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Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games

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INTERNATIONAL SPORTS LAW PERSPECTIVE

INTRODUCING THE COURT OF ARBITRATION FOR SPORT: THE AD HOC DIVISION AT THE OLYMPIC GAMES

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The Court of Arbitration for Sport (CAS) evolved from pressure in the early 1980s to find an ultimate, authoritative and neutral solution to judicial disputes among athletes, international and national sports federations, national Olympic committees and Olympic and other games organizers. The Olympic Movement decided to create a final and binding court of arbitration for all sports related disputes, including doping cases.

The CAS was established on April 6, 1983, at an IOC session in New Delhi¹ and since its inception has dealt with sports-specific disputes of a private nature. The Court provides a forum for the world's athletes and sports federations to resolve their disputes through a single independent and accomplished sports adjudication body. The CAS has demonstrated its ability to consistently apply the rules of different sports organizations and the worldwide rules of the Olympic Movement Anti-Doping Code² in a fair and evenhanded manner. The CAS is in the course of developing universal principles that are becoming recognized as the *lex sportiva*³ and has established a worldwide reputation of competence in dealing with sports-related disputes. Despite the growth and success of the CAS,

1. DIGEST OF CAS AWARDS 1986-1998 (Matthieu Reeb ed., 2000). Tricia Kavanagh, *The Doping Cases and the Need for the International Court of Arbitration for Sport*, 22 UNSW L.J. 721 (1999). For a complete discussion of the history, see Richard McLaren, *A New Order: Athletes' Rights and the Court of Arbitration at the Olympic Games*, VII OLYMPIKA: THE INT'L J. OF OLYMPIC STUDIES 1 (1998).

2. INT'L OLYMPIC COMM., MED. COMM'N, *The Anti-Doping Code*, available at <http://www.olympic.org/ioc/e/org/medcom/medcom%5Fantidopage%5Fe.html> (last visited Nov. 5, 2001); INT'L OLYMPIC COMM., MED. COMM'N, *Explanatory Memorandum Concerning the Application of the Olympic Movement Ant-Doping Code*, available at http://www.olympic.org/ioc/e/org/medcom/pdf/addenda_cio_antidopage.pdf (last visited Nov. 5, 2001).

3. A term coined by the Acting General Secretary of CAS Matthieu Reeb at the time of the publishing of the first digest of CAS decisions stretching over the period from 1983-1998. Richard McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes*, 35 VAL. U. L. REV. 379 (2001).

some International Federations (IFs) have not agreed to provide for CAS arbitrations.⁴

The following discussion will be divided into two parts. First, there will be an explanation of the history, structure and procedures of the CAS. Next, there will be a discussion of the substantive legal issues and principles that constitute the growing body of *lex sportiva* developed by the Court through its Ad Hoc Division (AHD) at the Olympic Games.

I. THE FUNCTION OF CAS

The CAS functions outside of all sports organizations in order to settle sports-related disputes through arbitration. The Code in Article S 1 provides for arbitration "only in so far as the statutes or regulations of the said sports bodies or a specific agreement. . ." exist establishing the CAS jurisdiction. Thus, CAS arbitration, as with most arbitration, is founded upon contractual agreement. Any natural or artificial person with the capacity to effect a legal transaction may have recourse to the CAS. This includes, international sports federations and sports associations, sports organizing committees, radio sponsors, television broadcasters and any other corporation involved in a sports-related dispute. Clauses providing for CAS arbitration are contained in the Olympic Charter,⁵ the Olympic Athlete Entry Form-Eligibility Conditions,⁶ and within the regulations, constitutions and athlete forms of sports bodies around the world.

4. The International Amateur Athletic Federation (IAAF) and Fédération Internationale de Football Association (FIFA) are two such bodies. Erica Bulman, *IAAF Considering Turning To Court Of Arbitration*, ASSOCIATED PRESS, available at <http://sports.yahoo.com/m/sa/news/ap/20001128/ap-iaaf-doping.html> (last visited Aug. 1, 2001). However, it should be noted that at its Congress in Edmonton, Alberta, Canada in August 2001, the IAAF passed a resolution adopting CAS arbitration. *IAAF News Letter*, Issue No. 50, Aug. 2001, at 2.

5. INT'L OLYMPIC COMM., THE OLYMPIC CHARTER, art. 74, available at http://www.olympic.org/ioc/efacts/charte/charte_protocol_e.html (last visited Feb. 1, 2001). The Article states: "Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport in accordance with the *Code of Sports-Related Arbitration*" (emphasis added).

