ In forging these two new institutions, the United States Olympic Committee (“USOC”) looked to the most established and successful examples of private dispute settlement: commercial arbitration. Thus, bodies such as the International Chamber of Commerce were drawn from, and AAA-CAS went as far as adopting (with modifications) the Commercial Arbitration Rules of the American Arbitration Association. Finally, both institutions, in ironically lock-step procession, amended their operating rules to respond to doubts about their independence: the CAS created the International Council of Arbitration for Sport (“ICAS”) in 1994 and the AAA-CAS amended its Supplementary Procedures as recently as 2005.

This Section will fully explore the history, relationship, and operating rules of CAS and AAA-CAS.²⁴ This exploration will demonstrate the influence that the commercial arbitration model has had on both institutions, and the additional influence of civil law traditions on CAS. Through this exploration, some of the structural weaknesses, with regards to handling doping cases, will be exposed.

A. *History and Development of the CAS*

The history of CAS is one of dramatic transformation that led to its now prominent role in the sports world. Its origins and initial structure raised doubts about its ability to be impartial. This initial concern has

23. A national governing body is the organization that operates on behalf of the International Federations (“IFs”) within each individual country. Straubel, *supra* note 7, at 532. The IFs sit just below the IOC and each IF governs an individual sport. *Id.* The IFs can only operate with the “blessing” of the IOC to have its sport become part of the Olympic games. *Id.* Both the CAS and the AAA-CAS were created by the United States Olympic Committee (“USOC”), in large part as a response to a flood of international criticism that the decisions of United States NGBs and the USOC on doping cases were nothing more than cover-ups. *See id.* at 525–40 (detailing several incidents of sport doping and how it was handled by the nation’s NGBs).

24. *See infra* Parts II.A–B (explaining the history and development of the CAS and the AAA-CAS).

been quelled, however, by change and expansion within CAS, a malleability that has garnered respect from the international community, and hopefully speaks to its ability to confront further problems moving forward.

1. Origins of the CAS

The attempt to create a single tribunal to settle the growing number of international sports disputes began with an International Olympic Committee (“IOC”) working group headed by IOC member and International Court of Justice Judge Kéba Mbaye in 1982.²⁵ This working group set out to create a tribunal that could settle international disputes quickly and inexpensively,²⁶ and this resulted in the establishment of the Statute of the Court of Arbitration for Sport.²⁷ This statute was ratified by the IOC in 1983 and CAS began operation in 1984.²⁸

The Statute of the Court of Arbitration for Sport required a master list of sixty arbitrators for parties to choose from. Fifteen of these arbitrators were appointed by the IOC, fifteen by the International Federations (“IF”), fifteen by the National Olympic Committees (“NOCs”), and the final fifteen were appointed by the IOC President from outside the other three groups (IOC, IF, and NOC).²⁹ The original statute created only a single division, as compared to the Ordinary Division and Appellate Division established later.³⁰ All of the CAS’s operating expenses were covered by the IOC and, in turn, only the IOC could amend the statute.³¹

From 1984 to 1991, the CAS saw very few disputes generally, and virtually no disciplinary cases.³² This changed in 1991, however, when the International Equestrian Federation (“FEI”) adopted a CAS model

25. See COURT OF ARBITRATION FOR SPORT, DIGEST OF CAS AWARDS II 1998–2000 xxiv (Matthieu Reeb, ed. 2002) (describing the creation of statutes that would ultimately be known as the “Court of Arbitration for Sport”).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at vii.

30. See *infra* Part II.A.2 (explaining fully the transformation of the tribunals in light of cases arising in the early to mid-1990s).

31. *Gundel v. CAS*, CAS 119 (March 15, 1993), DIGEST OF CAS AWARDS 1986–1998 271 (Matthieu Reeb, ed. 1998), available at <http://kluwerarbitration.com> (last visited Feb. 2, 2005).

32. To illustrate the changing demands on the CAS, between 1984 and 1991 only 34 requests for arbitration were filed with the CAS, whereas in 2003 there were 107 filed. See Arbitration for Sport, Statistics, tbl. 1, available at <http://www.tas-cas.org/en/stat/frmstat.htm> (last visited Apr. 17, 2005).

clause that, in essence, granted the right to appeal disciplinary decisions to the CAS.³³ Even though the CAS did not at that time have an appellate division, FEI decisions taken to the CAS were treated like appeals, with *de novo* review provided.³⁴

2. 1994 Challenge and Changes

In 1993, Elmar Gundel, a German-born jockey, appealed an FEI disciplinary decision to the CAS.³⁵ Unhappy with the subsequent CAS decision that basically upheld the FEI decision, Gundel challenged the impartiality and independence of the CAS under the Swiss Statute on Private International Law.³⁶ The essence of Gundel's claim was that the CAS was controlled by, or was not strictly independent from, the IFs and the FEI, as one of the IFs. While the Swiss Federal Tribunal³⁷ found the CAS to be independent from the IFs, it expressed concern about the CAS's independence from the IOC.³⁸ The Swiss Federal Tribunal pointed to three connections between the IOC and the CAS that raised concern about the CAS's independence: (1) the CAS was almost entirely funded by the IOC; (2) the IOC appointed up to half of the arbitrators to the master list; and (3) only the IOC could amend the CAS Statute.³⁹

As a direct result of the *Gundel* decision, the CAS redrafted its basic enabling statute, the Statute of the Court of Arbitration for Sport, to address the concerns of the Swiss Federal Tribunal.⁴⁰ In the Code of

33. See COURT OF ARBITRATION FOR SPORT, DIGEST OF CAS AWARDS II 1998–2000 xxv–xxvi (Matthieu Reeb, ed. 2002) (adopting the CAS model arbitration clause binding the parties to the judgment and mandating their cooperation).

34. Under the Statute of the Court of Arbitration for Sport, all cases were treated as an initial arbitrations. Therefore, all were decided as if they were being heard for the first time, with both judgments of fact and law vulnerable to review.

35. See COURT OF ARBITRATION FOR SPORT, DIGEST OF CAS AWARDS II 1998–2000 xxv (Matthieu Reeb, ed. 2002) (reducing the period of suspension for horse rider, but upholding the imposition of a fine).

36. See *id.* at xxvi (Matthieu Reeb, ed. 2002) (noting how the *Gundel* judgment led to major reform of the CAS).

37. The Swiss Federal Tribunal acts as a supreme court for questions of federal law in Switzerland as opposed to questions of canton law. Cyrill P. Rigamonti, *The New Swiss Constitution and Reform of the Federal Judiciary*, at <http://jurist.law.pitt.edu/world/swisscor1.htm> (last visited April 13, 2005).

38. See *A. & B. v. Int'l Olympic Comm., Swiss Fed. Tribunal (1st Civ. Chamber) Judgment of 27 May 2003*, at para. 3 (discussing a case brought against two cross-country skiers competing in the 2002 Olympic Winter Games in Salt Lake City, Utah where the plaintiffs argued that “the CAS [was] not an independent tribunal in a dispute in which the IOC [was] a party”).

39. *Id.*

40. See COURT OF ARBITRATION FOR SPORT, DIGEST OF CAS AWARDS II 1998–2000 xxvi (Matthieu Reeb, ed. 2002) (discussing the revision of the statute to make it more efficient).

Sports-related Arbitration, the CAS adopted three major changes. First, the Code created the ICAS, which was designed to stand between the CAS, as the arbitration body, and the IOC, as the administrative body, by carrying out many management functions.⁴¹ The ICAS was now responsible for approving the appointment of arbitrators to the master list, hearing challenges to arbitrators, and setting the CAS's budget.⁴² Second, the CAS's funding was diversified to include other sources, thus reducing the IOC's percentage of the funding.⁴³ Third, the CAS was divided into an Ordinary Division and an Appellate Division.⁴⁴ The Ordinary Division was charged with management of first time disputes (mainly those of a commercial nature) while the Appellate Division was designed to handle appeals from IF disciplinary decisions.⁴⁵

3. 1996 Additions

In 1996, the CAS family—and hence level of service—expanded further when it established two decentralized offices and an ad hoc tribunal at the Atlanta Olympic Games.⁴⁶ The two decentralized offices, one in North America and the other in Australia, were established to allow for local dispute settlements. In accordance with its local focus, the North American office uses American Arbitration Association administrators and arbitrators, and has its own set of procedural rules. Despite these local characteristics, AAA-CAS

41. See *A. & B.*, Swiss Fed. Tribunal at para. 3.3.1 (describing the events leading toward the creation of ICAS and its structure and function); CAS CODE, *supra* note 8, at S2 (stating that the “task of ICAS is to facilitate the settlement of sports-related disputes through arbitration and mediation and to safeguard the independence of the CAS and the rights of the parties”).

42. See CAS CODE, *supra* note 8, at B.

S6. The ICAS exercises the following functions:

3. It appoints personalities who are to constitute the list of arbitrators and the list of CAS mediators and can remove them from lists (Article S3);

4. It exercises those functions concerning the challenge and removal of arbitrators, and any other functions which the Procedural Rules confer upon it;

....

5.2. It approves the ICAS budget prepared by the CAS Court Office.

Id.

43. *A. & B. v. Int'l Olympic Comm.*, Swiss Fed. Tribunal (1st Civ. Chamber) Judgment of 27 May 2003, at para. 3.3.1, *translation available at* <http://www.spotrecht.org/urteile/SchwBGzuTAS.pdf> (last visited Apr. 23, 2005).

44. See CAS CODE, *supra* note 8, at S3 (“It comprises an ordinary Arbitration Division and an Appeals Arbitration Division.”).

45. COURT OF ARBITRATION FOR SPORT, DIGEST OF CAS AWARDS II 1998–2000 xxviii (Matthieu Reeb, ed. 2002).

46. *Id.*

decisions may still be appealed to the CAS.⁴⁷

Since the Atlanta ad hoc tribunal in 1996, other ad hoc tribunals have been established at the 1998 Nagano, 2000 Sydney, 2002 Salt Lake City, and 2004 Athens Olympic Games. An ad hoc tribunal was also established at the Kuala Lumpur Commonwealth Games in 1998.⁴⁸ The primary responsibility of these ad hoc tribunals is to quickly decide disputes, within twenty-four to forty-eight hours.⁴⁹ They achieve this shortened process by employing a separate set of operating rules from the two permanent divisions, and by selecting arbitrators from a list of twelve.⁵⁰

B. CAS Rules and Regulations

This survey of the procedural and operating rules employed by the CAS will reveal two separate roles filled by the organization, and the tension spawned by these disparate functions. On one hand, the CAS functions as a private dispute settlement body, with a corresponding emphasis on confidentiality and informal procedures. Alternatively, the CAS must also act as a public settlement body, with a need to create precedent and behave like a traditional court. Emblematic of this division are two unwritten CAS procedures: (1) the use of the CAS clerks to brief arbitrators; and (2) the decision to publish some awards and not others. In order to further develop and meet evolving challenges properly, these contradictions will have to be identified and addressed.

1. CAS Rules

The CAS is based in Lausanne, Switzerland and is divided into two divisions: an Ordinary Division that hears initial cases and an Appeals Division that handles review of decisions from other sports bodies. The Code of Sports-Related Arbitration contains rules common to both divisions as well as rules specific to each of the two divisions.

2. Common Rules

Lausanne is the seat of all arbitration proceedings, regardless of

47. See AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-49A (explaining that appeals may be made either by the athlete or by the applicable IF and appeals filed under these rules are heard in the United States).

48. COURT OF ARBITRATION FOR SPORT, DIGEST OF CAS AWARDS II 1998–2000 xxix (Matthieu Reeb, ed. 2002).

49. *Id.*

50. *Id.*

where they are physically held.⁵¹ Effectively, this ensures that certain municipal laws of Switzerland will govern all arbitrations.⁵² An arbitration will be conducted in either English or French depending on the parties' agreement.⁵³ In the event that the parties cannot agree on a language, the president of the division will choose either French or English.⁵⁴

The list of potential arbitrators for both panels is created by the ICAS.⁵⁵ Although the ICAS selects arbitrators for the master list, three-fifths of that list consists of arbitrators first nominated by the IOC, IFs, and NOCs, diluting the ICAS power of appointment.⁵⁶ The remaining two-fifths are to be—in equal parts—selected with an eye toward protecting the interests of athletes, and thus independent from the IOC, IFs, and NOCs.⁵⁷ Further, the master list of arbitrators shall be a fair representation of the continents and different judicial cultures of the world.⁵⁸ Each arbitrator must be legally trained, possess recognized competence in sports law or international arbitration, and have a command of either French or English.⁵⁹ Each arbitrator serves a renewable four-year term on the master list and takes an oath to be objective and independent.⁶⁰ Finally, each arbitrator must disclose any

51. CAS CODE, *supra* note 8, at S1.

52. According to the analysis of several courts and the Presidents of the CAS ad hoc Divisions for the Atlanta and Sydney Games, there is a separation between the legal seat of an arbitration and the physical site of an arbitration. The legal seat of the arbitration is a choice of the municipal law that will govern the procedure of the arbitration and any challenge to the result of the arbitration. Therefore, by choosing Lausanne, all CAS arbitrations are governed only by Swiss law. Specifically, when a hearing is physically held outside Switzerland, and one party is not Swiss, Chapter 12 of the Swiss Private International Law Act will govern. *See Raguz v. Sullivan & ORS*, Supreme Ct. of New South Wales Ct. App. 240 (Sept. 1, 2000) (holding that the agreement in this case was not a “domestic arbitration agreement because the agreed judicial ‘seat’ or ‘place’ of arbitration was Switzerland”); *Union of India v. McDonnell Douglas Corp.*, 2 Lloyd’s Rep. 48, Queen’s Bench Div., Comm. Ct. (Dec. 22, 1992) (finding that the arbitration clause provided London as the seat of arbitration and the procedure was to be conducted in accordance with the supervisory jurisdiction of the English Courts).

53. CAS CODE, *supra* note 8, at R29.

54. *Id.*

55. *Id.* at S6 & S14.

56. One-fifth of the list of CAS arbitrators shall be selected from persons nominated by the IOC, another one-fifth from a list nominated by the IFs, and another one-fifth from a list nominated by the NOCs. CAS CODE, *supra* note 8, at S14.

57. One-fifth of the list of arbitrators are to be appointed with the view of safeguarding the interests of athletes and another one-fifth of the list is to be persons independent of the IOC, IFs, and NOC. However, the Code does not detail how these potential arbitrators are to be identified. *Id.*

58. *Id.* at S16.

59. *Id.* at S14.

60. *Id.* at S13, S18.

circumstances that call into question his or her objectivity and independence.⁶¹ Any party can then challenge an arbitrator to the ICAS Board.⁶²

3. Ordinary Division Rules

The Ordinary Division handles the initial cases brought to the CAS; because of this singular purpose, some of its rules differ from the Appeals Division, which handles review.

a. Application and Jurisdiction

The CAS Procedural Rules govern any dispute referred by agreement of the parties to the CAS for resolution.⁶³ The CAS will resolve any dispute involving sport-related activity, including pecuniary matters.⁶⁴ The Ordinary Division hears cases at their initial stage, as opposed to appeals from previous decisions, including giving advisory opinions.⁶⁵ Ordinary Division cases are governed by the General Provisions of the Procedural Rules and the Special Provisions applicable to Ordinary Arbitration Procedure.⁶⁶ Although it previously appeared that any USADA case taken directly to the CAS under Supplementary Procedure Rule 57 would be heard by the Ordinary Division, the 2005 version of the Supplementary Procedures and USADA protocol negated this “direct” option.⁶⁷

b. Administration

The President of the Ordinary Division is responsible for administering the division, with some help from the Secretary General.⁶⁸ The President’s duties include ensuring the seamless nature of the proceedings, ordering provisional measures, and appointing arbitrators when the parties are unable to agree (on the make-up of the arbitration panel).⁶⁹ The Secretary General reviews all awards before they become final to make “rectifications of pure form” and potentially

61. *Id.* at R33.

62. *Id.* at R34.

63. *Id.* at R27.

64. *Id.*

65. *Id.* at S20.

66. *Id.* at R38–46.

67. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-57.

68. Of course, the administration of individual hearings is primarily in the hands of each panel, with a supervisory role for the President of the panel.

69. CAS CODE, *supra* note 8, at S20, R37, and R40.1. The President of the Division can order provisional measures until the case file has been transferred to the panel. Then the panel is empowered to order provisional measures. *Id.* at R37.

draw the panel's attention to fundamental issues of principle.⁷⁰

c. Pre-Hearing Procedures

The Code of Sports-Related Arbitration ("the Code") does not call for pre-hearing conferences and meetings as the AAA-CAS and Supplementary Procedures do. However, the parties can submit requests for provisional measures to the President before the panel is confirmed.⁷¹ When such a request is made, except in the case of extreme emergencies, the responding party is given ten days to offer counter arguments.⁷² Then, in making a provisional request, the requesting party is considered to have waived the right to request relief from a state authority.⁷³

In addition to provisional measures, in a further nod to pre-hearing procedures, the Code permits the parties to request an order for the production of documents and the examination of witnesses from the panel.⁷⁴ It is not clear from the Code text, however, whether such requests may be made before the commencement of the hearing, in the manner of pre-trial discovery, or simply during the hearing process.⁷⁵ Besides these allowances, there does not appear to be much in the way of pre-hearing discovery available to the parties.

d. Hearing Process

The hearing process begins with written submissions from both sides. The applicant's initial submission must include a statement of the claim, any written evidence to be submitted, and a list of witnesses and experts intended to be called.⁷⁶ The respondent's initial submission must include a response to the claim, written evidence, and a witness and expert list.⁷⁷ The applicant is then allowed a reply and the respondent a second response.⁷⁸ After all of the written submissions have been

70. *Id.* at R46. The scope of the Secretary General's power to review decisions does not read clearly, rather in a possibly open-ended way. Rule 46 could be read as stating that a decision does not become final until the Secretary General has approved the decision, including the power to force changes to the decision on matters of fundamental issues of principle.

71. *Id.* at R37.

72. *Id.*

73. *Id.*

74. *Id.* at R44.3.

75. Rule 44.3 states that the panel may address orders at "any time," which suggests that the order can be made before the hearing has begun. *Id.* However, Rule 44.3 is a subpart of Rule 44, which is dedicated to the hearing process as opposed to a pre-hearing process. *Id.*

76. *Id.* at R44.1.

77. *Id.*

78. *Id.*

proffered, the panel, after consulting with the parties, may hold an oral hearing.⁷⁹

In the case of a hearing, the panel president oversees and is particularly responsible for ensuring that the statements are concise and relevant to the written submissions.⁸⁰ Witnesses are “invited” to tell the truth under the sanction of perjury and the panel may exclude witnesses for irrelevance.⁸¹ Additionally, the hearings are closed and the awards private unless the parties agree otherwise.⁸² Considering the limited structural extent regarding hearings in the Code, it is evident that the President and Panel have a great deal of discretion over the operation of hearings.

The Code does not contain a specific reference to the evidentiary rule that will apply during a hearing, aside from the obligations of the President of the panel to ensure that statements be concise and relevant.⁸³ The Code does, however, specifically speak to the production of evidence prior to the hearing. Parties may request that the panel order the production of documents, if the requesting party can demonstrate that the documents exist and are relevant.⁸⁴ Further, the panel may order, on its own motion and for its own needs, the production of documents, witnesses, and experts.⁸⁵

The substantive law that governs the dispute will be the law chosen by the parties, and includes the equitable principle *ex aequo et bono*. Failing an agreement between the parties, Swiss law will be used.⁸⁶ Panel decisions are to be achieved by majority vote, or if a majority cannot be obtained, then by the President of the panel.⁸⁷

The award is to be written and briefly state the panels’ reasoning, unless the parties agree otherwise.⁸⁸ An award is not final, however, until the CAS Secretary General has reviewed the decision and has

79. *Id.* at R44.2, 44.1.

80. *Id.* at R44.2.

81. *Id.* at R44.2. The Code does not elaborate as to how the penalty of perjury will be pursued or enforced.

82. *Id.* at R44.2, 43.

83. *Id.* at R44.2.

84. *Id.* at R44.3. The requirement that the party prove relevancy prior to the production of the document follows the continental view of discovery rather than the United States’ view, which allows production of evidence that may lead to admissible evidence.

85. *Id.*

86. *Id.* at R45.