6. All athletes participating in the Olympic Games are required to sign this form. The form contains the following clause, at paragraph 7: "I agree that any dispute in connection with the Olympic Games, not resolved after exhaustion of the legal remedies established by my NOC, the International Federation governing my sport, the Sydney Organising Committee for the Olympic Games (SOCOG) and the IOC, shall be submitted exclusively to the Court of Arbitration for Sport (CAS) for final and binding arbitration . . ." *Athlete Entry Form*, Sydney Olympics (Sept. 2000) (on file with author).

The Code of Sports Related Arbitration⁷ (the "Code") is applied to settle sports-related disputes through arbitration. The Code is divided into two parts: Statutes of the Bodies Working for the Settlement of Sports-related Disputes (S1-S26) and Procedural Rules (R27-69). In this regard, the CAS operates using two different proceedings; (1) ordinary arbitration proceedings; and, (2) appeal arbitration proceedings. For disputes resulting from contractual relations or wrongful acts, the ordinary procedure is applicable. On the other hand, the appeal procedure applies to disputes resulting from decisions of sports federations or associations.⁸ On rare occasions CAS may take on an entirely ad hoc procedure.⁹ Upon request, the CAS is also able to provide advisory opinions on any issue concerning the practice or development of sport or any activity relating to sport that is not the subject of any dispute.¹⁰ Finally, an ad hoc division (AHD) was created by the governing body of CAS, the International Council of Arbitration for Sport (ICAS),¹¹ to preside over disputes arising during the Olympics.¹²

The broad mandate of the Court places a vast number of disputes within the ambit of CAS arbitration. The CAS commenced its jurisprudential life with its first case in 1986.¹³ Since that time, the CAS has issued eight Advisory Opinions and rendered 172 awards through the Appeal and Ordinary procedures of the Code.¹⁴ In addition, the AHD

7. COURT OF ARBITRATION FOR SPORT, CODE, available at <http://www.tas-cas.org/english/code/fracode.asp> (last visited Aug. 1, 2001) [hereinafter CODE].

8. COURT OF ARBITRATION FOR SPORT, *Presentation: What Are the CAS Arbitration Procedures?*, available at <http://www.tas-cas.org/english/presentation/frapresentation.asp> (last visited Aug. 1, 2001).

9. See *Mecca-Medina & Majocen v. FINA*, No. 2000/A/270 (CAS Arb. 2001) and the specific arbitration agreement used to hold a second round of hearings in the case. The Arbitration agreement is set out in its entirety in the decision.

10. CODE, *supra* note 7, at R. 60-62. These Rules provide for advisory requests and are only employed in very rare cases, but can have a profound impact. For the most recent advisory opinion that has been rendered by the CAS, see *Body Suit Opinion*, Advisory opinion for the CAS TAS 2000/C/267 AOC.

11. CODE, *supra* note 7, at art. S6.8 (creating the AHD).

12. The AHD follows the rules set out in the Code and special additional rules created for the Olympic Games. COURT OF ARBITRATION FOR SPORT, ARBITRATION RULES FOR THE GAMES OF THE XXVII OLYMPIAD IN SYDNEY, available at <http://www.tas-cas.org/english/rules/frarules.asp> (last visited Aug. 1, 2001) [hereinafter OG RULES].

13. *Niedershasli Hockey Club v. Swiss Nat'l Hockey Fed'n*, No. 86/01 (CAS 1986).

14. The exact breakdown is as follows: between 1986-1994, 76 requests for arbitration and 55 requests for advisory opinions, resulting in 32 awards and 6 advisory opinions; between 1995-2000, under the revised Code, 30 requests for arbitration (ordinary procedure), 141 appeals, and 11 requests for advisory opinions, resulting in 140 awards and 2 opinions. Letter from Lise Narbel to Jim Bunting (Feb. 26, 2001) (on file with author). (Great appreciation is

has decided 26 Olympic cases over the course of two Summer Games (Atlanta and Sydney) and the Nagano Winter Games.

II. THE INTERNATIONAL COUNCIL FOR SPORTS ARBITRATION (ICAS)

Today the court is responsible to the ICAS¹⁵ that was established to provide a layer of insulation from one of the Court's primary sources of funds, the International Olympic Committee (IOC). ICAS is a 20-member council composed of high-level jurists. It elects its own officers from its membership and appoints CAS division presidents and their deputies.¹⁶ The members, who consist of representatives of the International Sports Federations, National Olympic Committees and the International Olympic Committee, must sign a declaration "undertaking to perform their functions in a personal capacity with total objectivity and independence and in conformity with the provisions of the Code of Sports-Related Arbitration."¹⁷

The ICAS is responsible for a variety of administrative functions. Article S6 of the Code sets out these functions, including amending the Code; developing and maintaining the list of CAS arbitrators; conducting challenges to CAS arbitrators and where necessary removing an arbitrator; managing the funds allocated to its operations; appointing and, upon proposal of the president, removing the Secretary General; and supervising the Court Office of the CAS.¹⁸

III. CAS STRUCTURE

The CAS is located in Lausanne, Switzerland, however, pursuant to Article S6.8 regional or local, permanent or ad hoc offices can be established. Pursuant to this provision, the ICAS has established offices in New York, USA and Sydney, Australia. The Lausanne office handles the majority of the CAS proceedings. However, where it is deemed ap-

extended to Lise Narbel and Matthieu Reeb, Acting Secretary General of the CAS, for providing this information).

15. For a history of the events leading up to the creation of ICAS in 1993, see McLaren, *supra* note 1, at 3-4.

16. CODE, *supra* note 7, at art. S6(2). The ICAS elects the ICAS president that is proposed by the IOC. The ICAS president is also the CAS president. *Id.* at art. S9. This constitutes an improvement over the initial CAS rule where the IOC president was also the CAS president and the amended CAS rule formerly providing that the IOC president choose the CAS president from among the members of the CAS.

17. *Id.* at art. S5.

18. *Id.* art. R34 (providing for a challenge to an arbitrator); *see also id.* at art. R35 (providing for the possible removal of a CAS arbitrator).

propriate, arbitration hearings can be held at another location.¹⁹ In this manner, proceedings can be referred to either of the two regional offices. The Sydney office, or Oceania Registry, deals extensively with disputes arising within Australia. That regional office addressed an array of selection disputes prior to the Sydney Games. Australian athletes have recourse to the CAS Oceania Division by virtue of arbitration clauses within the rules of the Australian Olympic Committee.

The regional office in New York (formerly in Denver) has, in contrast, not been nearly as active as its Oceania counterpart. It had originally been set up in contemplation of the Olympic Games as was the Oceania division. However, CAS was less familiar to the sporting community at the time and the AHD of CAS was about to commence operations for the first time in Atlanta in 1996. Following the creation of the United States Anti-Doping Agency²⁰ (USADA) on October 1, 2000, a different use of CAS was proposed by USADA.²¹

Permanent regional CAS offices provide convenient and effective implementation of CAS proceedings in their locale in different parts of the world. The success of the New York office and the Oceania Registry will likely lead to the establishment of additional regional CAS offices.²²

The same provisions that allow the ICAS to establish regional offices also provide for the creation of an ad hoc division of CAS to preside over the Olympic Games.

19. *Id.* at art. R28.

20. This organization took over from the various national governing bodies and the United States Olympic Committee to create a national testing agency for anti-doping in the US. U.S. ANTI-DOPING AGENCY, *What is USADA?*, available at http://www.usantidoping.org/what_is/index.htm (last visited Aug. 1, 2001).

21. Under USADA rules, when an athlete tests positive and the B sample confirms that test, the athlete has two courses of adjudication. Athletes can elect to take their dispute directly to the international version of CAS, although the case would be heard in the USA, not in Lausanne. Alternatively, athletes can have their disputes heard by the American Arbitration Association (AAA), but only by CAS accredited arbitrators. Under this election there is a further appeal to the international version of CAS, but again the case would be heard in the USA. *Id.* at *Athletes: USADA Protocol for Olympic Testing*, available at http://www.usantidoping.org/athletes/protocol_2.asp (last visited Aug. 1, 2001).

22. At the time of this writing the Canadian Secretary of State for Amateur Sport had announced that there would be a new ADR system for Canadian sports persons in place before the close of the year 2001. An ADR implementation committee was working on a unified set of arbitration rules using the CAS Code as the model. This might result in a further model for a national CAS system. Letter from Denise Codere, Canadian Sports Minister to Richard McLaren, Professor of Law, Univ. of W. Ontario (Feb. 2001) (on file with author).

IV. THE DESIGN AND JURISDICTION OF THE AHD

The AHD is designed to augment, and not to attenuate, athletes' rights.²³ Article 74 of the Olympic Charter and a clause contained in the Olympic Athlete Entry Form affirms the Court's jurisdiction over the games. Disputes are presided over by a panel of three arbitrators from a pool of CAS arbitrators specially selected by ICAS for the Games. Any decision is final and binding with no possibility of appeal.²⁴ Prior to the Sydney Games, the AHD presided over the Atlanta and Nagano Games.²⁵

Any proceedings of the AHD are governed by the CAS Arbitration Rules for the Games designed and enacted prior to each Olympiad by the ICAS.²⁶ These special rules are used in addition to the Code. The proceedings are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (PIL Act). The PIL Act applies to arbitration as a result of the express choice of law contained in Article 17 of the OG Rules, and as a result of the choice of Lausanne, Switzerland as the seat of the ad hoc Division, pursuant to Article 7 of the OG Rules. Further, pursuant to Article 17 of the OG Rules, Arbitration Panels must decide disputes "pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate."²⁷ Finally, Article 16 provides that a Panel has "full power to establish the facts on which the application is based."