87. *Id.* at R46.

88. *Id.* While the decision must be brief, perhaps following in the civil law tradition, it cannot be too brief in order to allow the Secretary General to review the decision for fundamental issues of principle.

called the Panel's attention to any fundamental issues of principle overlooked by the Panel.⁸⁹

e. Appeals Division

In cases where there is an appeal, matters are shifted from a sports body or the Ordinary Division to the Appeals Division.

i. Jurisdiction and Administration

The Appeals Division has jurisdiction and the Appeals Division's procedural rules apply when an appeal is taken from a sports body's decision, provided that the sports body's rules permit such an appeal and all other remedies have been exhausted.⁹⁰ The Appeals Division also has jurisdiction if the parties specifically agree to its jurisdiction.⁹¹ An appeal must be made within twenty-one days of the lower decision to trigger the Appeals Division's jurisdiction.⁹²

Oversight and administration of Appeals Division cases is handled by the Appeals Division's President.⁹³ The Division President is given specific power to combine appeals that contain the same issues and oversee the appointment of the arbitrators.⁹⁴

ii. Hearing Process

As an appellate tribunal, the Appeals Division needs few pre-hearing procedures. However, the applicant, in the statement of appeal, may request a stay of the decision originally rendered by the sports body.⁹⁵ Apparently, this kind of a request is decided by the Appeals Division President without further proceedings.⁹⁶

The hearing process, which must be completed (completion is indicated by the publishing of the panel's written decision) within four months of the filing of the statement of appeal, is initiated with the applicant's brief. The brief must include a statement of the facts, legal

89. *Id.* The extent of the Secretary General's power to force a change in the award is unclear from Rule 46.

90. *See id.* at R47 (providing for an appeal against the decision of a federation, association, or sports-related body, as well as against the CAS acting as a first instance tribunal).

91. *Id.*

92. *Id.* at R49.

93. *Id.* at R49-56 (containing provisions that give the President powers such as the power to form a panel in the absence of an agreement and the power to authorize direct examination of parties, witnesses, and experts).

94. *Id.* at R53, R54.

95. *Id.* at R48.

96. *Id.* The rule does not provide for a hearing. *Id.* Therefore, the only logical conclusion is that no other formalities are required before the President can grant the stay.

arguments, all exhibits and evidence, a list of all witnesses and experts that the applicant intends to call at the hearing, any witness statements, and any request for "other evidentiary measures."⁹⁷ The respondent must then submit an answer that includes the items required in the applicant's brief, plus any counterclaims.⁹⁸ The breadth and detail of the two briefs should be comprehensive when compared with a traditional appellate brief, because the Appeals Divisions hears the case *de novo*. Thus, the panel has full power to review both the facts and law and to either issue a new decision or refer the case back to the original sports body for reconsideration.⁹⁹

The applicable substantive law governing the hearing is the law chosen by the parties, which in most cases will be the rules of the sports body.¹⁰⁰ When the parties have not agreed on the substantive law, the law of the country of the sports body's domicile will be used.¹⁰¹ Regardless of the law that governs the appeal, a panel may use general rules of law it deems appropriate and necessary to help interpret IF rules and fill gaps in those rules.¹⁰² Panels must then explain why it was necessary to use such rules to supplement the chosen law and rules.¹⁰³

The hearing itself is controlled by the Panel President, who directs the examination of witnesses and any oral argument.¹⁰⁴ The decision of the panel is to be taken by majority vote and in the failure of a majority, taken by the President of the Panel.¹⁰⁵ The decision is to be written and made public unless the parties agree otherwise.¹⁰⁶ However, as stated above, the decision is not final until the CAS Secretary General has reviewed the decision and drawn the panel's attention to fundamental issues of principle.¹⁰⁷

4. AAA-North American Rules

Cases initiated by the USADA are procedurally governed by the Commercial Arbitration Rules and Mediation Procedures ("Commercial

97. *Id.* at R51. Although the rule does not explicitly define "other evidentiary measures," this open-ended language seems to indicate a general policy of providing wide latitude to the arbitrators in the process.

98. *Id.* at R55.

99. *Id.*

100. *Id.* at R58.

101. *Id.*

102. *Id.* at R58.

103. *Id.*

104. *Id.* at R57.

105. *Id.* at R59.

106. *Id.*

107. *Id.* at R59.

Rules”) of the American Arbitration Association (“AAA”) as modified by the Supplementary Procedures for Arbitration of Olympic Sport Doping Disputes (formerly Supplementary Procedures).¹⁰⁸ In most instances, the provisions of the Commercial Rules have been replaced by the Supplementary Procedures to the point that the Commercial Rules play virtually no role in governing the arbitration. The resulting combination or synthesis of the procedural rules can be divided, for the purposes of analysis, into the categories of: (1) application and jurisdiction; (2) administration; (3) pre-hearing procedures; (4) hearing procedures; and (5) post-hearing and appeal. The rules governing the composition and selection of panel members will be covered in the Section below.

a. Application and Jurisdiction

Both the Commercial Rules and the Supplementary Procedures apply to cases that arise out of the USADA’s Protocol for Olympic Movement Testing.¹⁰⁹ Once an athlete has tested positive for a prohibited substance, the USADA Review Board review has been completed, and the USADA has consequently decided to prosecute an athlete, then the Commercial-Supplementary Procedure Rules will apply.¹¹⁰ Although proceedings under the Supplementary Procedures are initiated when the USADA serves notice on the athlete, it appears, though not explicitly stated in the Supplementary Procedures, that the Supplemental Procedures do not apply to the USADA Review Board process.¹¹¹

108. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-1.

109. *Id.*

110. UNITED STATES ANTI-DOPING AGENCY, PROTOCOL FOR OLYMPIC MOVEMENT TESTING at <http://www.usantidoping.org/files/active/what/protocol/pdf> [hereinafter USADA PROTOCOL] (effective as of Aug. 13, 2004). Under the United States Anti-Doping Agency’s Protocol, once an athlete’s A-sample has tested positive for a prohibited substance, a specific set of procedures is initiated. *Id.* at § 8. First, the athlete is notified of the positive result, and is notified of his right to be present with a witness at the testing of a B-sample. *Id.* at § 8(b). He is also supplied with laboratory documents from the A-sample testing process. *Id.* If the B-sample test is positive, USADA’s Anti-Doping Review Board reviews the test result and any documentary evidence submitted by the athlete to determine if there is sufficient evidence of doping to justify a hearing. *Id.* If the Review Board finds sufficient evidence USADA may, in its discretion, charge the athlete with a doping offense. *Id.* at §§ 8–9; *see also* Straubel, *supra* note 7, at 563–64 (outlining the USADA’s procedure for taking two samples from athletes).

111. USADA notifies an athlete that his or her A-sample tested positive. USADA PROTOCOL, *supra* note 110, at § 8. This notification may be considered the notification which triggers the application of the Supplementary Procedures under Rule 4; however, this is likely not the case. Rule 1 reads that “these Supplementary Procedures shall apply to arbitrations.” AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-1. Rule 4 reads that “Arbitration proceedings shall be initiated by USADA by sending a notice to the athlete . . .” *Id.* at R-4. Thus, Rule 1 and Rule 4, read alone, could be interpreted to say that the Supplementary Procedures apply to section 8(b) notification of the A-positive test results. *See* USADA

Therefore, it appears that two separate notifications of the athlete are contemplated. The first notification occurs when an athlete's A-sample has tested positive but before the B-sample is tested. The second notice occurs after the review board process has been completed and the USADA has made the administrative decision to prosecute the athlete.¹¹² After the AAA-CAS hearing, the athlete may choose to have the matter decided by a CAS Appeals Panel. The CAS appeal hearing, despite taking place in the United States, is administered by the CAS's Lausanne Office, using the CAS Appeals Division rules.¹¹³

b. Administration

According to the Supplementary Procedures, doping cases are administered by the AAA through an AAA Vice-President, who is also the Secretary for the North American, Central American, and Caribbean Islands decentralized office of the CAS.¹¹⁴ However, it appears that in practice USADA doping cases are administered by the AAA's case

PROTOCOL, *supra* note 110, at § 8(b) (detailing the procedures by which the USADA notifies an athlete of the test results). But section 9(a)(i)(5) of the USADA Protocol reads "the process before the Review Board shall not be considered a 'hearing.'" *Id.* at § 9(b)(v). If an arbitration is considered a hearing, then the first notice does not trigger the application of the Supplementary Procedures.

112. USADA PROTOCOL, *supra* note 110, at § 9. It could be argued that the first notice is notice of an administrative process that does not trigger procedural protections, and that the second notice is notice of an adjudicative process that does involve and trigger procedural protections.

113. Many questions remain about CAS-administered arbitrations held in the U.S. as is permitted by Rule 49A. The first question is whether the arbitration would be considered an initial arbitration and governed by the rules of the Ordinary Arbitration Division, or whether it would be considered an appeal and governed by the rules of the Appeals Division. The second question is—since the hearing must be held in the United States—whether Swiss or United States public law and choice of law rules would apply. For example, while Rule 57 states that the CAS decision "shall be final and binding and shall not be subject to further review or appeal except as permitted by the Swiss Federal Judicial Organization Act or the Swiss Statute on Private International Law," because the hearing is being held in the United States, it might also be governed by the Federal Arbitration Act. CAS CODE, *supra* note 8, at R57. Application of the Federal Arbitration Act ("FAA") would occur under the following reasoning. First, the Act applies to "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising." 9 U.S.C. § 2 (2000). Second, the term "involving commerce" has been equated to Congress's power to regulate under the commerce clause. *See Snyder v. Smith*, 736 F. 2d 409, 418 (7th Cir. 1984) (interpreting the "involving commerce" requirement not as a limitation but a qualification suggesting that Congress intended the FAA to apply to all contracts that it constitutionally could regulate), *overruled on other grounds by Felen v. Andreas*, 134 F.3d 873 (7th Cir.1998). Finally, the Supreme Court found, in *Flood v. Kuhn*, that professional baseball is a business which engages in interstate commerce. Therefore, if Olympic Movement sports are considered now similar to professional baseball, the arbitration of disputes arising out of Olympic Movement sports involves interstate commerce and is therefore "commercial." *Flood v. Kuhn*, 407 U.S. 258, 282–83 (1972).

114. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-2.

management office.¹¹⁵ Thus, the Secretary of the North American decentralized CAS serves primarily as a communication link between the AAA and the CAS's Lausanne Office.

c. *Pre-Hearing Procedures*

Pre-hearing procedures are the same under the Commercial Rules and the Supplementary Procedures, and fall into two categories: (1) pre-panel selection; and (2) post-panel selection. Before the arbitrator(s) have been selected, the AAA, at the request of the parties or at the AAA's initiative, can hold an administrative conference.¹¹⁶ The conference is conducted by the AAA, and may address any administrative matter including arbitrator selection and discovery. Once the arbitrator(s) are selected, control of the proceedings shifts from the AAA to the panel of arbitrators.

After establishment of the panel, the parties, arbitrators, or AAA can request a preliminary hearing.¹¹⁷ At the preliminary hearing the parties discuss the scheduling of the rest of the process and the narrowing of the issues.¹¹⁸ At this stage the arbitrators may order interim measures, including injunctive relief and discovery requests.¹¹⁹ The parties may request the production of documents, the identity of witnesses to be called, and any other pertinent information.¹²⁰

d. *The Hearing*

After the 2004 amendments to the Supplementary Procedures there is no longer a time limit for completing the arbitration process, only interim limits within the process. The arbitrators, however, are given the authority to shorten the time limits as necessity dictates, particularly in the case of protected competitions.¹²¹ Further, even though the

115. E-mail from Mr. Brian Winn, District Vice President for the AAA, Atlanta Regional Office, to Michael S. Straubel, Associate Professor of Law, Valparaiso University (June 16, 2004, 13:26:36 CST) (on file with author).

116. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-10; AMER. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R9 (July 1, 2003) [hereinafter AAA COMMERCIAL ARBITRATION RULES], available at <http://www.adr.org/sp.asp?id=22440> (last visited Apr. 30, 2005).

117. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-22; AAA COMMERCIAL ARBITRATION RULES, *supra* note 116, at R20.

118. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-22; AAA COMMERCIAL ARBITRATION RULES, *supra* note 116, at R20.

119. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-36; AAA COMMERCIAL ARBITRATION RULES, *supra* note 116, at R34.

120. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-23; AAA COMMERCIAL ARBITRATION RULES, *supra* note 116, at R21.

121. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-24. Protected

standard order of proof presentation is called for,¹²² the arbitrators have the authority to alter the proceeding as needed, provided that the parties are treated equally and each party is given a fair opportunity to present its case.¹²³ In other words, arbitrators have a large degree of autonomy to manage and control each particular hearing process as they see fit, as long as basic notions of due process are followed.¹²⁴

During the hearing, the substantive rules governing the question of whether a doping offense has occurred is now governed by the World Anti-Doping Code. Should the World Anti-Doping Code not address an issue, the USADA Protocol, USOC National Anti-Doping Policy, and applicable IF rules will be used.¹²⁵ Prior to their amendment in 2005, the Supplementary Procedures specifically allowed for the mitigation of the Anti-Doping Code and IF rules by the principles of CAS precedent. The reason for this change is unknown. Further, neither the Commercial Rules nor the Supplementary Procedures provide for a method of selecting a fall-back body of national substantive law, a contingency the rules of the European CAS do provide for.¹²⁶ Thus, in a case where a back-up substantive law is needed, it must be asked whether the process provided in the European CAS's rules will be used—or should be used—in order to create uniformity and predictability in the Global CAS system.¹²⁷

During a hearing, standard rules of evidence need not be followed.¹²⁸ Nevertheless, to be admitted, evidence must be relevant and material.¹²⁹ Additionally, the arbitrators are required to recognize legal privileges and may subpoena witnesses when necessary.¹³⁰ While the World Anti-

competitions are the most important events and include the Olympic and Pan American Games.

122. Supplementary Procedures Rule 32 states that the claimant, USADA, shall first present its case, and then the respondent, the athlete, shall present his or her case. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-32. Beyond those simple guidelines, there are no dictates as to the conduct of the hearing. The process is left to the discretion of the arbitrators. *Id.*

123. *Id.*

124. Though not due process in the Constitutional sense, as interpreted by attorneys in the United States attorneys, the requirement of a fair hearing will undoubtedly be viewed as a minimal level of procedural due process.

125. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-33(e).

126. See CAS CODE, *supra* note 8, at R45 (stating that Swiss law will apply if the parties did not choose a law to govern); *id.* at R58 (stating that, on appeal, the panel should apply the law chosen by the parties, or, in the absence of this choice, the country law where the sports body is domiciled, or according to laws that the panel deems appropriate).

127. If precedent is to be used and serve as a stabilizing tool, then one source of substantive law should also be used if consistency is to be achieved.

128. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-33(a).

129. *Id.* at R33(a), (b).

130. *Id.* at R33(c), (d).

Doping Code establishes the ultimate burden of proving a doping offense,¹³¹ the Supplementary Procedures establish a very important presumption and accompanying burden of proof: that the transportation, custody, and testing of an athlete's sample is presumed to be done properly and according to prevailing scientific standards.¹³² To rebut the presumption, an accused athlete need only submit counter-evidence to remove the presumption and have the USADA charged with the burden of proving proper custody and reliable testing by clear and convincing evidence.¹³³ It is uncertain, however, whether the USADA's burden on the question of sample testing will be to show that the testing process itself was properly carried out, or whether the proscribed process does in fact itself produce reliable results.¹³⁴

Hearings are to be private, with only concerned parties allowed to attend, unless the arbitrators decide otherwise.¹³⁵ Concerned parties can include the applicable IF's representatives, at the IF's election.¹³⁶ At the conclusion of the hearing process, the arbitrators must reach a decision by a majority vote. Additionally, the Supplementary Rules—as opposed to the Commercial Rules—then require a written, reasoned decision.¹³⁷

e. Post Hearing and Appeal

Because the AAA-CAS proceedings are initial hearings, decisions can be appealed to the European CAS.¹³⁸ However, that appellate hearing must be held in the United States,¹³⁹ which raises interesting questions of the law that might govern the hearing.¹⁴⁰ Finally,

131. *Id.* at R33(e). See WORLD ANTI-DOPING AGENCY, THE WORLD ANTI-DOPING CODE § 3.1 (Feb. 20, 2003), available at <http://www.cces.ca/pdfs/wada-wadc-Final-E.pdf> (last visited Apr. 23, 2005) [hereinafter WADA CODE] (establishing that the standard of proof will be whether the organization has established a violation to the comfortable satisfaction of the hearing body).

132. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-33(e).

133. *Id.*

134. The reliability of the testing procedure has been challenged in several CAS cases. See *infra* Part III.E.2 (noting several CAS cases where the reliability of the testing procedure has been challenged).

135. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-25.

136. *Id.* at R-4.

137. *Id.* at R-44. But see AAA COMMERCIAL ARBITRATION RULES, *supra* note 116, at R42(b) (providing that the arbitrator does not need to render a reasoned award unless one is requested in writing prior to appointment of the arbitrator or the arbitrator deems one necessary).

138. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-49.

139. *Id.*

140. When the hearing is physically held within the United States, public laws, such as the Federal Arbitration Act, could apply under the territorial principle of jurisdiction.

according to Rule 49(a) of the Supplementary Procedures, the decision of the European CAS is final and may only be challenged as is permitted by the Swiss Federal Judicial Organization Act or the Swiss Statute on Private International Law.¹⁴¹ However, the Federal Arbitration Act may be applicable despite the limitations contained in Rule 49(A).¹⁴²

III. QUESTIONS OF FAIRNESS AND CONSISTENCY

The CAS, and later AAA-CAS, were spawned from commercial dispute models.¹⁴³ However, both of these bodies are now being forced—because of the burgeoning questions surrounding drug use in international sport—into deciding disputes that are decidedly uncommercial in nature. In fact, these doping allegations, regardless of whether they are quasi-criminal in nature, or breach of contract in nature, are accusatory and therefore require a heightened level of fairness, apparent to all parties.

There are five areas in which the CAS and the AAA-CAS, because of this change in focus, need to address questions and concerns about their methods and the appearance of fairness: (1) in the selection of arbitrators to hear the cases; (2) CAS independence from the governing bodies of the Olympic Movement; (3) the choice of substantive law used in each case; (4) the development and use of precedent; and (5) the development and consistent use of key legal doctrines. In looking at these five areas of concern, it can be seen that the effort to create a unified international adjudication system has encountered bumps along the way. These bumps will be identified and then addressed with suggestions for the coming challenges in the future of international sport arbitration.

A. *The Arbitrator Selection Process*

The process of creating a master list of arbitrators has proven to be a very important question to the legitimacy of the CAS, and thus subject to litigation in the national courts of Switzerland and the United States.¹⁴⁴ Thus, the process and the litigation it has spawned must be

141. CAS CODE, *supra* note 8, at R49(A).

142. *See supra* note 113 and accompanying text (suggesting that the FAA may be applicable because it applies to arbitration of a contract “involving commerce” and interpreting this phrase to include professional sports).

143. *See supra* Part II (describing the origins of CAS and AAA-CAS).

144. For examples involving athletes and the use of arbitration under the CAS, see *Jacobs v. USA Track & Field*, 374 F.3d 85, 89 (2d Cir. 2004); *A. & B. v. Int’l Olympic Comm.*, Swiss Fed. Tribunal (1st Civ. Chamber) Judgment of 27 May 2003, *translation available at*

examined very closely in any appraisal of the CAS's legitimacy and potential to handle doping cases.

1. CAS Selection

The first step in the process of creating a CAS arbitration panel is the formulation of a master list of arbitrators from which to choose.¹⁴⁵ Then, from this list, arbitrators must be selected for both ordinary division and appellate division matters.¹⁴⁶

a. Creating the Master List

The lists of potential arbitrators for both the Ordinary and Appeals divisions are created by the ICAS.¹⁴⁷ However, while the ICAS selects the arbitrators for the master list, three-fifths of that list consists of arbitrators first nominated by the IOC, IFs, and NOCs.¹⁴⁸ The remaining two-fifths are to be, in equal parts, selected with an eye toward protecting the interests of athletes and to be independent from the IOC, IFs, and NOCs.¹⁴⁹ Further, the master list of arbitrators shall be a fair representation of the continents and different judicial cultures of the world.¹⁵⁰ Each arbitrator must be legally trained, possess recognized competence in sports law or international arbitration, be knowledgeable of sports in general, and have a command of either French or English.¹⁵¹ Each arbitrator serves a renewable four-year term on the master list and takes an oath to be objective and independent.¹⁵² Finally, each arbitrator must disclose any circumstances that call into question his or her objectivity and independence.¹⁵³ Any party can then challenge an arbitrator, and the challenge will be decided by the ICAS Board.¹⁵⁴

<http://www.spotrecht.org/urteile/SchwBGzuTAS.pdf> (last visited Apr. 23, 2005).