V. THE COURT PROCEDURE

Proceedings before the AHD are governed by the OG Rules. The OG Rules follow informal court-like procedures that apply the principles of natural justice and due process.²⁸ The arbitration process begins when an application is filed with the court office of the AHD.²⁹ Upon

23. Michael J. Beloff, *The Court of Arbitration for Sport at the Olympics*, 4 SPORTS AND THE L. J. 5 (1996).

24. For a rare example of an attempt to appeal a decision of the Ad Hoc Division, see the December 4, 2000 decision of the Swiss Federal Tribunal court. *Raducan v. Comité Int'l Olympique*, 5P.427/2000 (Arrêt Du Tribunal Fédéral Suisse 2000).

25. For a discussion of the AHD experience at the Atlanta and Nagano Games, see McLaren, *supra* note 1.

26. See generally OG RULES, *supra* note 12.

27. *Id.* at art. 17.

28. Michael J. Beloff, QC, *The CAS Ad Hoc Division At The Sydney Olympic Games*, INT'L SPORTS L. REV. (2001) (on file with author).

29. OG RULES, *supra* note 12, at art. 10.

receipt of an application, the President of the AHD³⁰ forms an arbitral panel³¹ of three independent arbitrators.³²

The AHD serves notice of the application to the respondent, along with notice of the hearing.³³ The CAS has also developed the practice of serving notice to third parties that could be affected by the AHD award.

In certain circumstances, the President, or the Panel where it is already formed, can provide interim relief to an applicant without first hearing from the respondent.³⁴ Such relief will be granted upon consideration of such factors as whether the applicant stands to suffer irreparable harm; whether the application will likely succeed on its merits; and whether the interests of the applicant outweigh those of the respondent or other members of the Olympic Community. Any interim measures awarded by the AHD cease to be effective when a decision is rendered under Article 20.³⁵

Article 15(b) of the Special Rules grants the AHD extensive powers and discretion to organize the procedure in the hearing. In principle “. . . the Panel would hold one single hearing, during which each party (including an interested party) presented its case. . . .”³⁶ Article 15(d) provides a similar discretion in relation to evidence. The AHD also has the power to establish the facts upon which an application is based.³⁷ This allows the Panel to consider any relevant facts at “first instance,” regardless of whether they have been previously established. The AHDs broad range of discretion, in organizing the proceedings and considering evidence, results in a mixture of styles in conducting the hearings. Some hearings were conducted on the inquisitorial principle, others more on the common law approach of formal oral evidence and submissions. The result has been that the AHD has preserved a wide range of powers to study the case and to clarify the material truth. Thus, the process is a curious mixture of the civil law approach through the use of the inquisitorial principle and the common law approach of examination and cross-examination.

30. The President is selected by the ICAS. *Id.* at art. 4.

31. *Id.* at art. 11.

32. Arbitrators are required to be unconnected to the parties of a dispute. *Id.* at art. 12. It should also be noted the OG Rules provide for a single arbitrator panel in exceptional circumstances. *Id.* at art. 11.

33. *Id.* at art. 15(c).

34. *Id.* at art. 14.

35. See *supra* note 12.

36. Beloff, *supra* note 28, at § 5.2.

37. OG RULES, *supra* note 12, at art. 16.

The AHD is required to provide a decision within twenty-four hours of the lodging of the application, unless the President extends the time limit.³⁸ The Panel is also required to provide brief written reasons for its decisions,³⁹ although in practice the decisions contain a comprehensive analysis. The decisions rendered by the AHD are final and binding, and may not be appealed or challenged.⁴⁰ However, to the extent that it is possible to appeal a decision of the AHD, the location of the seat of arbitration in Lausanne limits an appeal to the Swiss Federal Tribunal.⁴¹

VII. THE DEVELOPMENT OF *Lex Sportiva* at the Olympic Games

The first portion of this paper explored the history, structure and procedures of the CAS. The remainder of this discussion focuses on the substantive legal issues and principles that constitute the growing body of *lex sportiva* developed by the CAS AHD. These principles will be illustrated through the ensuing analysis of the AHDs Olympic decisions.

A. *Types of Disputes arising during the Games*

The Olympics have proven to be a fruitful time for the development of *lex sportiva* and a variety of disputes has arisen prior to and during the Games.

These disputes include issues regarding:

- I) The jurisdiction of the CAS;
- II) Affected Third Parties and National eligibility rules;
- III) Validity of athlete suspensions by the IOC and IFs;
- IV) The principle of non-interference with the decisions of sports officials;
- V) Doping violations and the existence of strict liability regime;
- VI) The resolution of commercial advertising issues at the Games; and
- VII) The manipulation of sporting rules for strategic advantage.

38. *Id.* at art. 18.

39. *Id.* at art. 19.