145. See *infra* Part III.A.1.a (describing the process of selecting arbitrators for a master list).

146. See *infra* Part III.A.1.b.i-ii (explaining the selection process).

147. CAS CODE, *supra* note 8, at S6, 14.

148. *Id.* at S14. One-fifth of the list of CAS arbitrators shall be selected from persons nominated by the IOC, another one-fifth from a list nominated by the IFs, and another one-fifth from a list nominated by the NOCs. *Id.*

149. *Id.* One-fifth of the list of arbitrators are to be appointed with the view of safeguarding the interests of athletes and another one-fifth of the list is to be persons independent of the IOC, IFs, and NOC. However, the Code does not detail how these potential arbitrators are to be identified. See *id.* (outlining who will make the list of potential arbitrators without clarifying how they are picked).

150. *Id.* at S16.

151. *Id.* at S14.

152. *Id.* at S13, 18.

153. *Id.* at S33.

154. *Id.* at R34.

b. Selecting Panel Members

Since the process for selecting panel members differs between the Ordinary and Appeals divisions, it is necessary to break up the processes into two separate Sections.

i. Ordinary Division

An Ordinary Division case is heard by either a single arbitrator or a panel of three arbitrators, as agreed to by the parties.¹⁵⁵ Failing an agreement, the choice of single arbitrator or panel is determined by the President of the Division.¹⁵⁶ The method of selecting the arbitrator(s) is also done according to the agreement of the parties.¹⁵⁷ In the absence of an agreement, if a single arbitrator is to be used, the President shall make the appointment.¹⁵⁸ If a panel of three is to be used, each party selects one arbitrator and the third arbitrator is selected by agreement of the appointed arbitrators.¹⁵⁹ In the case of more than two parties, the applicants and the respondents jointly appoint an arbitrator for each side to the panel, and the two appointed arbitrators select the third arbitrator.¹⁶⁰ If the three parties have divergent interests, and in the absence of an agreement selecting the arbitrators, the President appoints all three arbitrators.¹⁶¹ Finally, arbitrators are only considered officially appointed after the President of the Division has confirmed their appointment. In the confirmation process the President is to confirm that the arbitrators are independent as required by Code Rule 33.¹⁶² Unfortunately, the Code is silent on the extent of the President's power to block appointment at this stage.¹⁶³

ii. Appeals Division

The Code expresses a preference that appeals be heard by a panel of three arbitrators unless the parties agree on a single arbitrator at the outset, or alternatively if the President of the Division deems the appeal

155. *Id.* at R40.1.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at R41.1.

161. *Id.*

162. *Id.* at R40.3.

163. *Id.* R40.3 does not specify if the President may veto or reject the appointment of an arbitrator that does not meet the requirements of R33. *Id.* This power may be implied, otherwise the requirement would be a nullity. However, the Code gives exclusive right to disqualify arbitrators to the ICAS Board in R34. *Id.* at R34.

to be an emergency case that should be heard by a sole arbitrator.¹⁶⁴ If the appeal is to be heard by a single arbitrator, the arbitrator is appointed by the Division President.¹⁶⁵ On the other hand, if a panel is to hear the appeal, the applicant nominates an arbitrator in the statement of the appeal, and the respondent nominates an arbitrator within ten days of receiving the statement of appeal,¹⁶⁶ and the Division President names the President of the panel after consulting with the party appointed arbitrators.¹⁶⁷ All nominations become final only after the Division President confirms that each arbitrator is independent of the parties.¹⁶⁸

2. North American CAS

The recent amendments to the Supplementary Procedures seem to have addressed some of the concerns about the rules for selecting arbitrators for AAA-CAS panels. However, concerns about the creation of the master list, which ultimately leads to the panels, remain.

a. Creating the Master List

The arbitrator or arbitrators that will hear a USADA claim (or prosecution) are chosen from a combined roster composed of both AAA and CAS arbitrators.¹⁶⁹ In some cases, the parties may agree to have appointed an arbitrator who is not on the AAA-CAS roster.¹⁷⁰ In order to be named to the AAA-CAS Master list, the arbitrator must be approved by ICAS.¹⁷¹ The arbitrator then appears on both the CAS and

164. *Id.* at R50.

165. *Id.* at R54.

166. *Id.* at R48, 53.

167. *Id.* at R54.

168. *Id.* at R33, 54.

169. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-3. Also, arbitrators appointed to hear disputes brought under the AAA Commercial Rules, unless otherwise agreed, are drawn from an AAA created roster. AAA COMMERCIAL ARBITRATION RULES, *supra* note 116, at R3, 11.

170. While both the AAA Commercial Rules and Supplementary Procedures do not explicitly permit the parties to name arbitrators not on the national rosters, Rule 12 of the Commercial Rules states that when the parties agree on an arbitrator or a method to select an arbitrator, that agreement will be honored. Rule 12 goes on to require that the name and address of the arbitrator be sent to the AAA. The provisions of Rule 12 imply that the parties will name arbitrators unknown to the AAA. However, Rule 3 of the Supplementary Procedures reads that “[t]he Panel of Arbitrators for doping cases shall consist of the North American Court of Arbitration for Sport (CAS) Arbitrators who shall also be AAA Arbitrators.” But the title of Rule 3 is “National Pool of Arbitrators.” This may all be academic however, because athletes are unlikely to ask USADA before testing positive to agree to a non-AAA-CAS arbitrator and USADA is unlikely to agree to a non AAA-CAS arbitrator.

171. Although the Supplementary Procedures do not specifically state that ICAS must

AAA-CAS master list. The details of who nominates the AAA arbitrators to the ICAS are not covered in the Code or Supplementary Procedures, however, and inquiries of AAA and CAS officials have produced incomplete and conflicting answers.¹⁷²

b. Selecting Panel Members

Prior to the 2005 amendments to the Supplementary Procedures, the parties were free to agree on their own process for selecting arbitrators and failing such an agreement the Procedures called for a selection process that involved significant AAA involvement and discretion.¹⁷³ Now, after the 2005 amendments to the Procedures, the selection process is carefully proscribed and the role of the AAA is reduced.

The new selection process begins with the AAA sending a list of all the AAA-CAS arbitrators to the accused athlete and to the USADA.¹⁷⁴ A single arbitrator is to be chosen unless either party notifies the AAA within five days of its desire for a three arbitrator panel.¹⁷⁵ If a single arbitrator is chosen, the parties are first encouraged to agree upon that particular arbitrator.¹⁷⁶ Failing an agreement, each party is to strike up to one-third of the arbitrators from the list provided by the AAA and rank the remaining arbitrators.¹⁷⁷ The parties are then invited to “accept” or agree upon a mutually acceptable arbitrator from the combined preference list provided by the AAA.¹⁷⁸ If a mutually acceptable arbitrator cannot be found, the AAA will appoint the

approve AAA-CAS arbitrators appointed to the master list, ICAS must approve all arbitrators appointed to the CAS master list. *See supra* Part III.A.1.a (detailing creation of the CAS master list).

172. North American-CAS Regional Secretary Jennifer Coffman did not know how AAA-CAS arbitrators were nominated. E-mail from Jennifer Coffman, Regional Secretary, North American-Comm'l Arbitration for Sport, to Michael S. Straubel, Associate Professor of Law, Valparaiso University School of Law (June 7, 2004) (on file with author). AAA Vice-President Brian Winn believed that the USOC and USADA nominated the arbitrators to ICAS. E-mail response from Brian Winn, Vice President, AAA, to Michael S. Straubel, Associate Professor of Law, Valparaiso University School of Law (June 8, 2004) (on file with author). Requests to USOC General Counsel Jeffrey Benz and USADA General Counsel Travis Taggart have gone unanswered to date.

173. *See* AAA COMMERCIAL ARBITRATION RULES, *supra* note 116, at R12 (discussing the powers of the AAA). For example, under the 2000 Supplementary Prodedures the AAA chooses the ten arbitrators that the parties were allowed to select their “party-appointed” arbitrator from. Under the 2005 Supplementary Procedures the parties are permitted to select their “party-appointed” arbitrator from the entire master list of AAA-CAS arbitrators.

174. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-13(a).

175. *Id.* at R-13(b).

176. *Id.* at R-13(c).

177. *Id.*

178. *Id.*

arbitrator from the remaining members of the panel.¹⁷⁹

If the parties elect to use a three arbitrator panel, USADA first selects and notifies the AAA of its chosen arbitrator. The AAA then notifies the athlete of the USADA selection, after which the athlete has five days to make his or her selection.¹⁸⁰ The third arbitrator, and henceforth president of the panel, is selected by an agreement between the two chosen arbitrators.¹⁸¹ Should the appointed arbitrators be unable to agree, then the aforementioned process of selecting a single arbitrator is used.¹⁸²

All arbitrators selected to a panel, both the “party-appointed” arbitrators and the panel chair, are expected to be neutral.¹⁸³ Ensuring this fair-mindedness, both the party-appointed arbitrator and the panel chair can be disqualified for circumstances indicating a lack of impartiality or independence.¹⁸⁴ This includes “any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives.”¹⁸⁵ The AAA serves as the judge of whether an arbitrator shall be disqualified.¹⁸⁶ However, due to the use of anachronistic labels and uncorrected overlaps between the Supplementary Procedures and the Commercial Rules, only the panel chair is required to disclose circumstances affecting their neutrality. Further, the parties may only request the disqualification of a panel chair, not the other party-appointed arbitrator.¹⁸⁷ In the Commercial Rules and then the Supplementary Procedures, the panel chair is referred to as the “neutral arbitrator.”¹⁸⁸ Although all of the arbitrators are mandated to be neutral, this title is used for the panel chair because, unlike the party-appointed arbitrators who can communicate with the parties during the hearing, the panel chair has no contact with the parties and was not selected by the

179. *Id.* at R-13(c).

180. *Id.* at R-13(d)(i).

181. *Id.* at R-13(d)(ii).

182. *Id.*

183. *Id.* at R-12.

184. *Id.* at R-19.

185. *Id.*

186. *Id.*

187. 2005 Supplementary Procedure Rule 19 permits the parties to object to the service of the “neutral” arbitrator. Rule 12 states that party-appointed arbitrators may be disqualified for the reasons listed in Rule 19 but there is no express statement in the rules permitting the parties to object to the service of a party-appointed arbitrator. *Id.* at R-12, -19.

188. *Id.* at R-12, -19, -20; AAA COMMERCIAL ARBITRATION RULES, *supra* note 116, at R12, 13, 16, 17, 18.

parties.¹⁸⁹

B. Independence From Governing Bodies

One of the major challenges to the effectiveness and legitimacy of the CAS and AAA-CAS have been doubts about their independence. Questions of independence have been raised about the organizations' relative autonomy from the governing bodies of the Olympic Movement and about the independence of individual arbitrators within the organizations. Three specific situations raise doubts about independence: (1) the operation of CAS and AAA-CAS; (2) the creation of the master list of arbitrators; and (3) the appointment of an individual arbitrator to hearing panels. These separate concerns will be raised in turn with the second two combined into a single category on arbitrator independence.¹⁹⁰

1. CAS-Lausanne Independence

In order to keep their concerns separate and more easily understood, this Section, like the one before, will first examine the CAS in Lausanne, and then the North American-CAS. First, this Section will look at the institutional independence of the entire organization, and then the specific independence of the arbitrators and how the selection process potentially affects their level of independence.¹⁹¹

a. Institutional Independence

The independence of the CAS, as an institution, from the IOC and the rest of the bodies of the Olympic Movement was a concern early in the history of the CAS and remains—although at a much reduced level—a continuing concern. The foundation of this concern is the CAS's birth from the IOC and enduring dependence on the IOC and other Olympic Movement institutions for its funding.¹⁹² The fear is that at a minimum, the CAS will see the IOC and other governing bodies as its constituency and feel the need, however subtle, to please that constituency. This concern was perhaps most importantly expressed by the Swiss Federal Supreme Court in a 1993 judgment.¹⁹³ As a direct result of that

189. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 116, at R-18.

190. See *infra* Parts III.B.1-2 (commenting on the challenges and concerns raised by certain areas of CAS independence, or lack thereof).

191. See *infra* Part III.B.1.a-b (examining CAS independence).

192. See *supra* Part II.A.1 (detailing the genesis of CAS and its financial backing).

193. See *supra* Part II.A.2 (describing the *Gundel* case and its effects on CAS). The *Gundel* case was a public law appeal of a CAS decision (CAS 92/63 G. v. FEI) to the Swiss Federal Tribunal, decided March 15, 1993, published in OFFICIAL DIGEST OF FEDERAL TRIBUNAL

judgment, the CAS was restructured.¹⁹⁴

In order to address concerns about its institutional autonomy, the CAS has taken two main steps. One was to create the ICAS and the other was to diversify its funding. The ICAS was created in order to serve as a buffer between the IOC and sports establishment in the arbitration process.¹⁹⁵ It consists of twenty members, four appointed by the IOC, four appointed by the International Federations, four appointed by National Olympic Committees, four selected by the twelve previously appointed members with an eye toward protecting the interest of athletes, and four selected by the already appointed members intended to be independent of the governing bodies of the Olympic Movement.¹⁹⁶ ICAS functions include amending the Code, electing the President of each CAS Division, appointing arbitrators to the master list, hearing challenges on the independence of arbitrators, and approving the CAS budget.¹⁹⁷ Second, to diversify its funding, the CAS now receives one-third of its funding from the IOC, one-third from the International Federations, and one-third from the National Olympic Committees.¹⁹⁸

The first step in determining whether the ICAS and the new funding system adequately protect the CAS's independence is to identify the appropriate standard. While many standards would be appropriate, the most appropriate is that found in Swiss law.¹⁹⁹ This standard has been applied by the Swiss Federal Tribunal to the CAS in cases challenging the CAS's independence from the IOC.²⁰⁰ The Swiss standard looks for

JUDGMENTS II, 119, 271.

194. See COURT OF ARBITRATION FOR SPORT, DIGEST OF CAS AWARDS II, 1998–2000 xxv–xxvi (Mathieu Reeb, ed. 2002) (highlighting the role of *Gundel* in bringing about organizational reform at CAS); *supra* Part II.A.2 (discussing the organizational changes that followed the 1993 challenge to CAS independence).

195. The ICAS statute specifically states that its purpose is to “safeguard the independence of the CAS . . .” CAS CODE, *supra* note 8, at S2.

196. *Id.* at S4.

197. *Id.* at S6.

198. See Agreement concerning the constitution of the International Council of Arbitration for Sport (Paris Agreement), art. 3, *reprinted in* DIGEST OF CAS AWARDS II 1998–2000 884 (Mathieu Reeb, ed. 2002) (setting forth the proportion of funding from various entities).

199. Although CAS operates on the international level, hearing cases between citizens of different countries and sometimes applying different national law, it has declared Switzerland to be its “seat” and thereby chosen Swiss law to govern its operation. See *supra* note 51 and accompanying text (discussing the application of Swiss law to all CAS arbitrations, regardless of where the arbitrations are physically held). Further, Switzerland has become the *de facto* homeland of the Olympic Movement and the IOC, since a good number of IFs are headquartered there and Swiss law is the *de facto* law of the Olympic Movement.

200. A. & B. v. Int'l Olympic Comm., Swiss Fed. Tribunal (1st Civ. Chamber) Judgment of 27 May 2003, *translation available at* <http://www.spotrecht.org/urteile/SchwBGZuTAS.pdf> (last

“circumstances [that would] produce the appearance of prejudice and cast doubt over [a] judge’s impartiality.”²⁰¹

Before applying that standard, however, it should be noted that the question of CAS independence becomes more important, and therefore scrutinized more carefully, when the case before the CAS involves an accusation of wrongdoing by an athlete. Such a case pits an institution of the Olympic Movement, in a prosecutorial posture, against an individual athlete. Thus, the relative power relationship between the two parties creates a strong need for CAS to be independent.

In 2001, the Swiss Federal Tribunal addressed the question of CAS independence from the IOC and concluded that the CAS was sufficiently independent from the IOC.²⁰² The foundation of the Court’s conclusion was that the creation of the ICAS and the diversification of funding have sufficiently reduced the IOC’s ability to influence any CAS decision by essentially diluting the IOC’s role in controlling and funding the CAS.²⁰³ Before moving on, it must be stated that the 1994 reforms have gone a long way to ensuring CAS independence.²⁰⁴ But the facts and arguments presented to the Court failed to frame the issue as it may now exist. That issue may be more properly phrased as: is the CAS sufficiently independent from the collective governing bodies of the Olympic Movement? The CAS’s constituency—its benefactors, upon whom it relies for its continued existence—is now the combination of the IOC, the IFs, the NOCs, and the NGBs. Those governing bodies collectively share common interests, particularly vis-à-vis individual athletes. Therefore, the question has simply been rearranged to ask: does the collective influence of the Olympic governing bodies on the ICAS and CAS and the exclusive funding of the CAS by Olympic governing bodies challenge the independence of the CAS?

Despite the concerns, CAS reforms have insulated it for the most part. Direct influences—such as those feared by the Swiss Federal Tribunal before the 1994 reforms—are now highly unlikely. Any potential influences will be subtle. For example, administrative decisions, such as the appointment of panel presidents, the review of decisions for publication and approval, and the approval of executive position appointments could all be done, however subconsciously, to

visited Apr. 23, 2005).

201. *Id.* at para. 3.3.3.

202. *Id.* at para. 3.3.3.1–4.

203. *Id.*

204. *See supra* Part II.A.2 (discussing the changes instituted in 1994).

please the constituency that the CAS owes its existence and financial support to. But, assuming this worst case scenario, does this threat rise to the level of “circumstances [that would] produce the appearance of prejudice and cast doubt over [a] judge’s impartiality?”²⁰⁵ Likely not. Subtle institutional pressures like these are rarely demonstrable and would not create the objective circumstances sufficient to create impartiality.²⁰⁶ Nevertheless, such subtle pressures can manifest themselves in a way that, while not outcome determinative in an individual case, and despite the best of intentions, work—over the long run—to affect the outcome of cases. Such subtle effects could cause the development of doctrine that favors governing bodies, over time stacking the deck against an athlete, or in cases involving management decisions.

These subtle influences are inherent to almost all judicial institutions. But efforts must still be made to minimize their effects. Grand structural solutions or changes, such as alternative funding for the CAS could be practically difficult and may not reduce significantly the existing pressures. The best protections will likely come with day to day changes in the CAS operating rules, such as the openness of the arbitrator appointment and selection process and other steps mentioned below.²⁰⁷ One unique solution which would require more analysis, and is beyond the scope of this Article, is the creation of monitoring groups comprised of athletes or athletes’ attorneys, perhaps akin to a union.

b. Arbitrator Independence

The other main source of questions about CAS autonomy revolves around the arbitrators that hear CAS disputes, and how much autonomy *they* are allowed in the hearings. There are two ways in which CAS arbitrators can have their autonomy curtailed. First, by creating a finite list of arbitrators, only certain people will be appointed, and thus reliance on the body creating the list may be fostered. Second, in order to become a member of a panel, arbitrators must pass through the tricky panel selection process, a process that can usurp some of their independence.

205. *A. & B. v. Int’l Olympic Comm.*, Swiss Fed. Tribunal (1st Civ. Chamber) Judgment of 27 May 2003 at para. 3.3.3; *see Gundel v. CAS*, Swiss Fed’l Tribunal (Mar. 15, 1993), *appeal from G. v. FEI*, CAS 92/63, in OFFICIAL DIGEST OF FED’L TRIBUNAL JUDGMENTS II, 119, 271 (using this as its standard).

206. The Swiss Federal Tribunal requires proof of bias by objective circumstances only. *A. & B. v. Int’l Olympic Comm.*, Swiss Fed. Tribunal (1st Civ. Chamber) Judgment of 27 May 2003 at para. 3.3.3.