40. *Id.* at art. 21.

41. *See supra* note 24.

1. The jurisdiction of the CAS

As previously noted, Article 1 of the CAS Arbitration Rules for the Games⁴² provides for disputes arising during the Games to be resolved by the AHD. The AHD also has jurisdiction over the IFs at the Games by consideration of CAS arbitration clauses in their bylaws or regulations.

Two of the AHDs decisions at the Nagano Games addressed this question of jurisdiction. The first case, *Schaatsefabriek Viking B.V v. German Speed-Skating Association (Viking)*, involved a request from a Skate Manufacturing Corporation for an order prohibiting members of the German National Skating Federation from wearing skate covers manufactured by a rival firm.⁴³ The AHD did not provide the requested award on the basis that the Olympic Charter had not been violated. However, the Court stressed that its decision was in no way a determination of whether the Manufacturing Corporation had a valid legal claim. Rather, the AHD noted that it was confined to dealing with disputes arising at, or in connection with the Games. In absence of a clear violation of the Olympic Charter or other applicable rules, the AHD did not have jurisdiction to render an award at the Games.

In a second case that arose during the Nagano Games, *Steele v. CIO*, the AHD provided further guidance as to the extent of its jurisdiction.⁴⁴ Steele raised an application claiming that the International Ski Federation had improperly excused him from competition. He claimed that he was eligible to compete in the Games under the rules of the Puerto Rican Ski Federation (PRSF). However, the CAS noted that the Puerto Rican Olympic Committee recognized the Puerto Rican Winter Sports Federation as its official winter sports body, not the PRSF. Therefore, Steele was not an accredited athlete and did not have standing to bring the dispute to the AHD.

Three disputes during the Sydney Games considered the breadth of the AHDs jurisdiction. All three of these disputes involved the International Amateur Athletic Federation (IAAF), which does not provide for CAS arbitration in its rules or its constitution. As a consequence, the consensual underpinnings for arbitration contained in most IF rules

42. OG RULES, *supra* note 12, at art. 1. These rules are issued in connection with the Games to augment the Code and are promulgated by ICAS pursuant to powers conferred in Article S6.8 of the Code.

43. *Schaatsefabriek Viking B.V v. German Speed-Skating Association (Viking)*, (Nagano Winter Olympic Games, 1998) (unpublished decision).

44. *Steele v. CIO*, (Nagano Winter Olympic Games, 1998) (unpublished decision).

could not be relied on for jurisdiction. The IAAF has its own internal arbitration procedure using its "Arbitration Panel," whose jurisdiction is directed only at disputes inside the IAAF, including determinations of the games rules by member federations and their application to athletes. Thus, the jurisdiction of the IAAF Arbitration Panel came into conflict with that of the AHD at the Sydney Games.

Dieter Baumann is a German middle distance runner, and was the Olympic 5000 meter champion in 1992 at Barcelona. He had been cleared of an alleged doping infraction by his IAAF member federation, the German Athletic Federation (DLV). He was, therefore, properly accredited for participation in the Sydney Games by the IOC. The IAAF believed that the DLV had made an erroneous decision related to doping control and brought the case before its Arbitration Panel sitting in Sydney.⁴⁵ The Panel found a doping infraction to have occurred and applied the sanction of a two-year ineligibility on Baumann pursuant to Rule 60.2 of the IAAF Rules, thereby overruling the DLV decision. At the request of the IAAF, the IOC removed the athlete's accreditation. Baumann, who had not been a party to the IAAF arbitration, brought an appeal to the AHD, which had jurisdiction over the athlete by virtue of the Games entry form.⁴⁶ The IAAF raised a preliminary objection disputing the jurisdiction of the AHD because of the absence of a CAS arbitration clause in its constitution and the fact that its own Panel had just made a final and binding determination.

The AHD dismissed the objection.⁴⁷ It held that it had jurisdiction over the accreditation decision.⁴⁸ Both the IOC and the IAAF, being members of the Olympic movement, were deemed to have subscribed to the arbitration clause within the Olympic Charter pursuant to Article 74. The IAAF then proceeded to withdraw from the proceedings and walked out of the hearing room.

45. The jurisdiction to so act arises out of Rule 21.3(ii) and 59.2 of the IAAF Constitution. LAURI TARASTI, *LEGAL SOLUTIONS IN INTERNATIONAL DOPING CASES: AWARDS BY THE IAAF ARBITRATION PANEL 1985-1999* 171 (2000). See also Bevilacqua Case 25.11.1996, IAAF v. Federazione Italiana di Atletica Leggera FIDAL, Ct. Arb. Case, cited in TARASTI, *supra*, at 143.