207. *See infra* Part III.B.2.a–b (recommending changes in the arbitrator selection process to improve transparency and independence).

i. Master List Creation

The independence of the CAS arbitration process depends largely on the initial selection of independent and qualified arbitrators. Under the provisions of the Code, the CAS maintains a master list of at least 150 arbitrators²⁰⁸ who must be legally trained, possess “competence” in sports law or international arbitration, and have a good command of English or French.²⁰⁹ Further, the arbitrators should represent the different continents and judicial cultures of the world.²¹⁰ One-fifth of the arbitrators on this list are to come from those nominated by the IOC, one-fifth from those nominated by the IFs, and one-fifth from those nominated by the NOCs.²¹¹ The fourth one-fifth of the master list is to be appointed with an eye toward protecting the interest of athletes, and the final group is required to not be associated with the governing bodies of the Olympic Movement.²¹² All arbitrators on the master list must be approved by ICAS.²¹³

Despite the attempt to create a diversified master list of arbitrators, as is described above, there are concerns that the list either contains too many—or is dominated by—potentially biased arbitrators. While the Swiss Federal Tribunal addressed this claim and dismissed it, the Tribunal focused on the influence of the IOC alone and not the collective influence of the governing bodies of the Olympic family.²¹⁴ The Olympic governing bodies together nominate three-fifths of the master list. Then, the remaining two-fifths of the arbitrators, though theoretically from the outside the Olympic Movement, are identified and approved by an ICAS dominated by members appointed by the Olympic family. It can be argued therefore that all of the arbitrators come from, have ties to, or owe their presence on the master list of arbitrators to the Olympic family. Further, the list can and does include arbitrators who have and continue to represent parties before the CAS, including governing bodies, an arrangement that can create a conflict of interest or the appearance of a lack of independence. Finally, as a closed list, even though the list consisted at one time of over 180 persons, the selection of experienced and well-qualified arbitrators is

208. CAS CODE, *supra* note 8, at S13.

209. *Id.* at S14.

210. *Id.* at S16.

211. *Id.* at S14.

212. *Id.*

213. *Id.* at S6. Interestingly, the composition of the ICAs has the same distribution, as far as the percentage of nominations allocated to each group, as the master list. *Id.* at S4.

214. Gündel v. CAS, *appeal from G. v. FEI*, CAS 92/63 (Mar. 15, 1993), in OFFICIAL DIGEST OF FED’L TRIBUNAL JUDGMENTS II, 119, 271.

limited to a small group of frequently used arbitrators.

Do these concerns rise to the level of “circumstances [that would] produce the appearance of prejudice and cast doubt over [a] judge’s impartiality” and can the number of potentially biased arbitrators populating the master list be reduced? Yes, the inclusion of arbitrators that continue to represent parties before the CAS does create an appearance of doubt of impartiality, and there are steps that can be taken to reduce the number of potentially biased arbitrators. Further, the impact of the remaining potentially biased arbitrators can be reduced by expanding the source of arbitrator nominations.

Just as it may be a violation of the Code of Judicial Conduct for a judge to hear a case being argued by a government agency that formerly employed him,²¹⁵ it creates the appearance of a conflict of interest when an attorney represents an athlete or a governing body and then serves as an arbitrator in a disciplinary case. This is particularly so when the collective interest of the Olympic Movement is then called into question by an athlete, such as in doping cases.²¹⁶ The easiest way to prevent this appearance of impropriety is to not appoint arbitrators to the master list that represent parties, including athletes, before the CAS. This will, of course, reduce the number of available experienced arbitrators. This shortage will be temporary, however,²¹⁷ and CAS arbitrators’ resultant improved legitimacy would be worth the temporary shortage of experienced arbitrators.

The source of arbitrators should also be expanded in order to balance out the number of arbitrators nominated by governing bodies. The current one-fifth division of nominations should be expanded to sixths. An athletes’ union should be added as a source of nominations to the master list. Adding an athletes’ union as a source of nominations would create a balance of one-half of the nominations coming from governing

215. See IND. CODE ANN., CODE OF JUDICIAL CONDUCT, Canon 2 & cmt. (West 2003) (stating that a judge should disqualify himself in a proceeding in which the judge’s impartiality might reasonably be questioned because he was formerly employed by a government agency that is a party in the case).

216. All governing bodies now have a commonality of interest in doping cases because they have adopted the World Anti-Doping Code and any interpretation of the Code or precedent could affect how all governing bodies enforce the World Anti-Doping Code. All of the IFs were forced to accept the World Anti-Doping Code as a condition of participation in the 2004 Olympics.

217. The growing importance and number of CAS cases will attract more qualified persons to become arbitrators thus expanding the pool of independent arbitrators. Also, to be a qualified arbitrator, an arbitrator need not satisfy both of the CAS eligibility criteria: arbitration experience and sport experience. Arbitration experience is the more important of the two criteria and easily found. See CAS CODE, *supra* note 8, at S14 (requiring qualified arbitrators to have “competence with regard to sports law and/or international arbitration”).

bodies, and one-half of the nominations coming or representing non-governing body origins. While adding an athletes' union as a nominating source may not work to remove potentially biased arbitrators from the master list, it will at the least create a better appearance of balance.²¹⁸

Alternative solutions, such as an open list of arbitrators or the addition of arbitrators nominated by an athletes' union, without excluding arbitrators that have represented parties, likely would not eliminate the conflicts of interest. An open list would compromise the quest for using only qualified arbitrators, as well as still allowing the appointment of arbitrators that represent parties before the CAS. Expanding the master list to include arbitrators nominated by an athletes' union would only increase the number of arbitrators that have represented parties. Perhaps the CAS could prohibit arbitrators from hearing cases between a governing body and an athlete when the arbitrator has represented either in the past. But that prohibition might not clearly announce that the CAS does not tolerate any appearance of a conflict of interest.

ii. Selection of Panel Members

In both the Ordinary and Appellate Divisions each party is permitted to name an arbitrator to the panel.²¹⁹ In Ordinary Division cases the President or third member of the panel is selected by the two party-appointed arbitrators.²²⁰ In the Appellate Division the panel President is appointed by the Division President.²²¹ Permitting the parties to appoint panel members creates the opportunity for the appointment of biased or friendly arbitrators. The parties in both Divisions will quite logically and reasonably appoint arbitrators that they believe are receptive or friendly to their positions in the case. To do otherwise would be foolish and possibly even professional malpractice by the attorney representing a party. This may explain why the same arbitrators are consistently re-appointed by federation and athletes' attorneys.²²² The result is two arbitrators with directly opposite

218. While creating an athletes' union may be a benefit to Olympic athletes, creating an international union to counter balance the international presence of the IOC will be difficult for many reasons. Perhaps the best vehicle for such a counter balance would be a strong athletes' advisory committee and ombudsman, similar to but even stronger than the once created by the USOC.

219. CAS CODE, *supra* note 8, at R40.2, 48, 53.

220. *Id.* at R40.2.

221. *Id.* at R54.

222. This information is based on interviews with two CAS arbitrators and a review of the published CAS decisions.

predispositions and attitudes on the panel. With two votes potentially predetermined, this leaves the panel President to break the deadlock. Then, because the panel President plays the critical tie-breaking role, his appointment becomes, perhaps, the pivotal event in deciding who wins the case. This increases the importance of the CAS's role and increases the chance for control of the outcome by CAS.

In an effort to reduce these possible improper influences, arbitrators are required to complete and sign a declaration of independence in which they are required to disclose any possible conflicts of interest.²²³ The Division President then confirms that each panel member is independent of the parties to the case before the panel can proceed to hear the case.²²⁴ Finally, the parties can challenge an arbitrator's independence; this challenge would be heard by the ICAS.²²⁵

Does the appointment of friendly arbitrators create circumstances that produce the appearance of prejudice and cast doubt over a judge's impartiality? Do these safeguards prevent the appointment of friendly or biased arbitrators? Because objective circumstances are required to prove the appearance of prejudice or doubt of an arbitrator's impartiality, the appointment of friendly arbitrators is likely not enough to disqualify an arbitrator.²²⁶ But that does not remove a serious problem, and one that seriously challenges the CAS's credibility.

The practice of party-appointed arbitrators is deeply-rooted in the tradition of arbitration. It is a time-honored practice that is not easily challenged. But, it was developed primarily for commercial arbitration involving contract disputes. Many of the cases that the CAS hears do not fit the commercial arbitration mold. Doping cases and other disciplinary cases are more akin to a prosecution. Doping cases are more like a criminal prosecution than like a traditional arbitration case because there is an accusation of wrongdoing and the remedy is more than mere compensation. This distinction may be best demonstrated by comparing arbitration of a contract dispute with the arbitration of a doping accusation. In a contract dispute, the parties are arguing over

223. CAS Code R33 requires that each arbitrator disclose any circumstances likely to affect his independence. CAS CODE, *supra* note 8, at R33. At the beginning of each arbitration, each arbitrator is requested to complete a form on which he or she declares any circumstance likely to affect his independence. Interview with Matthieu Reeb, Secretary General, CAS, in Lausanne, Switzerland (May 25, 2004) (on file with author).

224. CAS CODE, *supra* note 8, at R33, 40.3, 54.

225. *Id.* at R34.

226. The standard applied by ICAS in deciding disqualification requests is one of Swiss public law and a difficult standard to satisfy. Interview with Matthieu Reeb, *supra* note 223 (May 25, 2004).

their obligations under the contract and whether there was a breach of these obligations. The remedy can be either specific performance or compensatory damages. On the other hand, in a doping case, one party, the USADA, accuses the other party of violating disciplinary rules and the potential remedy is a two-year suspension. The difference in the remedy is the critical difference that makes the process like a prosecution. A two-year suspension is a penalty or a punishment. Arguably, if the remedy of a doping case would be limited to specific performance or compensatory damages (designed to make the parties whole) the athlete would only be disqualified from the competition involved or suspended as long as the drug involved enhanced the athlete's abilities.

Indeed, the Swiss Federal Tribunal expressed this view when it declared that a suspension, such as what flows from a doping violation, is a "genuine statutory punishment that affects the legal interests of the person."²²⁷ As a prosecution-like proceeding imposing a statutory punishment, the practice of party-appointed arbitrators creates a taint on the proceeding. The panel in a prosecution-like proceeding should be as beyond reproach as possible, and party-appointed arbitrators create reproach.

The CAS declaration and challenge procedure is laudable and effective, but not entirely sufficient to remove the taint of parties appointing friendly arbitrators. The CAS does not investigate the completeness and truthfulness of the declarations.²²⁸ The challenge procedure standard is that of Swiss public law, a tough standard to satisfy.²²⁹ The declaration and challenge procedure only stops the appointment of a clearly-biased arbitrator, but it does not stop the appointment of party-friendly arbitrators. The publication of reasoned decisions does help prevent undue influence by friendly arbitrators: the arbitrators must explain and support their decision publicly. Nevertheless, publication does not prevent undue subtle influence; it may only expose blatant examples.

If the CAS wishes to reduce the appearance—if not the reality—of undue influence by party appointed friendly arbitrator, it could do away with party-appointed arbitrators in disciplinary cases and use a lottery system for the appointment of arbitrators. In such a system the CAS

227. A. & B. v. Int'l Olympic Comm., Swiss Fed. Tribunal (1st Civ. Chamber) Judgment of 27 May 2003 para. 2.1, translation available at <http://www.spotrecht.org/urteile/SchwBGzuTAS.pdf> (last visited Apr. 23, 2005).

228. Interview with Matthieu Reeb, *supra* note 223 (May 25, 2004).

229. *Id.*

would select all three arbitrators by lot and then allow each party a limited number of peremptory strikes. A random appointment process would not allow either side to claim that the other side or the CAS manipulated the panel composition. Furthermore, the overall credibility of the decision would be enhanced.

A potential downside to using a random appointment process would be that parties lose the security of having an advocate on the panel. Given the choice between a random system and the current system, some parties might reasonably choose the current system because they prefer the security provided with the appointment of one friendly arbitrator—knowing that the other side will appoint an unfriendly arbitrator—over the insecurity of risking a panel with no friendly faces on it. This insecurity would be increased when a party faces a closed panel that it feels is dominated by unfriendly faces. All of this begs the threshold question: which selection system reduces the likelihood of biased arbitrators tainting the process? Picking between the two systems may require a choice between: (1) a system that is based on only a slightly cynical view of the arbitration process; and (2) a system that is based on a very cynical view of the arbitration process.

Adopting the random selection process over the current system would be based on the assumption that under the current system, parties can find friendly arbitrators who will identify with their position. This assumption stems from a cynical view of arbitration. But choosing the random process would also be based on assumptions. It would assume that there are a limited number of “friendly” arbitrators on the master list and that the odds are good that the peremptory strikes will be enough to ensure an unbiased panel. This second assumption, however, is the optimistic view of arbitration. Continuing with the current system would admit that many or all arbitrators are friendly to one side or the other and that it is safer to have at least one arbitrator friendly to each position on the panel than risk a panel with three unfriendly arbitrators on it. Keeping the current system might just require an even more cynical view of arbitration.

Perhaps there is a middle ground that recognizes the parties’ fears, but at the same time puts faith in the majority of arbitrators to be neutral. In this kind of combined system, each party would retain the right to appoint one arbitrator, but the third arbitrator would be randomly selected and each party allowed one strike. Such a combined system would retain the security of appointing a friendly arbitrator, while reducing the insecurity (particularly from the athlete’s perspective) of the swing vote arbitrator being selected by an institution that the parties may not trust. Selecting the third party arbitrator by lot

would also help insulate the CAS from claims of influencing the process. Nevertheless, it is important to note that for any system to work well, as much information as possible about each arbitrator should be made available to the parties, so that the parties may make well informed decisions. In addition to a resume for each arbitrator, the CAS should list every case that an arbitrator has decided on its web site list of arbitrators.

2. North American-CAS Independence

The question of the North American CAS institutional independence has been thrust into the limelight recently by several high profile cases and involves several preliminary questions.²³⁰ Several cases arising out of the BALCO matter, including one case that has been taken to the Federal Courts, have raised concerns that the USADA and the USOC exert undue influence over the AAA-CAS arbitration process.²³¹ Before an analysis of AAA-CAS can be done, it must first be determined whether the institution in question is North American-CAS or the AAA.

Under the Supplementary Procedures, doping cases—cases brought by USADA—are administered by “the AAA through the AAA Vice President then serving as the Secretary” for North American-CAS.²³² This reference to both the AAA and to North American-CAS creates some initial confusion about which institution is really administering USADA cases. This confusion is compounded by the reference to the establishment of decentralized offices by CAS in the Code²³³ and the right, under the Supplementary Procedures, to appeal an AAA-CAS decision to the CAS.²³⁴ Combined, these provisions suggest the existence of a single entity, known as the CAS, with a branch office in North America. If there is in fact a single entity, that conclusion could have significant legal consequences.²³⁵ However, a close examination of the Supplementary Procedures shows that it is the AAA that performs

230. See, e.g., *Jacobs v. USA Track & Field*, 374 F.3d 85, 87 (2d Cir. 2004) (stating that the AAA sided with the USADA in concluding that the arbitration should proceed under the Supplementary Procedures rather than the Commercial Rules).

231. See *id.* (discussing the interplay between the AAA-CAS, USADA, and USOC).

232. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-2.

233. *Id.*

234. *Id.* at R-49A, -57.

235. If North American-CAS is legally part of CAS, in other words CAS and North American-CAS are one legal entity, it is possible that CAS's declaration of Lausanne as the legal seat of CAS could mean that NA-CAS cases are subject to Swiss law and not U.S. law. See CAS CODE, *supra* note 8, at S1 (stating that the seat of the CAS is established in Lausanne, Switzerland).

most, if not all, of the important administration tasks.²³⁶ Therefore, it is important to first examine the AAA.

a. Institutional Independence from Governing Bodies

The proper test to evaluate AAA independence from USADA and the USOC is whether its funding and the USOC's and USADA's control of the AAA constitute "circumstances [that would] produce the appearance of prejudice and cast doubt over [a] judge's impartiality."²³⁷ As for the question of the AAA's funding: AAA's administrative costs in handling USADA cases are paid by the USADA.²³⁸ Otherwise, the AAA is a large non-profit arbitration institution that does not rely upon funding from the USADA, the USOC, or any other party to the USADA-initiated cases for its existence. This is an important difference from the CAS, which does rely upon funding from the parties that appear before it for its continued existence.²³⁹ Because the AAA does not rely upon funding from the parties that appear before it for its continued existence, it cannot be said that the AAA's funding casts doubts on its institutional impartiality.²⁴⁰

The second question in the test for institutional independence is whether the USADA and the USOC exert any control over the AAA's administration of arbitration proceedings. The Supplementary Procedures and the USADA's Protocol do not contain any provisions giving the USOC or USADA a direct say in the AAA's administration of the arbitration process. The allegations in current litigation and conflicting information from NA-CAS and AAA officials raise some red flags. In *Jacobs v. USADA*, the plaintiff alleged that the USADA conducted training sessions for North American-CAS arbitrators and pays all of their expenses.²⁴¹ Additionally, AAA and NA-CAS officials have given conflicting information or have been unable to explain who nominates AAA arbitrators to the CAS master list, and in one case

236. See AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-10, -13, -19 (stating that the AAA conducts administrative conferences, oversees the selection of arbitrators, and decides any challenges to an arbitrator).

237. A. & B. v. Int'l Olympic Comm., Swiss Fed. Tribunal (1st Civ. Chamber) Judgment of 27 May 2003 at para. 3.3.3, translation available at <http://www.spotrecht.org/urteile/SchwBGzuTAS.pdf> (last visited Apr. 23, 2005)

238. USADA PROTOCOL, *supra* note 110, at § 10(e).

239. See *supra* Part III.B.1 (discussing the funding for CAS).

240. While the AAA does not rely on USADA's business for its existence, the desire to retain USADA's business or frequent and consistent contact with USADA representatives may still influence individual AAA officials.

241. Brief for the plaintiff, *Jacobs v. USA Track & Field*, 374 F.3d 85 (2d Cir. 2004) (on file with author).

suggested that the USADA screens or appoints them.²⁴² Assuming, *arguendo*, that these allegations are accurate, and then adding the possibility of indirect control through the pressure to please a consistent client, there still does not appear to be enough control of the AAA by USADA and the USOC to conclude that the AAA is dependent. However, if these allegations are true, the USADA is tainting the current pool of arbitrators by conducting *ex-parte* training sessions and it should not be permitted to nominate or play any role in selecting the master list of arbitrators. Thus, the ICAS should refuse to consider arbitrators screened or nominated by the USADA. If the USOC is consulting the USADA on nominations, the USOC has committed an ethical breach that should be stopped immediately.

b. Master List Creation

To be on the master list of NA-CAS arbitrators, an arbitrator must satisfy the requirements of both the CAS and the AAA.²⁴³ Next, the arbitrator must be approved by the ICAS.²⁴⁴ After being approved by the ICAS, an arbitrator then appears on both the CAS and AAA-CAS master list.²⁴⁵ There are currently forty-three potential AAA-CAS arbitrators.²⁴⁶ However, who nominates the arbitrators to the ICAS and whether those nominations are required to—or actually do—fall into the five categories of nominations that make-up the CAS master list is not covered in the Supplementary Procedures. Further, inquiries of the NA-CAS and the AAA officials have produced conflicting answers.²⁴⁷

242. See *supra* note 172 and accompanying text (discussing the ambiguity in how the master arbitrator list is compiled and the lack of clarification provided by the AAA and North American-CAS officials).

243. See AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-3 (stating that the National Panel of Arbitrators consists of those that are both CAS and AAA arbitrators).

244. CAS CODE, *supra* note 8, at S3, 6.

245. A separate list of North American-CAS arbitrators is not kept. E-mail from Jennifer Coffman, Regional Secretary, North American-CAS, to Michael S. Straubel, Associate Professor of Law, Valparaiso University School of Law (June 7, 2004) (on file with author). All North American-CAS arbitrators appear on the master CAS list. *Id.* However, there are forty-three arbitrators from North America on the CAS master list, and Regina Jacobs, in her claim against USADA claims that she has been told by North American-CAS and AAA sources that there are currently anywhere from twenty-five to thirty-eight North American-CAS arbitrators. *Jacobs v. USA Track & Field*, 374 F.3d 85, 85 (2d Cir. 2004).

246. There are currently forty-three arbitrators on the CAS master list from North America. See Court of Arbitration for Sport, Master List of CAS Arbitrators, at <http://www.tas-cas.org> [hereinafter CAS Arbitrators] (providing biographical information on each of the arbitrators) (last visited Feb. 2, 2005).

247. North American-CAS Regional Secretary Jennifer Coffman was unaware of whether North American-CAS arbitrators fell into the five categories listed in S14. E-mail from Jennifer Coffman, Regional Secretary, North American-CAS, to Michael S. Straubel, Associate Professor

Recent high profile cases have raised a number concerns about the composition of the NA-CAS master list and thereby the method of constructing the master list.²⁴⁸ The leading concern is that many, if not the majority, of the arbitrators are biased due to their current or previous connections with the USOC, USADA, or NGBS. Of the forty-three AAA-CAS arbitrators, nine have connections with the USOC, eleven have connection with NGBs, four have connections with IFs, two with the IOC and Olympic Organizing Committees, and one is the President of WADA.²⁴⁹ A similar concern is that a large number of the arbitrators have been influenced by contracts with or educational programs put on by the USADA.²⁵⁰ The allegation of improper contacts by the USADA is not a structural problem and can be easily prevented in the future. Currently there are concerns, however, that many of the arbitrators have contacts with the governing bodies of the Olympic Movement that could influence their rulings. This is a structural concern that should be addressed.

Similar to questions about the CAS master list, the questions exist of whether these concerns rise to the level of producing the appearance of prejudice and casting doubt over a judge's impartiality and whether the number of potentially biased arbitrators populating the master list be reduced? The inclusion of a large number of arbitrators that have connections with the governing bodies of the Olympic Movement, if not raising the appearance of doubt, at least raise a red flag that the NA-CAS should be concerned about. This concern is particularly heightened by the fact the NA-CAS arbitrator only hears doping cases that pit the Olympic Movement's representative, USADA, against athletes.

There are four possible ways to deal with this taint on the NA-CAS. The most drastic is to purge the master list of all arbitrators with current or recent ties to the governing bodies of the Olympic Movement. This step would certainly enhance the credibility of the process. But would it simultaneously gut the list of experienced and informed arbitrators? The second alternative is to increase the number of arbitrators with no connection to the Olympic Movement. For example, the proposed athletes' union could nominate arbitrators until there is a fair balance on the master list. This alternative would dilute the taint, but may just increase the number of conflicts of interest by adding arbitrators tied to

of Law, Valparaiso University School of Law (June 7, 2004) (on file with author).

248. See, e.g., *Jacobs*, 374 F.3d at 88 (arguing that arbitrators should be selected under the Commercial Rules).

249. See *supra* note 246 (discussing the CAS master list of arbitrators).

250. See CAS Arbitrators, *supra* note 246 (detailing biographical data of arbitrators).

the athletes and their representative body. The third alternative is to go to either an open list or an alternative list of arbitrators such as the AAAs list of commercial arbitrators. This alternative would remove some of the taint but it would forsake the benefit of using arbitrators who are knowledgeable and experienced in sport and doping law.²⁵¹ Finally, the fourth alternative is to create a permanent, or semi-permanent, small list of full-time arbitrators completely lacking in, or with very minimal connections with both the Olympic Movement and athletes' causes. This kind of panel would function like full-time professional judges. This solution would remove the taint but change the nature of the process from traditional arbitration to something new.

Considering the prosecutorial nature of all current NA-CAS cases, the composition of the master list and the process of selecting a panel of arbitrators, as will be discussed below, should be changed to improve the integrity and legitimacy of the process. Of the four possible solutions listed above, the best long-term solution would be the first: to establish a list of arbitrators with no current or recent connections with the Olympic Movement or athletes. The nominating and screening process would have to be open and interests other than those of the governing bodies, such as the athletes', would have to be involved. Then the arbitrators would have to pledge not to represent or be involved in the governing activity of governing bodies or athletes' interests.

Furthermore, purging the NA-CAS master list of arbitrators with connections to Olympic Movement Governing bodies and athletes that have appeared before the CAS would not reduce the quality of the arbitration process and instead improve the legitimacy and credibility of the arbitration process. While the CAS seeks arbitrators with expertise and experience in both arbitration and sport, expertise and experience in sport is not limited to experience within the Olympic Movement governing bodies, and the sporting world is very big. Further, of the two backgrounds, arbitration experience is more valuable than a sport background. It is the ability to understand the rules and doctrines at issue in an arbitration that is important. A sound legal background and experience is more valuable in understanding the relevant rules and doctrines than the desire for a sports background. Therefore, filling the NA-CAS master list with arbitrators from outside the Olympic Movement, but who have significant legal experience, will not harm and only improve the arbitration process.

251. See CAS CODE, *supra* note 8, at S14, 16 (requiring that the arbitrators be selected from a varying pool and that each arbitrator be familiar with the sport and law and be objective).

c. Selection of Panel Members

The 2005 amendments to the Supplementary Procedures has made the panel selection process more like that of the CAS, and consequently, has removed some of the concerns that existed before.²⁵² Now, when a three arbitrator panel is used, each party selects one from the entire list of arbitrators and the two appointed arbitrators work together to select the third arbitrator.²⁵³ In the event the two appointed arbitrators are unable to agree on the third, the parties are then asked to prioritize the remaining choices, so that the AAA can facilitate an agreement.²⁵⁴ Failing agreement, the AAA will select the third arbitrator.²⁵⁵ The parties may then challenge that appointment if they are unhappy with the selection, by raising concerns about their ability to be neutral and impartial—it appears, however, that this same kind of appeal can not be raised with respect to the other party’s selection.²⁵⁶ These appeals are decided by the AAA.²⁵⁷

The same concerns that raise doubt about the panel selection process of the CAS apply to the AAA-CAS process. Permitting the parties to appoint panel members creates the opportunity to appoint friendly arbitrators that the parties believe are likely to, if not rule in their favor, be sympathetic to their position. The practice of parties appointing arbitrators is akin to judge shopping, a practice that offends notions of due process in the United States. Further, because the AAA can both select the panel chairman and decides any challenge against that chairman, there is a fear that the process is tightly controlled by an institution that could be influenced by the USOC and USADA. Whether or not these concerns are in fact valid, they do create the appearance of prejudice and cast doubt over the impartiality of the

252. Before the 2005 Amendments both parties had to select their party-appointed arbitrators from a list of 10 arbitrators created by the AAA. AAA-CAS SUPPLEMENTARY PROCEDURES R-13 (2000). This power gave the AAA control over the selection of the arbitrators. Also, the AAA appointed the third arbitrator, who became the chair of the panel. *Id.*

253. *See infra* Part III.A.3.b (detailing this method as employed in CAS arbitrator selection).

254. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-13 (d)(i).

255. *Id.* at R-13(c)(2).

256. Supplementary Procedure R-19 states that the parties may challenge the independence of a “neutral arbitrator,” but does not state that any other arbitrators, including a party-appointed arbitrator may be challenged. *Id.* A reading of other sections of the Supplementary Procedures, particularly Rule 15 and Rule 20, suggests that the terms “chairman” and “neutral arbitrator” are synonymous in this context. *Id.* at R-15, -20. Therefore, it seems reasonable to conclude that only the chairman can be challenged.

257. *Id.* at R-19.

process, and certainly call the fairness and legitimacy of the process into question.

With very important issues, such as an athlete's reputation, career, and income involved, the NA-CAS arbitration system should strive to eliminate or at the very least reduce taint wherever possible. Two possible solutions exist that may reduce this taint. First, in addition to removing from the master list arbitrators that have current or recent connections with parties, a random appointment system for all three panel members or at least the panel chairman could be used. Second, the parties could be allowed to challenge the independence of all three arbitrators, before the ICAS or a similar body outside of the AAA.

Of the systems discussed above, the best would be a combined system, where each party would retain the right to appoint one arbitrator, with the third arbitrator randomly selected, allowing each party one strike of the potential third arbitrator. Such a combined system would retain the security of appointing a friendly arbitrator while reducing the insecurity of the swing vote arbitrator selected in a manner that the parties may not trust. Further, as was suggested for the CAS process, regardless of the process chosen, it should be as transparent as possible. The master list of arbitrators should be publicly available, and in addition, the names and positions of the people making administrative decisions should be available.

C. Choice of Substantive Law

A fair and well-constructed arbitration process should include a process for selecting the procedural rules and the substantive laws that govern the arbitration. However, there should also be a back-up choice of law to fill the gaps that invariably occur in the primary choice of procedural and substantive laws, and importantly a body of mandatory law that will ensure that the process protects basic notions of fairness and due process. For example, for the CAS Appeals Division, the choice of procedural rules is the Code of Sports-related Arbitration and Mediation Rules, the body of law chosen to fill the gaps in the Code is the law agreed to by the parties or the law of the IF's home state, and the method for ensuring fairness is the Swiss Statute on Private International Law.²⁵⁸ This Section, which examines the CAS and AAA-CAS choice of law provisions, uses a template that looks at whether the choice of procedural rules or the choices of substantive

258. See CAS CODE, *supra* note 8, at R27, 28, 58 (detailing procedural rules). The effect of designating Lausanne, Switzerland, as the seat of all CAS arbitrations is to subject the Swiss statutes to Private International Law.

laws includes these three categories: (1) an initial choice; (2) a back-up, gap-filling choice; and (3) mandatory due process protections.

1. Basic Provisions

Both the CAS and AAA-CAS rely on substantive law and procedural rules established by Code. These basic, initial choices of law are not complete, and thus have to be supplemented with further, gap-filling law.

a. CAS Code

The Code's procedural rules apply whenever the parties agree to submit a dispute to CAS.²⁵⁹ The Code does not specifically provide for a backup body of procedural law to fill the gaps that may occur in the Code's procedural rules. Thus far, the practice of CAS panels has been to look to the back-up substantive law chosen by the parties to fill the gaps.²⁶⁰ By designating its legal seat as Lausanne, Switzerland, the CAS has indirectly designated that the fairness of its process in general, as well as the process in each individual arbitration, can be tested under Swiss law, specifically the Swiss Statute on Private International Law.²⁶¹ The Swiss Statute on Private International Law sets out the minimum requirements for international arbitrations—such as impartiality and due process—required when the legal seat is in Switzerland.²⁶²

The substantive law applied in CAS arbitration is the law chosen by the parties.²⁶³ The law chosen by the parties can be the rules set by the governing body, or state laws.²⁶⁴ In the absence of a choice by the parties, the Ordinary Division uses Swiss law and the Appellate Division uses the law of the sports body's country of domicile.²⁶⁵ In practice, however, the only choice of law is the IF's rules and the panels are thus forced to use Swiss law and the sports body's home law to fill

259. *Id.* at R27. Such an agreement may be expressed either in a contract or may be included in a sports-governing body's rules. *Id.* Such a rule is considered to be a contractual agreement between the governing body and a member of the sports organization. *Id.* However, it can be argued that such a "contractual agreement" is a contract of adhesion.

260. *See, e.g.*, S. v. FINA, CAS 2000/A/274 (Oct. 19, 2000), DIGEST OF CAS AWARDS II 1998–2000 389 (Matthieu Reeb, ed. 2002) (applying the parties' choice of Swiss law), available at <http://www.klumberarbitration.com> (last visited Feb. 2, 2005).

261. A. & B. v. Int'l Olympic Comm. Swiss Fed. Tribunal (1st Civ. Chamber) Judgment of 27 May 2003.

262. *Id.*

263. CAS CODE, *supra* note 8, at R45, 58.

264. *Id.* at R58.

265. *Id.*

the gaps.²⁶⁶ Also, in the Appellate Division, panels are permitted to apply any law it deems necessary, as long as the reasons for using such law are explained.²⁶⁷ When CAS panels have used this third option, they have resorted to general principles of law,²⁶⁸ civil law doctrines,²⁶⁹ and basic concepts of human rights.²⁷⁰ The use of back-up laws, in addition to filling gaps in an IF's substantive rules, has also provided CAS panels with much-needed due process standards to help ensure fairness in the decision process.²⁷¹

b. AAA-CAS Supplementary Procedures

The procedure of AAA-CAS arbitrations is governed by the Commercial Arbitration Rules of the AAA, as modified by the Supplementary Procedures.²⁷² However, in practice, the Commercial Arbitration Rules play little, if any, role.²⁷³ The Supplementary Procedures do not provide for a back-up source of domestic law to fill gaps.²⁷⁴ Further, the Supplementary Procedures do not designate a legal seat for AAA-CAS arbitrations, as the CAS Code does, and thereby does not designate a body of mandatory law to ensure the fairness of AAA-CAS procedures.²⁷⁵ However, as will be discussed in more detail below, the Swiss statute on Private International Law and the Federal Arbitration Act may apply to AAA-CAS arbitrations and

266. *Strahija v. FINA*, CAS 2003/A/507 para. 6.1 (Aug. 11, 2003), available at http://www.sportslaw.nl/categorieen/print.asp?p_nr=42 (last visited Apr. 24, 2005).

267. CAS CODE, *supra* note 8, at R58.

268. *See B. v. ITU*, CAS 98/222 (Aug. 9, 1999), DIGEST OF CAS AWARDS II 1998–2000 330 (Matthieu Reeb, ed. 2002) (applying the civil law concept of strict liability), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

269. *Id.*

270. *See H. v. FIM*, CAS 2000/A/281 (Dec. 22, 2000) DIGEST OF CAS AWARDS II 1998–2000 410 (Matthieu Reeb, ed. 1998) (explaining that the human rights of an accused athlete must be preserved even if not provided for in the federation rules), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

271. *See S. v. FINA*, CAS 2000/A/274 (Oct. 19, 2000), DIGEST OF CAS AWARDS II 1998–2000 389 (Matthieu Reeb, ed. 1998), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005) (asserting that the Panel must guarantee equal treatment of the parties and ensure the right to be heard).

272. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-1.

273. A survey of all AAA-CAS awards finds no cites to the Commercial Rules.

274. The 2000 Supplementary Procedures in Rule 33 provided that prior CAS decisions may be used to mitigate IF rules. That provision has been removed from the 2005 Supplementary Procedures, thereby calling into question the role of CAS precedent in AAA-CAS.

275. The Supplementary Procedures do not contain a declaration of a seat of the arbitration. *Id.* at R-11. However, Rule 11 does require that any CAS hearing held under these rules be held in the United States. *Id.* If held in the United States, the Federal Arbitration Act likely applies unless there has been a contractual choice of Swiss law replacing the Federal Arbitration Act. *See infra* Part III.C.1.b.2 (discussing *Bremen*).

provide the vital fairness check.²⁷⁶

The substantive law that applies in AAA-CAS arbitrations is the rules of the World Anti-Doping Code and IF involved.²⁷⁷ However, there is no provision that acts as a gap-filler. Therefore, there is no template for ensuring the fairness of the World Anti-Doping Code and IF rules, such as a national body of law.

2. The Application of the Swiss Statute on Private International Law to AAA-CAS Proceedings

The Code designates Lausanne, Switzerland as CAS's seat.²⁷⁸ The purpose and result of selecting a "seat" for all CAS arbitrations is to pick a municipal law to test and ultimately validate the legitimacy of the CAS arbitration process. Selecting the law to govern the arbitration (*lex arbitri*),²⁷⁹ as opposed to the law governing the merits of the dispute, confers nationality upon CAS awards for purposes of enforcement under the New York Convention²⁸⁰ and creates confidence in the system and ensures basic fairness within Swiss law. All international arbitrations, defined as an arbitration involving at least one non-Swiss citizen, must satisfy the requirements of the Swiss Statute on Private International Law.²⁸¹

CAS and its arbitration process have been tested in admittedly limited circumstances, under the Statute on Private International Law. In all challenges to CAS, the Swiss Federal Tribunal has found CAS and its process impartial and fair.²⁸² However, because these challenges came from arbitrations physically held within Switzerland, there is some question of whether the concept of a "seat" designation will have extraterritorial application to arbitrations physically held outside of Switzerland. While the Swiss Federal Tribunal has accepted the concept of a split between the physical location of an arbitration hearing

276. See *infra* Part III.C.1.b.2 (discussing the protections of the Federal Arbitration Act).

277. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-33.

278. CAS CODE, *supra* note 8, at R28.

279. For more discussion of the concept of *lex arbitri*, see Gabrielle Kaufmann-Kohler, ARBITRATION AT THE OLYMPICS: ISSUES OF FAST-TRACK DISPUTE RESOLUTION AND SPORTS LAW 100–102 (Kluwer Law International 2001).

280. To enforce an arbitration award under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards the award must be made in the territory of a member state. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201–208 (1970).

281. A. & B. v. Int'l Olympic Comm., Swiss Fed. Tribunal (1st Civ. Chamber) Judgment of 27 May 2003, translation available at <http://www.spotrecht.org/urteile/SchwBGzuTAS.pdf> (last visited Apr. 23, 2005).

282. *Id.*

and the legal location or “seat” of the arbitration hearing, the important question of whether foreign courts (such as the courts of the United States) will accept the “seat” doctrine remains.²⁸³

This question of extraterritoriality has gained increasing import with the advent of “ad hoc,” on-location CAS tribunals. Starting with the 1996 Atlanta Olympic Games, special CAS ad hoc tribunals have been established at the Olympic Games to hear disputes arising during the Olympic Games. All of those ad hoc tribunals have designated their “seat” as Lausanne, Switzerland. It can be argued that the ad hoc tribunals are legally different, for purposes of analyzing the “seat” question, from the permanent tribunals in Switzerland and the decentralized CAS tribunals such as AAA-CAS. In fact, a challenge of the Sydney Olympics ad hoc tribunal framed an analysis that could apply to determining whether AAA-CAS’s “seat” is Lausanne, Switzerland.²⁸⁴ In *Raguz v. Sullivan*, the Supreme Court of New South Wales Court of Appeal found that the selection of a “seat” was at its essence a contractual choice of law that would be upheld as long as it did not violate Australian public law and policy.²⁸⁵ Since it did not violate Australian law and the parties had contractually agreed to Lausanne as the seat of the arbitration, the Court found that it did not have the jurisdiction to interfere with the enforcement of the contract choice of Lausanne as the seat of the arbitration.²⁸⁶

The analysis used by the Australian Court in *Raguz* could very conceivably be followed by a United States Court hearing a challenge to the selection of Lausanne as the seat of AAA-CAS arbitrations. In the court’s analysis, the first step would be to determine if an athlete in an AAA-CAS hearing had agreed to the selection of Lausanne. Such an agreement would have to rest on a series of interlocking contracts.²⁸⁷ The first contract would be the athlete’s membership in the governing NGB and IF. The second contract would be the agreement or statutorily required connection between the NGB and the USOC. The third contract would be the contract between the USOC (or possibly IF) and CAS to decide the disputes. The fourth contract, or connection, would be that the North American Decentralized Office of CAS is part of a larger CAS structure governed by the Code of Sport-related

283. *Id.*

284. *Raguz v. Sullivan & ORS*, 2000 N.S.W.C.A. 240 (Sept. 1, 2000).

285. *Id.*

286. *Id.*

287. The Supreme Court of New South Wales Court of Appeal in *Raguz*, relied on the same reasoning. *Id.* at para. 65.

Arbitration.²⁸⁸ Assuming the court finds that there has been a contractual choice, the next question is whether it would honor this choice of law agreement.

In the United States, a contract choice of law clause is evaluated under the rubric initially established in *Bremen v. Zapata Off-Shore*.²⁸⁹ Under the *Bremen* test, a choice of law clause will be honored unless it is unreasonable. A clause can be unreasonable if it was the result of fraud, undue influence, overweening bargaining power, or will result in the breach of an important public policy found in mandatory public law.²⁹⁰ Using the *Bremen* test in the case of selecting Lausanne as the seat of arbitration, the strongest arguments for declaring the clause unreasonable would be that it was the result of overweening bargaining power²⁹¹ and that it violates public policy found in the Federal Arbitration Act or Amateur Sports Act. Assuming for the sake of argument that the clause was not the result of overweening bargaining power, the effect of the Federal Arbitration Act and Amateur Sports Act should be briefly examined.