46. Arbitration CAS ad hoc Division (O.G. Sydney 2000) 006, Dieter Baumann v. International Olympic Committee (IOC), National Olympic Committee of Germany and International Amateur Athletics Federation (IAAF), award of 22 September, 2000, in *CAS AWARDS - SYDNEY: THE DECISIONS DELIVERED BY THE AD HOC DIVISION OF THE COURT OF ARBITRATION FOR SPORT DURING THE 2000 OLYMPIC GAMES IN SYDNEY* (2000), at 65 [hereinafter *Baumann*].

47. *Id.*

48. *Id.*

The AHD, having established jurisdiction over the involved parties, addressed a preliminary claim that this case could not be heard because it would be contrary to the principle of *res judicata*.⁴⁹ The Panel dismissed this contention noting that neither Baumann nor the IOC had been a party to the IAAF arbitration, and that the issues in dispute had been expanded and now included loss of athlete accreditation at the Olympic Games. Therefore, the AHD was seized of the dispute and able to examine the merits of Baumann's case. Despite reaching this determination, the AHD did not interfere with the IAAF's previous decision once it was satisfied that the IAAF Arbitration Panel had dealt with all of the evidence. The AHD effectively operated as an appeal court over the IAAF. The removal of Baumann's accreditation was held to be valid and the athlete was no longer able to compete in the Games.⁵⁰

A second dispute, brought before the AHD by Melinte, raised similar issues to those addressed in Baumann.⁵¹ The applicant was the world record holder in the Women's Hammer Throw and had been accredited by the IOC to compete in the Games upon her arrival in Sydney. However, Melinte had tested positive for nandrolone prior to the Games. On September 17, 2000, the IAAF requested an explanation for the positive test from the Romanian Athletic Federation. Thereafter, the IAAF exercised its ability to provisionally suspend an athlete following a positive

49. A matter that has been previously determined shall not be heard again. *See generally* McLaren, *supra* note 3.

50. *First Class Verdict of Guilt*, FRANKFURTER ALLGEMEINE ZEITUNG (Sep. 23, 2000) [hereinafter *First Class Verdict*]; *It Is Not Over, It Just Started*, SAARBRUCKER ZEITUNG (Sep. 23, 2000) [hereinafter *It Is Not Over*]. It should be noted that despite being prohibited from competition Baumann sought and received an injunction from the Frankfurt Higher Regional Court authorizing him to compete. He has subsequently competed in a number of events including the German National Indoor Championships. In response, the IAAF has applied Rule 53.1 to any athlete who takes part in the same competition as Baumann. Rule 53.1 states that any athlete who takes part in an event in which he knows another athlete to be ineligible under IAAF Rules is himself ineligible. The rule has currently been applied to eight athletes. Press Release, International Association of Athletics Federations, IAAF Statement in the Baumann Case (Feb. 26, 2001) available at <http://www.iaaf.org/News/PressRelease/getnews.asp?Code=3218> (last visited Aug. 1, 2001). In addition, the IAAF has also said that Baumann's two-year ban, which was due to be lifted in 2002, would be automatically extended until 2003. KEEPING TRACK, INT'L TRACK & FIELD NEWSLETTER: ISSUE NO. 106, *Contaminated Runners* (Janet Heinonen, ed., March 2001), available at <http://www.runnersworld.com/keepingtrack/mar2001.html>.

51. Arbitration CAS ad hoc Division (O.S. Sydney 2000) 015, Mihaela Melinte v. International Amateur Athletic Federation (IAAF), award of 29 September, 2000, in CAS AWARDS, *supra* note 46, at 145 [hereinafter *Melinte*].

A sample.⁵² Consequently, Melinte was removed from competition while awaiting her turn to throw the hammer on the field of Stadium Australia.

The case raised many of the issues that were addressed in the Baumann decision and the AHD relied upon its previous determinations in support of its jurisdiction to resolve the dispute. The IAAF still refused to be recognized as a party to the dispute, but unlike the Baumann case it participated in the hearing by answering questions. The AHD rejected an attempt to distinguish the jurisdictional issues in this dispute from those in Baumann, on the grounds that the IOC did not revoke Melinte's accreditation. It dismissed this claim pointing out that the athlete had been removed from the field of play in Stadium Australia and that constituted a dispute arising during the Games within the meaning of Article 74 of the Olympic Charter.⁵³

The primary issue raised by Melinte was that she had been denied due process. The AHD concluded that the information put before it by Melinte would have been the same information provided to the IAAF.⁵⁴ The AHD was not persuaded by the applicant's submissions and dismissed the application. However, the AHD noted that its decision was not to be viewed as a determination of whether or not Melinte had committed a doping offence.⁵⁵ Rather, the Panel's decision only denied the applicant emergency relief with respect to her participation in the Games. The IAAF procedures would have to be followed, first within the member's process and perhaps subsequently before the IAAF Arbitration Panel.⁵⁶

52. *Control of Drug Abuse*, available at <http://www.iaaf.org/InsideIAAF/index.asp> (last visited Aug. 1, 2001). Rule 59.2 provides for an immediate protective measure allowing for the suspension of an athlete where the IAAF believes that a National Federation failed to impose the proper suspension, before the case has been resolved at the National level, as it had been in Baumann.