The Federal Arbitration Act, in section ten, lists a series of grounds upon which an arbitration award may be set aside.²⁹² The intent of Congress, in drafting section ten, was to ensure an impartial arbitration process.²⁹³ Similarly, the Amateur Sports Act, in sections 220509 and 220529, attempts to ensure an impartial arbitration process to protect

288. CAS CODE, *supra* note 8, at S6; AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-2.

289. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

290. *Id.* at 12-13.

291. It could be argued that the contract between an athlete and an NGB, represented by the athlete's membership in the NGB, is a contract of adhesion. In order to compete, an athlete must join the NGB and the athlete is forced to accept the NGB's rules and conditions of membership as they exist and without the ability to negotiate over those terms.

292. Those grounds include:

where the award was procured by corruption, fraud, or undue means;

where there was evident partiality or corruption in the arbitrators, or either of them;

where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;

where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made; or

where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10 (2000 & Supp. 2002).

293. *Commonwealth Coatings Corp. v. Cont'l Cas Co.*, 393 U.S. 145, 147 (1968).

athletes' rights.²⁹⁴ Considering the goal of both Acts to ensure an impartial arbitration process, it is fair to characterize these as laws expressing public policy concerns of Congress.²⁹⁵ As expressions of important public policy concerns, the question becomes whether Swiss law, particularly the Statute on Private International Law, provides the same protections as the Federal Arbitration Act and the Amateur Sports Act provide. A reading of the decision by the Swiss Federal Tribunal in *A. & B. v. International Olympic Committee*,²⁹⁶ suggests that the Statute on Private International Law is generous in its protections and would likely satisfy the test employed in *Bonny v. Society of Lloyd's*.²⁹⁷ Thus, the selection of Lausanne as the seat would likely be upheld.

3. The Use of Supplementary Law

The Code permits CAS panels to use—in the event gaps exist in the rules of a sports governing body—the laws of domestic legal systems and, in some cases, any rule of law the panel deems appropriate.²⁹⁸ Both Ordinary and Appellate CAS panels have found it necessary to fall back on these supplementary sources of law. While the primary source of supplementary law used by panels is Swiss domestic law, largely due to the fact that many IFs are headquartered in Switzerland, panels have also drawn upon the domestic law of the United Kingdom,²⁹⁹ general principles of law,³⁰⁰ civil law traditions,³⁰¹ and concepts from international human rights law.³⁰² The need to apply supplementary

294. Amateur Sports Act, 36 U.S.C. §§ 220501–220529 (1978). Section 220509 states that an ombudsman will handle athletes' complaints and concerns. 36 U.S.C. § 220509 (1978). Section 220529 provides for an arbitration process which employs the AAA and AAA Commercial Rules for parties aggrieved by the decisions of the USOC and its member NGBs. 36 U.S.C. § 220529.

295. A mandatory law is one that applies as a matter of law rather than by the choice of the parties and expresses the intent of Congress to protect an important public policy. An example of a mandatory law is the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300–1315 (1936).

296. *A. & B. v. Int'l Olympic Comm.*, Swiss Fed. Tribunal (1st Civ. Chamber) Judgment of 27 May 2003.

297. See *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 162 (7th Cir. 1993) (holding that a choice of foreign law will be upheld even if it means that it will result in an escape from mandatory United States law if the foreign law does not offend the policy behind the United States law).

298. CAS CODE, *supra* note 8, at R45, 58.

299. See *ITF v. K.*, CAS 99/A/223 (Aug. 31, 1999), DIGEST OF CAS AWARDS II 1998–2000 345 (Matthieu Reeb, ed. 2002) (applying the parties' choice of English law), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

300. See *B. v. ITU*, CAS 98/222 (Aug. 9, 1999), DIGEST OF CAS AWARDS II 1998–2000 330 (Matthieu Reeb, ed. 2002) (applying civil law concepts to supplemental CAS rules), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

301. *Id.*

302. See *H. v. FIM*, CAS 2000/A/281 (Dec. 22, 2000). DIGEST OF CAS AWARDS II 1998–2000 410 (Matthieu Reeb, ed. 2002) (providing the accused athlete an opportunity to discharge himself), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

law usually arises from one of three categories: (1) procedural rules and doctrines,³⁰³ (2) due process requirements,³⁰⁴ and (3) definitions of IF rules.³⁰⁵

Quite different from the Code of Sports-related Arbitration, the AAA-CAS Supplementary Procedures do not explicitly permit recourse to supplementary sources of law.³⁰⁶ However, in a few cases, AAA-CAS panels found it necessary to fall back on supplementary source material.³⁰⁷ Without guidance in selecting the source of supplementary law, AAA-CAS panels are likely to use the law that the arbitrators are most familiar with, namely, the law of the United States. It is open to question as to whether this lack of guidance for choosing supplementary law in the AAA-CAS Supplementary Procedures and the open-ended choice of supplementary law found in the Code is equitable.³⁰⁸

4. Choice of Law Analysis

Since the inception of CAS arbitration, panels have found it necessary to resort to supplementary sources of law to decide the cases before them. When an IF's rules are inconsistent or ambiguous, panels have resorted to rules of statutory construction. When the rules of an IF are incomplete, panels have turned to general principles of law and domestic law to fill the gaps.³⁰⁹ When the fairness of an IF substantive rule or the fairness of IF conduct is challenged, panels have relied upon general principles of law and domestic law to resolve those claims.³¹⁰

303. *See* S. v. FINA, CAS 2000/A/274 (Oct. 19, 2000) DIGEST OF CAS AWARDS II 1998–2000 389 (Matthieu Reeb, ed. 2002) (supplementing with Swiss domestic law), *available at* <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005); B. v. FINA, CAS 98/211 (June 7, 1999), DIGEST OF CAS AWARDS II 1998–2000 255 (Matthieu Reeb, ed. 2002) (detailing appellate procedures), *available at* <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

304. *See, e.g.*, B. v. ITU, CAS 98/222 (Aug. 9, 1999), DIGEST OF CAS AWARDS II 1998–2000 330 (Matthieu Reeb, ed. 2002) (discussing basic legal and procedural guarantees such as the presumption of innocence), *available at* <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

305. *See, e.g., id.* (discussing the relevant IF rules).

306. AAA-CAS SUPPLEMENTARY PROCEDURES, *supra* note 10, at R-33.

307. *See, e.g.*, USADA v. Neben, AAA No. 30-190-00713-03 (October 2003) (dissent by Christopher Campbell); USADA v. Ina, AAA No. 30-190-00814-02 (October 2002) (dissent by Christopher Campbell).

308. It could be argued that the absence of a supplementary law selection gives the arbitrators the freedom to fashion the best result for the dispute before them rather than being limited to the solution found in the supplementary law.

309. *See* S. v. FINA, CAS 2000/A/274 (Oct. 19, 2000), DIGEST OF CAS AWARDS II 1998–2000 389 (Matthieu Reeb, ed. 2002) (using Swiss law to fill in the gaps), *available at* <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

310. *See* B. v. IJF, CAS 98/214 (Mar. 17, 1999), DIGEST OF CAS AWARDS II 1998–2000 308 (Matthieu Reeb, ed. 2002) (applying French law as supplementary), *available at*

Without being able to apply supplementary sources of law, these panels would not have been able to render reasoned and well-supported decisions, and the panels would have been forced to use their personal notions and experience to decide the cases. While an arbitrator's personal experience may be sufficient to fill some gaps in the law, relying on this personal input for qualified, fair decisions bets the entire process on the luck of finding a sufficiently experienced arbitrator on the panel. It certainly does not enhance the credibility and legitimacy of the arbitration process. Unfortunately, this is exactly the situation that the open-ended nature of AAA-CAS Supplementary Procedures creates.

Because the Supplementary Procedures do not provide for the use of supplementary sources of law, AAA-CAS panels can find themselves without sufficient guidance to decide new issues and arguments. This may have been the situation in two AAA-CAS cases where at least one of the panel members felt compelled to issue a dissenting opinion that relied on United States domestic law for guidance.³¹¹ A lack of guiding authority, however, is not the only reason to provide for the use of supplementary law in the CAS and AAA-CAS arbitration process. Supplementary law can be the source of due process and substantive law protections for the parties, two essential assets in the adjudication process.

These protections are of heightened importance in doping cases, which are increasing in numbers and importance, internationally. Though often characterized as a contractual relationship, the relationship between athletes and the Olympic Movement in disciplinary and doping cases is not one of equal power. The Olympic Movement drafts the rules and operates the administrative machinery, thus giving it a more powerful position. Due process protections, such as those found in the Swiss Statute on Private International Law,³¹² can help protect the balance of power between the parties and ensure the fairness of the arbitration process. Protections like these need to be expanded to enable the CAS to adequately handle the doping cases headed its way.

The AAA-CAS Supplementary Procedures and the Code of Sports-related Arbitration should be amended to provide a single source of

<http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

311. For an example of a CAS decision with a dissenting opinion, see *ITF v. K.*, CAS 999/A/223 (Aug. 31, 1999), *DIGEST OF CAS AWARDS II 1998–2000* (Matthieu Reeb, ed. 2002), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

312. See *G. v. FEI*, CAS 91/53 (Jan. 15, 1992), *DIGEST OF CAS AWARDS 1986–1998 79* (Matthieu Reeb, ed. 1998) (the panel used the general principle of the law of interpretation *contra stipulatorem*), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

supplementary law. Creating a single supplementary of law, such as Swiss law, would make CAS and AAA-CAS decisions more consistent, and thus improve the quality of the decisions, the efficiency of the arbitration process, and the fairness of the process.

Choosing Swiss law as the back-up source of law for all CAS and AAA-CAS arbitrations would avoid placing arbitrators in the predicament of having to refer to an unfamiliar body of law to decide a case. Swiss law, because it has a rich history of dealing with sports law issues and because it has been widely and consistently used by many CAS panels, is as good if not better than any other country's law. Non-Swiss educated arbitrators would initially be at a disadvantage in applying Swiss law, but could easily learn it. Further, they would not face the problem of becoming familiar with another country's laws—for example South Korea's laws for Judo cases—the next time they were on a panel.³¹³ Also, athletes with similar charges against them, and similar defenses, would not run the risk of being treated differently because the panel used different supplementary law. In an example of the inequity of the current, scattered process, in the penalty phase of a doping hearing, one country's law may prohibit a four-year suspension while another country's law may allow a four-year suspension.³¹⁴ This kind of disparity completely destroys the credibility of CAS and must be remedied.

Using a single source of supplementary law would lead to higher quality decisions and precedent. As arbitrators become more familiar with Swiss law, both by applying it in cases before them and by seeing and reading opinions where it was used in other CAS decisions, their comfort level with Swiss law and in turn the quality of their decisions using Swiss law would improve. CAS and AAA-CAS precedent would be legitimized because there would not be conflicting precedent due to the use of conflicting supplemental law. But most importantly, using Swiss law would provide a consistent touchstone for ensuring the

313. See *S. v. FEI*, CAS 91/56 (June 25, 1992), DIGEST OF CAS AWARDS 1986–1998 93 (Matthieu Reeb, ed. 1998) (noting that IF rules does not mention the right to present counter evidence), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005); *S. v. FINA*, CAS 2000/A/274 (Oct. 19, 2000), DIGEST OF CAS AWARDS II 1998–2000 389 (Matthieu Reeb, ed. 2002) (using Swiss law to determine when a change in procedural rules became effective), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

314. See *S. v. FINA*, CAS 2000/A/274 (Oct. 19, 2000), DIGEST OF CAS AWARDS II 1998–2000 389 (Matthieu Reeb, ed. 2002) (examining due process fairness of IF introducing new evidence on appeal not used in the first proceeding), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005); *P. v. FINA*, CAS 97/180 (Jan. 14, 1999), DIGEST OF CAS AWARDS II 1998–2000 184 (Matthieu Reeb, ed. 2002) (testing strict liability doctrine under Swiss law), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

fairness of the arbitration process, an essential feature moving forward generally, and specifically in the pseudo-criminal doping cases that are becoming more prevalent.

D. The Development and Use of Precedent

Historically, the notion of precedent and its role in arbitration proceedings has been minimal.³¹⁵ Arbitration was originally designed to seek unique solutions individually tailored to the circumstances of the dispute before the arbitrators.³¹⁶ However, arbitration proceedings—particularly in CAS as well as other situations—are becoming concerned with consistency, predictability, and fairness. Therefore, precedent, as a way of promoting consistency, predictability, and fairness has begun to play a larger role in CAS decisions. But the role that precedent plays in the decision process seems to vary between CAS and AAA-CAS. Additionally, the flat structure of CAS does not lend itself to easily reconciling conflicting precedent.

1. The Role and Production of Precedent in CAS

The Code of Sports-related Arbitration does not specifically speak to the role of precedent. Code Rules 46 and 59 provide that before an award can be signed by the arbitrators, it must be reviewed by the CAS Secretary General who may draw to the panel's attention fundamental issues of principle.³¹⁷ One of the purposes of this process, according to the current CAS Secretary General, is to allow the Secretary General to point out discrepancies in their award from existing CAS precedent, so that the panel may bring the award into line with existing principles, if it so desires.³¹⁸ But, as the current Secretary General has stressed, Rules 46 and 59 do not give him the authority to force a change in the award nor has he expressed a willingness to pressure the panel to change the award to conform to existing principle.³¹⁹ The Secretary General will only ask that the panel explain in the award why it has departed from existing principle. Interestingly, this can be seen as a way of bringing the award into line with existing principle without changing the outcome of the award, as it will show that existing principle has not

315. S.C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT'L LAWYER 187, 187-206(1989).

316. *Id.*

317. CAS CODE, *supra* note 8, at R46, 59.

318. Interview with Matthieu Reeb, Secretary General, Court of Arbitration for Sport, in Lausanne, Switz. (May 25, 2004) (on file with author).

319. *Id.*

been changed.³²⁰ But, ultimately, the panel can refuse to even explain its departure from existing principle.³²¹

CAS panels' use of precedent has become more standardized over time. But even though CAS precedent has existed for some time, CAS panel has been slow, until the past several years, to cite and rely on CAS-created precedent.³²² This sparse use of precedent could be due to the civil law traditions of the majority of the early and active CAS arbitrators.³²³ Nevertheless, panels over the past three to four years have demonstrated and created a willingness to cite and rely on CAS precedent.³²⁴ In fact, several panels have referred to the development of CAS *lex sportiva*.³²⁵ But, unlike AAA-CAS panels, CAS panels generally limit their use of precedent to that of reference to legal principles.³²⁶

320. *Id.* Requiring the panel to explain its reasons for departing from existing precedent would lead to two possible results: the first is that the case is distinguished on its facts and the precedent is preserved and unchanged; the second is that the precedent is challenged head-on and a conflict is created. *Id.*

321. Tom Weir, *Jones Quickens Pace of Confronting Drug Use Issue*, USA TODAY, June 17, 2004, at 11C.

322. Court of Arbitration for Sport, DIGEST OF CAS AWARDS II 1998–2000 xxx (Matthieu Reeb, Ed. 2000) (creating digest to develop jurisprudence and harmonization of judicial rules and principles within the sports world). For examples of sparing use precedent, see USA Shooting and Q v. UIT, CAS 94/129 (May 23, 1995), DIGEST OF CAS AWARDS II 1998–2000 345 (Matthieu Reeb, ed. 2002), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005); W. v. X.S.A., CAS 91/45 (Mar. 31, 1992), DIGEST OF CAS AWARDS 1986–1998 33 (Matthieu Reeb, ed. 1998), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005); G. v. Int'l Equestrian Fed'n, CAS 91/53 (Jan. 15, 1992), DIGEST OF CAS AWARDS 1986–1998 79 (Matthieu Reeb, ed. 1998), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005). For examples of mid-life reluctance to rely on precedent, see also B. v. FINA, CAS 98/211 (June 7, 1999), DIGEST OF CAS AWARDS II 1998–2000 255 (Matthieu Reeb, ed. 2002), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005); UCI v. FCI, CAS 98/212 (Feb. 24, 1999), DIGEST OF CAS AWARDS II 1998–2000 274 (Matthieu Reeb, ed. 2002), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005). But, for examples of CAS increased use of precedent, see IAAF v. Boulami, CAS 2003/A/452 (Nov. 19, 2003); Baxter v. Int'l Olympic Comm., CAS 2002/A/376 (Oct. 15, 2002), available at <http://www.britski.org.uk/baxter.pdf> (last visited Feb. 2, 2005); Jovanovic v. USADA, CAS 2002/A/360 (Feb. 7, 2002), available at http://www.usantidoping.org/files/active/arbitration_rulings/arbitration_ruling_2_11_2002_jovanovic.pdf (last visited Feb. 2, 2005).

323. Interview with Jean-Philippe Rochat, former CAS Secretary General, Lausanne, Switz. (May, 25, 2004) (on file with the author). CAS's view and use of precedent is the same as the civil law system's use of precedent. *Id.*

324. See, e.g., IAAF v. Boulami, CAS 2003/A/452 (rejecting an athlete's argument based on earlier CAS decisions); Baxter v. Int'l Olympic Comm., CAS 2002/A/376 (rejecting athlete's argument based on earlier CAS decisions and citing specifically to several earlier CAS decisions); Jovanovic v. USADA, CAS 2002/A/360 (rejecting the same argument as in *Baxter*).

325. Canadian Olympic Comm & Scott v. Int'l Olympic Comm., CAS 2002/O/373 (Dec. 18, 2003) (finding jurisprudence developed from a number of principles of sports law and regulation).

326. *Id.*

2. The Role and Production of Precedent in AAA-CAS

Prior to their amendment in 2005, the AAA-CAS Supplementary Procedures, unlike the Code of Sports-related Arbitration, specifically recognized the role of precedent. 2004 Supplementary Procedure Rule 33(e), which covers choice of law matters, stated that IF and Anti-Doping Code rules may be mitigated by principles found in CAS decisions. While the reason for the deletion of reference to CAS precedent in Supplementary Procedure 33(e) is not known, and its effect speculative at this time, it is quite likely that the use of CAS precedent has become a common practice that will continue despite the 2005 amendment. In practice, AAA-CAS panels have made generous use of Rule 33(e). However, AAA-CAS panels use precedent in the way that courts in the United States rely on precedent. In addition to using precedent as a source of legal principles as CAS panels do, AAA-CAS panels use precedent to produce consistent results by comparing facts of the case before them with the facts of previous decisions.³²⁷ Also, in addition to comparing facts, the language used by AAA-CAS panels suggests that they view precedent as close to binding.³²⁸

3. Evaluation of CAS and AAA-CAS Use of Precedent

Both CAS and AAA-CAS panels are increasingly turning to prior decisions for guidance. While CAS practice is more limited in its reliance on precedent than AAA-CAS practice, CAS is embracing the use of precedent in order to help it ensure consistency and quality in its decisions. However, the structure of CAS could stand in the way of achieving consistency. Arbitration in general and the CAS structure in particular is a flat system where all decisions are final and equal in precedential value. With the exception of appeals from AAA-CAS

327. See, e.g., *USADA v. Vencill*, AAA-CAS No. 30 190 00291 03 (July 24, 2003) (citing a series of CAS decisions in order to develop proper sanctions and noting that the panel was not bound to apply the ISO standard in laboratory testing of the urine sample at issue in the case), available at http://www.usantidoping.org/files/active/arbitration_rulings/arbitration_ruling_7_24_2003_Vencill.pdf (last visited Feb. 2, 2005); *USADA v. Neben*, AAA-CAS 30 190 00713 03 (Oct. 16, 2003) (relying on *USADA v. Moninger*, AAA-CAS 30 190 00930 02, to conclude that UCI regulations do not require the USADA to prove or identify the source of the prohibited substance in the respondent's urine sample), available at http://www.usantidoping.org/files/active/arbitration_rulings/arbitration_ruling_10_21_2003_Neben.pdf (last visited Feb. 2, 2005).

328. See, e.g., *USADA v. Moninger*, AAA-CAS 30 190 00930 02 (Apr. 2, 2003) (relying on the analogous facts and standard of proof found in *Blackwelder v. USADA*, AAA-CAS 30 190 0012 02, and *USADA v. Dickey*, AAA-CAS 30 190 00241 02, to hold that respondent failed to meet its burden of proof that the chain of custody of open bottle of 15 capsules was adequate), available at http://www.usantidoping.org/files/active/arbitration_rulings/arbitration_ruling_4_3_2003_Moninger.pdf (last visited Feb. 2, 2005).

decisions to the CAS Appellate Division, there is no review of CAS decisions that could correct mistakes in the use or development of precedent, including the reconciliation of conflicting precedent. In a judicial system, conflicting precedent can be and often is reconciled by the single supreme court of the system. However, in CAS there is no single supreme court to reconcile conflicting awards.

Existing conflicts in precedent—in an arbitration setting—may not be an evil that demands much attention. It can be argued that conflicting precedent gives subsequent panels a choice of precedent that allows it to craft the most equitable solution to the present dispute or that time will allow a sort of Darwinian process where the best precedent is chosen or survives. But on the other hand, conflicting precedent can lead to unequal treatment of athletes. Such unequal treatment could particularly occur in the penalty phase of a doping case.

An example of this unequal treatment can be seen in two recent CAS Appeals Division decisions involving a conflict over the power of a CAS appeals panel to increase an athlete's doping sentence. The panel in *Pastorello v. USADA*, in an award issued June 27, 2002, specifically announced that on appeal "there is a possibility that a sentence will be increased."³²⁹ However, the panel in *Demetis v. Fédération Internationale de Natation Amateur* ("FINA"),³³⁰ found that a sentence cannot be increased. Therefore, while the step of creating a CAS supreme court might be unnecessary, the use of advisory decisions to reconcile conflicting precedent should be considered. While not changing the result of an award, the Secretary General or any party desiring to reconcile conflicting precedent, would ask a third panel to reconcile the question of law created by the conflict. Such a process, while perhaps academic in some sense, would improve the consistency and predictability of future CAS proceedings.³³¹ Improved consistency and predictability are going to be necessary if CAS is going to be able to handle, fairly, the increasing number of doping cases coming before its panels.

E. The Development and Application of Key Legal Doctrines

Even though the rules governing doping cases come from the IFs and the World Anti-Doping Code, CAS and AAA-CAS play a large role in developing and even modifying those rules. In particular, three key

329. *Pastorello v. USADA*, CAS 2002/A/363, at para. 6.8 (June 27, 2002).

330. *Demetis v. FINA*, CAS 2002/A/432 (May 27, 2003).

331. *Demetis v. FINA*, CAS 2002/A/432, at para. 9.4.8–9.4.11 (citing Swiss law to justify additional review in order to limit the risk of injustice).

doctrines that have been developed by CAS play an important role in doping cases. Those three doctrines: (1) the quasi-criminal nature of doping cases, discussed below because they are not only important, but they are uncertain and still developing; (2) strict liability; and (3) the comfortable satisfaction burden of proof.

1. Quasi-Criminal Doctrine

Sport disputes, including the enforcement of doping rules, are fundamentally private law matters of contract obligations. However, the quantum of procedural protections due athletes under notions of general principles of law, basic concepts of fairness, and the growing body of sports *lex tiva* can depend on whether doping cases are considered criminal by nature.³³² If doping cases are considered criminal by nature, then matters such as the burden of proof and permissible defenses will be affected.

When analyzing the question of whether doping cases are criminal in nature, CAS panels have focused on the consequences and sanctions being imposed. In the majority of cases, CAS and AAA-CAS panels have found the consequences to be penal.³³³ Because doping cases are criminal in nature, athletes are entitled to procedural protections such as

332. See *B. v. Int'l Triathlon Union*, CAS 98/222 (Aug. 9, 1999), DIGEST OF CAS AWARDS II 1998–2000 330 (Matthieu Reeb, ed. 2002) (examining the scope of strict liability and proof requirements in doping cases), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

333. See *id.* (finding doping investigations are quasi-private procedures); see also *Demetis v. FINA*, CAS 2002/A/432 (agreeing that sanctions are similar to criminal penalties); *H. v. FIM*, CAS 2000/A/281 (Dec. 22, 2000), DIGEST OF CAS AWARDS II 1998–2000 410 (Matthieu Reeb, ed. 2002) (holding that the “special circumstances of each case ‘should be reviewed when determining sanctions’”), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005); *C. v. FINA*, CAS 95/141 (Apr. 22, 1996), DIGEST OF CAS AWARDS 1986–1998 215 (Matthieu Reeb, ed. 1998) (implying doping sanctions are private in nature), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005); *N. v. Int'l Equestrian Fed'n*, CAS 92/73 (Sept. 10, 1992), DIGEST OF CAS AWARDS 1986–1998 153 (Matthieu Reeb, ed. 1998) (holding sanctions are dependent on the level of culpability of the athlete), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005); *USADA v. Neben*, AAA-CAS 30 190 00713 03 (Oct. 16, 2003) (applying a strict liability standard), available at http://www.usantidoping.org/files/active/arbitration_ruling_10_21_2003_neben.pdf (last visited Feb. 2, 2005); *USADA v. Vencill*, AAA-CAS 30 190 00291 03 (July 24, 2003) (finding doping sanctions to be quasi-criminal), available at http://www.usantidoping.org/files/active/arbitration_ruling_7_24_2003_Vencill.pdf (last visited Feb. 2, 2005). But see *N., J., Y., W. v. FINA*, CAS 98/208 (Dec. 22, 1998), DIGEST OF CAS AWARDS II 1998–2000 234 (Matthieu Reeb, ed. 2002) (finding doping cases to be non-criminal in nature), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005); *Blackwelder v. USADA*, AAA-CAS 30 190 00012 02 (May 17, 2002) (noting the proceeding is not criminal and “principles of criminal law do not generally apply when reviewing sanctions proposed by USADA”), available at http://www.usantidoping.org/files/active/arbitration_rulings/arbitration_ruling_5_22_2002_blackwelder.pdf (last visited Feb. 2, 2005).

the presumption of innocence.³³⁴ However, while the imposition of penal sanctions requires a showing of intent in most domestic legal systems, CAS panels have been able to reconcile the imposition of penal sanctions with the use of the strict liability doctrine.³³⁵ These panels have found that the difficulty of proving intent and the need to rid sport of drugs justify use of the strict liability doctrine.³³⁶ The panels, perhaps as a way to rationalize allowing the use of the strict liability doctrine in a criminal-like matter, make intent an element of the penalty phase of the process.³³⁷

However, this bifurcation of the process and divorce of the intent element from the guilt phase of the process may be a problematic fix. As will be explored below, the use of non-criminal, private law tools such as strict liability has caused CAS doctrinal concerns and could, unless better reconciled, continue to raise doubts about the soundness and fairness of the doping control system.

2. Strict Liability

Cases involving application of the strict liability doctrine were slow arrivals to CAS. Although CAS opened for business in 1986, it was not until 1992 that a CAS panel published its first opinion on an appeal from the IF application of the strict liability doctrine.³³⁸ This resistance to appeals was due in part to the mistrust or uncertainty about the new CAS entity and partly due to the relatively rare enforcement of anti-doping rules. Once strict liability cases came before CAS panels it became clear that CAS, as a body, would struggle for a consistent definition of strict liability.

334. See *B. v. Int'l Triathlon Union*, CAS 98/222 (determining the principle of 'in dubio pro reo' or the benefit of the doubt is applicable in doping investigations).

335. See *C. v. FINA*, CAS 95/141 (asserting lack of strict liability would make the "fight against doping . . . practically impossible"); *H. v. FIM*, CAS 2000/A/281 (finding that the "high objectives and practical necessities of the fight against doping amply justify the application of a strict liability standard" (internal citations omitted)).

336. *C. v. FINA*, CAS 95/141; *H. v. FIM*, CAS 2000/A/281.

337. *C. v. FINA*, CAS 95/141 (preferring a sliding scale of sanctions based on the athlete's level of fault); *H. v. FIM*, CAS 2000/A/281 (holding that the "special circumstances of each case" should be reviewed when determining sanctions).

338. *G.v. Int'l Equestrian Fed'n*, CAS 91/53 (Jan. 15, 1992), DIGEST OF CAS AWARDS 1986–1998 79 (Matthieu Reeb, ed. 1998), available at <http://www.kluwarbitration.com> (last visited Feb. 2, 2005).

The [CAS] wishes first of all to recall that, where doping of the taking of prohibited substances is concerned, there is normally and generally in the sporting regulations of Federations an inversion of the burden of proof in the sense that, as soon as the presence of prohibited substances is detected, there is the presumption of a voluntary act. It is then up to the athlete to produce evidence to the contrary.

Id.

Some of the trouble that CAS had in refining the strict liability doctrine can be attributed to the overlap of several steps or doctrines in the doping adjudication process. Proof of a doping violation naturally involves matters of burdens of proof and presumptions. Strict liability is an end point in proving a doping violation; burdens of proof and presumptions are tools or routes to the end conclusion of strict liability. CAS panels have disagreed and struggled with the appropriate burdens of proof and presumptions to reach or prove strict liability.³³⁹ And, CAS panels have been plagued by the use of strict liability in what is basically a penal process.³⁴⁰

Another difficulty in finding a single definition of strict liability can be blamed on the IFs. IFs and the IOC itself have defined strict liability differently.³⁴¹ CAS, as required by its rules and jurisprudence, must apply the definition of strict liability found in the IFs rules.³⁴² When IFs disagree, the CAS definitions can disagree. However, CAS panels, seeing the need for uniformity and fairness, have uniformly insisted that any definition of strict liability abide by general principles of law and

339. See *C. v. FINA*, CAS 95/141 (Apr. 22, 1996), DIGEST OF CAS AWARDS 1986–1998 215 (Matthieu Reeb, ed. 1998) (endorsing the presumption of the athlete's guilt, but allowing for burden shifting by the athlete by providing exculpatory evidence), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005); *S. v. Int'l Equestrian Fed'n*, CAS 91/56 (June 25, 1992), DIGEST OF CAS AWARDS 1986–1998 93 (Matthieu Reeb, ed. 1998) (upholding a presumption of guilt, but allowing the presumption to be overturned by proof to the contrary, but not requiring peremptory evidence), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

340. See, e.g., *N. v. Int'l Equestrian Fed'n*, CAS 92/73 (Sept. 10, 1992), DIGEST OF CAS AWARDS 1986–1998 153 (Matthieu Reeb, ed. 1998) (noting that, in this context, the concept of strict liability imposes the burden of proof normally imposed on the accuser, on the accused), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005); see also *B. v. Int'l Triathlon Union*, CAS 98/222 (Aug. 9, 1999), DIGEST OF CAS AWARDS II 1998–2000 330 (Matthieu Reeb, ed. 2002) (arguing that the rule of strict liability should be construed to go even further than imposing a presumption of guilt on the accused athlete and should allow exoneration only in a very limited set of specifically defined cases), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

341. See, e.g., *W. v. Int'l Equestrian Fed'n*, CAS 92/86 (April 19, 1993), DIGEST OF CAS AWARDS 1986–1998 161 (Matthieu Reeb, ed. 1998) (noting the IF adoption of IOC rules to conform with a strict liability standard), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005). Perhaps the most dramatic example of the disparate standards can be seen in the definitions applied by FINA, on the one hand, and the International Shooting Union and the IAAF on the other. Compare *C. v. FINA*, 95/141 (Apr. 22, 1996), DIGEST OF CAS AWARDS 1986–1998 187 (Matthieu Reeb, ed. 1998) (finding that strict liability required an irrefutable presumption of guilt), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005) with *USA Shooting & Q. v. Int'l Shooting Union*, CAS 94/129 (May 23, 1995), DIGEST OF CAS AWARDS 1986–1998 187 (Matthieu Reeb, ed. 1998) (finding the Union's regulation of strict liability different from the IOC regulation even though the Union argued the regulations were the same), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

342. See *USA Shooting & Q. v. Int'l Shooting Union*, CAS 94/129 (applying definition of strict liability found in IF's rules).

natural justice.³⁴³

With all of this under consideration, the CAS has developed two somewhat competing definitions of strict liability. The first, developed early in the court's history, can be best described as a "simple legal presumption." Under this definition, once the presence of a prohibited substance is established, a rebuttable presumption of guilt, negligence, or fault is created. The athlete may rebut this presumption by counter evidence such as the act of a third person.³⁴⁴ Presumably, such counter proof would allow the athlete to escape all sanctions and responsibility.

The second, now dominant definition, can be best labeled as "pure strict liability."³⁴⁵ Under this definition, any question of fault, intent, or negligence is irrelevant: an athlete may not avoid a sanction by showing an absence of fault. The concept is said to be similar to "civil liability, without fault in tort, or comparable to product liability cases."³⁴⁶

While pure strict liability seems to have won the day in CAS, its panels have been uncomfortable with the potential harshness of the doctrine and have developed two mitigating doctrines. The first mitigating doctrine stems from the view that the strict liability doctrine is akin to a penal sanction. The second mitigating doctrine requires a vigorous analysis of the causal link that supports a finding of strict liability.

Early in the CAS evaluation of the doctrine, strict liability was viewed as "akin to a penal sanction."³⁴⁷ Because it was akin to a penal

343. See *B. v. Int'l Triathlon Union*, CAS 98/222 (reasoning that strict liability "does not eliminate the need to establish the wrongful act itself and the causal link. . ."); *S. v. Int'l Equestrian Fed'n*, CAS 91/56 (June 25, 1992) (viewing strict liability as a presumption as well as burden).

344. See *S. v. Int'l Equestrian Fed'n*, CAS 91/56 (allowing proof of intentional act of a third party or faulty testing procedures to clear the athlete); see also *B. v. Int'l Triathlon Union*, CAS 98/222 (Aug. 9, 1999), DIGEST OF CAS AWARDS II 1998-2000 330 (Matthieu Reeb, ed. 2002) (viewing as proper that the accused athlete may present counter-evidence on the basic question of guilt or culpability), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005); *G. v. Int'l Equestrian Fed'n*, CAS 92/63 (Sept. 10, 1992), DIGEST OF CAS AWARDS 1986-1998 115 (Matthieu Reeb, ed. 1998) (reviewing evidence of an act by a third party as a valid method to rebut presumption), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

345. See *L. v. FINA*, 95/142 (Feb. 14, 1996), DIGEST OF CAS AWARDS 1986-1998 225 (Matthieu Reeb, ed. 1998) (outlining strict liability usage in doping cases), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

346. *L. v. FINA*, CAS 95/142 (internal citations omitted).

347. *N. v. Int'l Equestrian Fed'n*, CAS 92/73 (Sept. 10, 1992), DIGEST OF CAS AWARDS 1986-1998 153 (Matthieu Reeb, ed. 1998), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

[B]earing in mind the gravity of the measures which could be applied in this case, and which are akin to penal sanctions, there is no doubt that, by applying the general principals of law, the person responsible has the possibility of proving himself innocent

sanction, general principles of law give every defendant the right to prove his innocence by showing that the positive test result was the result of the action of a third party or that the analysis carried out was erroneous.³⁴⁸ Then, after the IOC redefined the strict liability doctrine in 1992, the CAS seemed to abandon the view of strict liability as a penal sanction and saw it as “civil liability, without fault in tort.”³⁴⁹ Then, in 1999, the CAS seemed to return to the view that strict liability indeed has aspects of a penal sanction.³⁵⁰

In two successive decisions, the CAS declared that while athletes were still responsible regardless of fault, they should be allowed to rebut the presumption of guilt by showing no fault to a virtual certainty.³⁵¹ This showing could be done by demonstrating that the results were caused by *force majeure* circumstances or the wrongful act of a third person.³⁵² The CAS, by providing this opportunity to rebut the finding of guilt, bifurcated the concept of strict liability. Responsibility would still lead to sanctions, but the athlete could be declared blameless. It seemed as though the CAS was still uncomfortable with punishing in the absence of fault.

The CAS, or at least one CAS panel, then took focus on the procedures accompanying the strict liability doctrine. In *B. v. International Triathlon Union*, the panel started with the conclusion that because strict liability is a quasi-penal process, general principles of law and the requirements of a fair trial apply to the process.³⁵³ That being so, strict liability is a scheme that punishes the consequences, the presence of a prohibited substance, or a previous act of consuming the

by providing proof to the contrary

Id.

348. *N. v. Int'l Equestrian Fed'n*, CAS 92/73.

349. *L. v. FINA*, CAS 95/142 (internal citations omitted).

350. *See B. v. Int'l Judo Fed'n*, CAS 98/214 (Mar. 17, 1999), DIGEST OF CAS AWARDS II 1998–2000 308 (Mathieu Reeb, ed. 2002), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005) (finding that the athlete is innocent until the banned substance is found in his body). The CAS found that:

Every athlete enjoys a presumption of innocence until such a time as the presence of a banned substance in his body is established. It is a matter for the sports organization to prove that presence; it is not required to prove intentional doping on the part of the athlete. That intent, and his culpability, are presumed as soon as proof of the presence of the banned substance has been furnished. The athlete can reverse this presumption of guilt by showing that the case is not one of doping and that he is innocent.

Id.

351. *Id.*

352. *B. v. Int'l Triathlon Union*, CAS 98/222 (Aug. 9, 1999), DIGEST OF CAS AWARDS II 1998–2000 338 (Mathieu Reeb, ed. 2002), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005)

353. *Id.*

prohibited substance.³⁵⁴ This process of working backward from a consequence to predicate act necessarily relies on a causal link between the consequence and the act.³⁵⁵ General principles of law and the requirements of a fair trial require that the causal link leave no doubt that the consequence was caused by one single act, the prohibited act. When that link cannot exclude other causes, the strict liability doctrine cannot be applied.³⁵⁶ *B. v. International Triathlon Union* therefore required that the scientific presumption that linked the consequences to the prohibited act to be beyond doubt. Thus, the CAS now recognized the right to challenge the science that strict liability rests upon.

Since *B. v. International Triathlon Union*, CAS panels appear to have agreed on a common basic definition of strict liability. That basic definition accepts that proof of a banned substance in an athlete's body is sufficient to prove a doping violation.³⁵⁷ Yet, CAS panels do not seem ready to accept that the doctrine stops there. CAS panels have implied that in the absence of fault, defined as either the intent to use a prohibited substance or negligence in not preventing the ingestion of a banned substance, a doping violation has not occurred.³⁵⁸ CAS panels have spoken of strict liability as "a legal presumption and the allocation of burdens of proof,"³⁵⁹ and have concluded that despite the presence of a banned substance in an athlete's body, athletes still have a right to "discharge" themselves.³⁶⁰ Discharging oneself according to the CAS means that the forbidden substance was "the result of an act of malicious intent by a third party" or that test results were "impaired by procedural defect."³⁶¹ Thus, it appears that the CAS does not employ

354. *Id.*

355. *Id.* (reasoning that "[t]he principle of the strict liability rule does not exempt the sports federations [from proving] the existence of a doping offense. . . . [The] rule does not eliminate the need to establish the wrongful act itself and the causal link between the wrongful act and its consequences").

356. *Id.*

357. See *Strahija v. FINA*, CAS 2003/A/507 (Aug. 11, 2003) (finding a doping offense occurs when a "prohibited substance is found within a competitor's body tissue or fluids"); *Baxter v. Int'l Olympic Comm.*, CAS 2002/A/376 (Oct. 15, 2002) (citing earlier cases as establishing the strict liability definition), available at <http://www.britski.org.uk/baxter.pdf> (last visited Feb. 2, 2005); *H v. FIM*, CAS 2000/A/281 (Dec. 22, 2000), DIGEST OF CAS AWARDS II 1998-2000 410 (Matthieu Reeb, ed. 2002) (determining the general rule under strict liability to be a finding of a forbidden substance in urine and test results not affected by procedural defects in a laboratory), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

358. See *Baxter v. Int'l Olympic Comm.*, CAS 2002/A/376 (reviewing a charge of doping and finding no intent by athlete, but still holding athlete liable for use of an illegal substance).

359. *Demetis v. FINA*, CAS 2002/A/432.

360. *H v. FIM*, CAS 2000/A/281 (finding that "common principles of law and the human rights of the accused" allow the athlete an attempt to challenge the panel's findings).

361. *Id.*

strict liability if a banned substance is found in an athlete's body.