53. *Melinte*, *supra* note 51.

54. *Id.*

55. *Id.*

56. *Id.* Rule 59.2 forces the IAAF to put a case before its own arbitration panel where it disagrees with a National Federation's decision. Following the Olympic Games Melinte's case was referred to IAAF arbitration. An IAAF panel found Melinte guilty of a doping offense and she was suspended for two years. Press Release, International Association of Amateur Federations, *Melinte Suspended 2 Years*, available at <http://www.iaaf.org/News/PressReleases> (last visited July 17, 2001).

The final case dealing with the jurisdiction of the AHD and the IAAF involved Segura, a Mexican race walker in the 20km event.⁵⁷ The case involved the application of the games rules with respect to infractions leading to a disqualification.⁵⁸ This time the IAAF was a full participant before the AHD and argued its case. Ultimately, the AHD rejected Segura's arguments and his application was dismissed.

The three Sydney cases illustrate that the IAAF had come full circle in attorning to the jurisdiction of the AHD. It went from a refusal to participate on the grounds of lack of jurisdiction and a decision having already been made; to remaining as an observer; and then finally submitting to the AHDs jurisdiction and arguing its case. The change of attitude apparently arose out of the way CAS dealt with the two previous IAAF cases and the praise it had received in the German Newspapers⁵⁹ in connection to the Baumann case.

2. Affected third parties and National eligibility rules

It has been noted that CAS arbitration, as with most arbitrations, are founded upon contractual agreement. This foundation raises an issue regarding the extent to which a party who is not an applicant or a respondent is affected by an arbitration award. The effect that an arbitration award has on third parties is a complex issue. One thing that is clear, however, is that arbitration awards can have serious consequences on parties who are not directly involved in the proceedings. The Code and the OG Rules provide that the Panel has full control over the proceedings and can organize the procedure, as it deems appropriate.⁶⁰ Therefore, in order to address this issue, the CAS developed the practice of serving notice to interested third parties at the Sydney Games. The *Raguz* case,⁶¹ the *Perez* trilogy⁶² and the related two Miranda decisions⁶³

57. Arbitration CAS ad hoc Division (O.S. Sydney 2000), 013, *Bernardo Segura v. International Association of Athletics Federations (IAAF)*, award of 30 September, 2000, in *CAS AWARDS*, *supra* note 46, at 131 [hereinafter *Segura*].

58. This issue is dealt with in more detail in Section F.1.IV.

59. *First Class Verdict*, *supra* note 50; *It Is Not Over*, *supra* note 50.

60. OG RULES, *supra* note 12, at art. 15(b); CODE, *supra* note 7, at R. 44.3.

61. *Raguz v. Sullivan*, 2000 NSWCA 290 (New South Wales Ct. App. 2000), in *CAS AWARDS*, *supra* note 46, at 185 [hereinafter *Raguz*].

62. Arbitration CAS ad hoc Division (O.S. Sydney 2000) 001, *United States Olympic Comm. (USOC) and USA Canoe/Kayak v. International Olympic Comm. (IOC)*, award of 13 September, 2000, in *CAS AWARDS*, *supra* note 46, at 13 [hereinafter *Perez 1*]; Arbitration CAS ad hoc Division (O.S. Sydney 2000) 005, *Angel Perez v. International Olympic Committee (IOC)*, award of 19 September, 2000, in *CAS AWARDS*, *supra* note 46, at 53 [hereinafter *Perez 2*]; Arbitration CAS ad hoc Division (O.S. Sydney 2000) 009, in the matter of Angel

illustrate the problem of the extent to which affected parties are bound by a CAS decision.

Prior to the commencement of the 2000 Olympic Games in Australia, the CAS Oceania division heard and rendered a decision in relation to a dispute between an Australian judo athlete, Rebecca Sullivan, and the Judo Federation of Australia, Inc.⁶⁴ Ms. Sullivan claimed that a proper implementation of the nomination criteria would have resulted in her selection to the Olympic team over Angela Raguz. The CAS Oceania Division nominated Ms. Raguz as an affected party. The Panel found in favor of Ms. Sullivan and the decision was eventually appealed to the New South Wales (NSW) Court of Appeal.⁶⁵ The NSW Court held that Ms. Raguz had been an affected party by the interlocking contractual agreements that existed between the athletes and their sports federation.⁶⁶ In this regard, the CAS award was held to be binding upon Ms. Raguz.