Also since *B. v. International Triathlon Union*, panels have continued to uphold strict liability doctrine and the no fault standard despite finding doping sanctions—such as suspension from competition—to be similar to penalties in criminal proceedings in which prosecutors bear the burden of proving guilt.³⁶² One reason CAS panels seem able to accept these seemingly contradictory concepts are the conceptual separation of the step of finding guilt and the step of determining the penalty.³⁶³ While these steps are normally separated in a criminal proceeding, the separation in doping cases emphasizes that questions of fault are relevant in the penalty phase and minimal fault can reduce a penalty.³⁶⁴ In fact, one panel has gone as far as stating that the strict liability doctrine applies to the question of disqualification from a competition, but not necessarily the question of suspension from further competition.³⁶⁵

AAA-CAS panels, on the other hand, have not, like CAS panels, expressed reservations about the strict liability doctrine working in practice like absolute liability. AAA-CAS panels have routinely and frequently stated that the USADA need only show the presence of a prohibited substance in an athlete's sample to prove a doping offense.³⁶⁶ No mitigating language or conditions have been used by AAA-CAS panels to date. Thus, despite the characterization of doping cases by many AAA-CAS panels as quasi-criminal, they continue to shun criminal case constructs meant to protect the accused.³⁶⁷

362. *Demetis*, CAS 2002/A/432.

363. For examples of cases affirming that an unintentional doping can result in reduced penalties compared to an intentional doping, see *Strahija*, CAS 2003/A/507 and *Demetis*, CAS 2002/A/432.

364. *Strahija*, CAS 2003/A/507; *Demetis*, CAS 2002/A/432.

365. *Baxter v. Int'l Olympic Comm.*, CAS 2002/A/376 (Oct. 15, 2002), available at <http://www.britski.org.uk/baxter.pdf> (last visited Feb. 2, 2005). "Consistent CAS law has held that athletes are strictly responsible for substances they place in their body and that for purposes of disqualification (as opposed to suspension), neither intent nor negligence needs to be proved by the sanctioning body." *Id.*

366. See *USADA v. Cherry*, AAA-CAS 30 190 00463 03 (Nov. 24, 2003) (noting that IAAF rules determine a doping offense has occurred when a prohibited substance is present in the athlete's body), available at http://www.usantidoping.org/files/active/arbitration_rulings/arbitration_ruling_11_24_2003_Cherry.pdf (last visited Feb. 2, 2005); *Neben v. UCI*, AAA-CAS 30 190 00713 03 (Oct. 21, 2003) (applying strict liability), available at http://www.usantidoping.org/files/active/arbitration_rulings/arbitration_ruling_10_21_2003_Neben.pdf (last visited Feb. 2, 2005); *USADA v. Vencill*, AAA-CAS 30 190 00291 03 (July 24, 2003) (noting that knowledge by the athlete in taking a prohibited substance is immaterial), available at http://www.usantidoping.org/files/active/arbitration_rulings/arbitration_ruling_7_24_2003_Vencill.pdf (last visited Feb. 2, 2005).

367. *Vencill*, AAA-CAS 30 190 00291 03.

3. Comfortable Satisfaction Standard of Proof

The standard of proof in a doping charge is in most cases dictated by the applicable IF rules, causing great confusion. Historically, the CAS standard of proof has varied between different IFs. For example, until recently the IAAF used a “beyond a reasonable doubt standard” while FINA has at times used a preponderance of the evidence standard.³⁶⁸ However, the Olympic Movement, through the World Anti-Doping Code, is attempting to create one uniform standard of proof for all IFs in doping cases. The IOC, by requiring all IFs to adopt the World Anti-Doping Code in order to be a member of the Olympic Games, is creating the uniform standard of proof “to the comfortable satisfaction of the hearing body.”³⁶⁹ While the standard has been codified in the World Anti-Doping Code, it was CAS that developed the standard and it will be CAS that will refine the standard.

The first use of the comfortable satisfaction standard of proof may have occurred in the Australian case of *Briginshaw v. Briginshaw*.³⁷⁰ In *Briginshaw*, the Australian Supreme Court searched for the appropriate standard of proof to establish wrong doing or fault in a divorce proceeding. As the foundation of the Court’s analysis, it established that a divorce proceeding was neither a criminal nor a quasi-criminal proceeding.³⁷¹ Therefore, proof beyond a reasonable doubt was not required as is required in all criminal matters.³⁷² Yet, on the other hand, while the Court said that a divorce proceeding is a civil matter, it was not a routine civil matter that employed proof by a preponderance of the evidence (or balance of probabilities).³⁷³ A divorce case was different

368. See INT’L ASS’N OF ATHLETIC FED’N, COMPETITION RULES 33 (2004–05) (detailing the standard of proof required by the IAAF), available at <http://www.iaaf.org/newsfiles/23484.pdf> (last visited Feb. 2, 2005). The rules state:

The standard of proof shall be whether the IAAF, the Member or other prosecuting authority has established an anti-doping rule violation to the comfortable satisfaction of the relevant hearing body, bearing in mind the seriousness of the allegation which is made. This standard of proof is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

Id.; see *IAAF v. Boulami*, CAS 2003/A/452, para. 4.3 (Nov. 19, 2003) (citing IAAF rule 21.9 requiring IAAF to prove beyond a reasonable doubt that doping occurred).

369. WADA CODE, *supra* note 131, § 3.1 (2003), available at http://www.wada-ama.org/rtecontent/document/code_v3.pdf (last visited Apr. 22, 2005). “The standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.” *Id.* at § 3.1.

370. *Briginshaw v. Briginshaw* (1938) 60 C.L.R. 336.

371. *Id.* at 347. “A petition for dissolution of marriage is not quasi-criminal, whatever the grounds.” *Id.* at 350 (internal citations omitted).

372. *Id.* at 347.

373. *Id.* at 361.

historically, but more importantly because it involved allegations of wrongdoing, even allegations of immorality, a higher level of proof than by a preponderance of the evidence was needed.³⁷⁴ Stressing that the burden of proof depends on the seriousness of the allegation or gravity of the consequences and that the presumption of innocence must be given weight, the court concluded that “the nature of the allegation requires (proof) to a comfortable satisfaction.”³⁷⁵

After *Briginshaw*, Australian courts used the comfortable satisfaction standard of proof in professional misconduct cases,³⁷⁶ unfair trade practice cases,³⁷⁷ immigration cases,³⁷⁸ and civil rights cases.³⁷⁹ However, the Australian courts have refused to use the standard in criminal or quasi-criminal cases.³⁸⁰ The Australian experience therefore instructs us that the comfortable satisfaction burden of proof can be employed civil matters where allegations of misconduct or immorality are involved, but not criminal or quasi-criminal proceedings. It further teaches that the quantity of proof is higher than a preponderance of the evidence, but not quite as high as beyond a reasonable doubt; exactly where in that range, however, is uncertain.

a. CAS Use of the Standard

Possibly because of its relative newness, only a handful of CAS panels have used the comfortable satisfaction standard. Further, those

374. *Id.* at 365–66.

375. *Id.* at 350.

376. *Murphy v. The Bar Assoc. of New South Wales* (2001) N.S.W.S.C. 1191 at para. 21 (citing *Briginshaw* to warrant caution in making a determination of liability).

377. *See* *Austl. Competition & Consumer Comm’n v. Pauls, Ltd.*, (2002) 1586 F.C.R. 43 (noting that the applicable standard of proof is that “[t]he facts proved must from a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied”) (quoting *Jones v. Dunkel* (1959) 101 C.F.R. 298 at 305 (emphasis omitted)); *Austl. Competition & Consumer Comm’n v. Mar. Union of Austl.* (2001) 1549 F.C.R. 56 (reasoning that the civil standard of reasonable satisfaction may take into consideration the gravity of the allegations in determining whether a fact has been proven to the requisite satisfaction of the court).

378. *Sun v. Minister for Immigration and Ethnic Affairs* (1997) 81 F.C.R. 103, 123 (finding *Briginshaw* required “cogent evidence” to determine bias and ultimately liability); *Wati v. Minister for Immigration and Ethnic Affairs* (1996) 71 F.C.R. 103, 113–14 (determining the level of proof required is “the balance of probabilities” or “reasonable satisfaction”).

379. *Maced. Teachers’ Ass’n of Vict., Inc. v. Human Rights and Equal Opportunity Comm’n* (1998) 91 F.C.R. 8, 42 (stating that *Briginshaw* provides guidance to applying the level of proof in civil matters involving serious allegations).

380. *Thomas v. The Queen* (1960) 102 C.L.R. 584 (Austl.) (insisting that criminal liability could be had only upon a finding of guilt beyond a reasonable doubt and nothing less), available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high%5fct/102clr584.html?query=%7e+thomas+v+the+queen> (last visited Apr. 24, 2005).

panels have not discussed or examined the standard very extensively. The first panel to employ the comfortable satisfaction standard was the *Kornev and Ghoulie v. International Olympic Committee* ad hoc panel at the Atlanta Games in 1996.³⁸¹ Though unreported, the *Kornev* panel is quoted as stating, in a doping case, that the “ingredients must be established to the comfortable satisfaction of the Court having in mind the seriousness of the allegation which is made.”³⁸² That language was next used by the *N., J., Y., W. v. FINA* panel in 1998. The *N., J., Y., W.* panel was careful to point out that the comfortable satisfaction standard was less than the criminal standard of beyond a reasonable doubt, but more than the ordinary civil standard of a preponderance of the evidence. Thus, a lower standard of proof than is required in a criminal case is appropriate in doping cases, according to the *N., J., Y., W.* panel, because disciplinary cases are not of a criminal nature.³⁸³ Rather, according to the panel, disciplinary cases are of a private law of association nature.³⁸⁴

CAS panels that have used the comfortable satisfaction standard after *N., J., Y., W.* have not discussed the standard’s meaning or the notion of whether it is a non-criminal standard.³⁸⁵ However, many CAS panels since *N., J., Y., W.* have characterized disciplinary cases involving doping to be criminal or quasi-criminal in nature.³⁸⁶ Considering the *N., J., Y., W.* panel premise that the comfortable satisfaction standard is a non-criminal standard and that the other CAS panels have found doping cases to be criminal in nature, there is, at the least, a question about the doctrinal foundation and the appropriateness of using the comfortable satisfaction standard in doping cases.

Problematically, where the standard falls between the preponderance of the evidence and beyond a reasonable doubt standard is unclear. Is proof to a comfortable satisfaction closer to proof beyond a reasonable

381. *N., J., Y., W. v. FINA*, CAS 98/208 (Dec. 22, 1998), DIGEST OF CAS AWARDS II 1998–2000 234 (Matthieu Reeb, ed. 2002) (citing *Kornev & Ghouliev v. Int’l Olympic Comm.*, OG 96/003/004 (unpublished)), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

382. *Id.*

383. *Id.* (adopting the test established in *Kornev*).

384. *Id.*

385. *Id.*

386. See, e.g., *Strahija v. FINA*, CAS 2003/A/507 (Aug. 11, 2003) (affirming that the standard of proof falls between criminal and civil standards), available at http://www.sportslaw.nl/categorieen/print.asp?p_nr=42 (last visited Apr. 24, 2005); *B. v. FINA*, CAS 99/211 (June 7, 1999), DIGEST OF CAS AWARDS II 1998–2000 255 (Matthieu Reeb, ed. 2002) (finding that a charge of testing manipulation against an athlete includes elimination of *mens rea*), available at <http://www.kluwerarbitration.com> (last visited Feb. 2, 2005).

doubt because doping cases are at the least quasi-criminal in nature? Or, is proof to a comfortable satisfaction closer to the preponderance of the evidence standard because doping cases are private in nature? Before the comfortable satisfaction standard becomes entrenched in CAS practice, these basic questions should be answered. These questions are important because, if doping cases truly are criminal in nature and if the comfortable satisfaction standard is a private-civil law standard, then, at the least, the CAS is being doctrinally untrue and inconsistent by concluding that a private-civil law standard can be used in a criminal like proceeding. At the worst, CAS is permitting due process violations by allowing the imposition of penal sanction with a non-criminal standard of proof.

b. AAA-CAS Use of the Standard

AAA-CAS panels have used the comfortable satisfaction standard more often than CAS panels have. This is largely due to the fact that the USADA protocol and the Supplementary Procedures call for the use of Olympic Movement Anti-Doping Code (“OMADC”), which has been superseded by the World Anti-Doping Code, when IF rules are silent on a matter. The OMADC uses the comfortable satisfaction standard.³⁸⁷ However, there is some question as to whether IF standards have been used in all cases.³⁸⁸ Nevertheless, AAA-CAS panels, just like CAS panels, have not examined or discussed the standard extensively.³⁸⁹ Furthermore, AAA-CAS panels have not

387. See USADA PROTOCOL, *supra* note 110 (discussing the OMADC procedures to determine violations); WADA CODE, *supra* note 131, cmt. § 3.1 (noting the standard is comparable to the one “applied in most countries to cases involving professional misconduct”), available at http://www.wada-ama.org/rtecontent/document/code_v3.pdf (last visited Apr. 24, 2005).

388. In *USADA v. Cherry*, the comfortable satisfaction standard was used despite the fact that at the time of the positive test and the time of hearing, the IAAF used the beyond a reasonable doubt standard. *USADA v. Cherry*, AAA-CAS 30 190 00463 03 (Nov. 24, 2003), available at http://www.usantidoping.org/files/active/arbitration_rulings/arbitration_ruling_11_24_2003_Cherry.pdf (last visited Feb. 2, 2005).

389. *USADA v. Cherry*, AAA-CAS 30 190 00463 03 (Nov. 24, 2003) (applying the comfortable satisfaction standard without explaining elements of standard), available at http://www.usantidoping.org/files/active/arbitration_rulings/arbitration_ruling_11_24_2003_Cherry.pdf (last visited Feb. 2, 2005); see also *USADA v. Sbeih*, AAA-CAS 30 190 001 100 03 (Mar. 25, 2004) (confirming the strict liability standard), available at http://www.usantidoping.org/files/active/arbitration_rulings/arbitration_ruling_3_25_2004_sbeih.pdf (last visited Feb. 2, 2005); *USADA v. Neben*, AAA-CAS 30 190 00713 03 (Oct. 20, 2003) (applying the comfortable satisfaction standard), available at http://www.usantidoping.org/files/active/arbitration_rulings/arbitration_ruling_10_21_2003_Neben.pdf (last visited Apr. 24, 2005); *USADA v. Moninger*, AAA No. 30-190-00930-02 (April 2, 2003), available at http://www.usantidoping.org/files/active/arbitration_rulings/arbitration_ruling_4_3_2003_Moninger.pdf (last visited Feb. 2, 2005) (applying the comfortable satisfaction standard); *Blackwelder v. USADA*, AAA-CAS 30

explained if a comfortable satisfaction is closer to a preponderance of the evidence or proof beyond a reasonable doubt.

Like CAS panels, AAA-CAS panels have not agreed on the nature of doping cases, thus failing to clarify the foundation of the comfortable satisfaction standard. Clarifying the foundation of the comfortable satisfaction standard, namely whether it is a criminal or private-civil law standard of proof in origin, could show whether it is high standard of proof closer to proof beyond a reasonable doubt, or a lower standard of proof closer to proof by a preponderance of the evidence. Many AAA-CAS panels have, without elaboration, declared that the comfortable satisfaction standard is appropriate despite the quasi-criminal nature of doping cases.³⁹⁰ Yet, other AAA-CAS panels have found doping cases to not be criminal proceedings, thereby justifying the use of a standard other than proof beyond a reasonable doubt.³⁹¹ Just like the unsettled foundation of the standard in CAS jurisprudence, the unsettled nature of the AAA-CAS jurisprudence on the standard should be settled. If doping cases are truly quasi-criminal proceedings and the comfortable satisfaction standard is a private law, civil cause of action, standard of proof, due process violations could occur.

IV. CONCLUSION

The CAS and its affiliates are necessary, beneficial, and innovative institutions in the world of *lex sportiva*. They have been a leader in developing and modernizing sports law. However, the structure of the CAS and—as also analyzed in this Article—AAA-CAS, are outdated and ill-suited to properly handle all of the types of disputes presented to them. Their weaknesses are particularly glaring in perhaps the most explosive type of matters the CAS handles: doping cases. This is even more troublesome considering the increased vigilance in the international sports community towards doping, and the potentially exponential leap in CAS influence if professional sports adopt their rules and procedures.

The CAS and the AAA-CAS were constructed as arbitration institutions. However, doping cases are different from disputes that can be easily and equitably settled by arbitration. Doping cases are

190 00012 02 (May 17, 2002) (adopting a higher standard of comfortable satisfaction instead of the civil standard of balance of probabilities), *available at* http://www.usantidoping.org/files/active/arbitration_rulings/arbitration_ruling_5_22_2002_blackwelder.pdf (last visited Feb. 2, 2005).

390. *Cherry*, AAA-CAS 30 190 00463 03 (applying the comfortable satisfaction standard).

391. *See Blackwelder*, AAA-CAS 30 190 00012 02 (noting the proceeding is not criminal and applying the comfortable satisfaction standard).

accusatory and quasi-criminal in nature and therefore fundamentally different from the typical contract dispute decided by arbitration. The processes and machinery for deciding quasi-criminal cases, such as doping charges, are inherently different from the processes and machinery for deciding contract type cases.

As several CAS panels have noted, doping sanctions are penal in nature and as such, require certain protections for the accused.³⁹² Among those protections are the presumption of innocence and the right to “discharge” oneself.³⁹³ To those protections, an unbiased and independent tribunal and methods to ensure equal protection and due process should be added. These protections are necessary because the basic objective of doping cases, like that of criminal cases, is to determine guilt.

On the other hand, the basic objective of settling contract disputes and other disputes typically settled by arbitration is to find an equitable solution or middle ground that best fits the circumstances of the particular dispute. Arbitration, with its flexible and less formal structure is designed specifically to settle contract disputes. However, a flexible and less formal structure may not ensure equal protection and due process in guilt determination, or quasi-criminal proceedings like those necessary in doping cases.

The CAS’s current structure is excellent for deciding contract disputes, however, it is inadequate, and should be modified for doping cases. The CAS should consider developing a second chamber, with separate procedures and arbitrators, to hear doping cases. Such a second chamber would draw its arbitrators from a separate master list of arbitrators, choose its arbitrators in a different way, and adopt procedures to ensure equal treatment of all accused athletes.

The CAS has been making progress toward the fair treatment of accused athletes. CAS panels have used principles of fairness to soften what might otherwise be an unfair result under the applicable IF rules.³⁹⁴ Also, the CAS rules attempt to insulate arbitrators for improper outside influences³⁹⁵ and its panels are attempting to harmonize the rules and principles that it applies to accused athletes in

392. See *supra* note 333 (using CAS cases finding sanctions are penal in nature).

393. See *supra* notes 350–52 and accompanying text (discussing an athlete’s ability to counter charges of doping).

394. See *supra* notes 347–52 and accompanying text (discussing the CAS procedure that allows an athlete to defend against charges given under strict liability).

395. See *supra* Part III.B (discussing CAS and AAA-CAS procedures for selecting arbitrators).

the name of increased fairness.³⁹⁶

Despite this movement in the direction of equity for accused athletes in doping cases, more steps must be taken. The CAS, and particularly the AAA-CAS, should take the following steps to ensure the fairness of doping hearings and—particularly for the AAA-CAS—to answer doubts about legitimacy. First, arbitrators on the master list drawn upon in doping cases should have no current or recent connections with the governing bodies of the Olympic Movement or athletes that have been accused of doping violations. Second, the arbitrator selection process should do away with, or at the least minimize, the practice of parties appointing arbitrators. Third, the burden of proof used in doping cases should be more like that used in criminal cases. And, fourth, a mechanism, such as a single supervisory panel, should be created to reconcile conflicting precedent to ensure equal treatment and remove some of the arbitrariness of panel decisions.

The doping cases growing out of the BALCO investigation, with their unique issues of proof and hurried nature as the Olympics approached in the summer of 2004,³⁹⁷ created, in a sense, a moment of truth for the CAS, and particularly the AAA-CAS. If the CAS and the AAA-CAS are to continue and even improve their legitimacy, they should consider the charges suggested above. And, as displayed by this analysis, the CAS must shed its original commercial dispute settlement structure and adapt to the unique demands of settling doping accusations.

396. See *supra* Part III.D (discussing the use of precedent in CAS and AAA-CAS panels).

397. Pete Carey, *Lifetime Ban sought for Montgomery; Doping agency alleges use of illegal substances*, CHI. TRIB., June 24, 2004, § 4, at 3.