The Miranda and Perez cases involved Nationality and Eligibility. These cases called into question the structure of Article 46 in the Olympic Charter.⁶⁷ The section requires an athlete to have been a National of a country for three years before he or she is eligible to compete for that country. If an athlete fails to meet the criteria, he or she cannot compete, unless the National Olympic Committee of the country where the athlete previously resided waives the eligibility requirement. On its face, this provision appears to be reasonable, however, the effect of the section was not entirely anticipated.

Two athletes, Angel Perez and Arturo Miranda, were nominated by their National Olympic Committees (the United States and Canada respectively) to compete in the Sydney Olympics. Both athletes were born in Cuba and had previously competed for their birth country. Neither athlete established official citizenship in their new country until 1999.

Perez, award of 25 September, 2000, in CAS AWARDS, *supra* note 46, at 91 [hereinafter *Perez* 3].

63. Arbitration CAS ad hoc Division (O.S. Sydney 2000) 003, Arturo Miranda v. International Olympic Committee (IOC), award of 13 September, 2000, in CAS AWARDS, *supra* note 46, at 29 [hereinafter *Miranda* 1]; Arbitration CAS ad hoc Division (O.S. Sydney 2000) 008, Arturo Miranda v. International Olympic Committee (IOC), award of 24 September, 2000, in CAS AWARDS, *supra* note 46, at 83 [hereinafter *Miranda* 2].

64. *Raguz*, 2000 NSWCA 290.

65. *Id.*

66. *Id.*

67. This rule is in place to ensure that any competitor in the Games is a National for the Country they are competing for. It is designed to prohibit a Country from inappropriately accrediting the athletes of another country.

Thus, they both fell below the three year Nationality requirement. In both instances, Cuba refused to waive the three year requirement.

In the first case in the *Perez* trilogy, Perez appeared as a witness but was not served as an affected party. This case was decided against the United States Olympic Committee (USOC), who had appeared on behalf of Perez.⁶⁸ However, since Perez had not been named as a party to the arbitration, he was able to apply to the AHD to have his case heard on its merits.

This resulted in *Perez 2* that addressed many of the issues brought forth in *Perez 1* and thus, raised the question of *res judicata*. Ultimately, the AHD ruled in favor of Perez.⁶⁹ It should be noted, however, that if Perez had been served as a party to *Perez 1* the AHD might never have heard the case on its merits in *Perez 2*.⁷⁰ As it stood, Perez was not an affected party in the *Perez 1* case, with the only parties being the USOC and the International Olympic Committee (IOC). In contrast, the Cuban Olympic Committee (COC) had been served as an affected third party in *Perez 1* and *Perez 2*, but declined to attend.

Eventually, the COC recanted their decision not to attend the previous two hearings and brought the issue of Article 46 of the Olympic Charter back to a differently constituted Panel of the AHD. In the final decision of the *Perez* trilogy, the Panel held that the COC was estopped from disputing that they were a party to *Perez 2*.⁷¹

The *Miranda* decisions addressed issues similar to those in the *Perez* trilogy. *Miranda 1* was brought before the AHD by the Cuban born Canadian diver, Miranda, and the case was decided against him.⁷² However, after the CAS ruling in *Perez 2*, the Canadian Olympic Association (COA) raised a subsequent application that became *Miranda 2*.⁷³ The facts between *Miranda* and *Perez* were sufficiently different that the AHD found against the COA.

68. *Perez 1*, *supra* note 62.

69. *Perez 2*, *supra* note 62.

70. This was precisely the stance that the AHD took in *Perez 3*.

71. *Perez 3*, *supra* note 62, at ¶ 28. The Panel held that the Cuban NOC had been aware of the hearing, and indeed had made written representations to the Panel. In any event, the Panel determined that a complaint regarding whether or not the COC had been given the opportunity to be heard should have been directed to the Swiss Federal Tribunal and not to CAS.

72. *Miranda 1*, *supra* note 63.

73. *Miranda 2*, *supra* note 63.

3. Validity of athlete suspensions by the IOC and IFs

The validity of suspensions imposed by the IOC, an NOC, or an IF has arisen as an issue on several occasions during the Games where the CAS has presided.

The first case of this nature occurred at the Atlanta Games when an athlete seized the flag from the *Chef de Mission* during the opening ceremonies.⁷⁴ After the incident, the Cape Verde NOC banned the athlete from competition and subsequently obtained the consent of the IOC.

The athlete brought the dispute before the AHD and complained that he had not been informed by the NOC or IOC of the allegations against him, nor did he have an opportunity to respond. The AHD emphasized the importance of the sixth principle of the Olympic Charter that stresses the importance of fair play. It held that this principle was equally important to disciplinary proceedings as it to competitive sports.⁷⁵ The Panel granted the athlete interim relief so that he was able to remain in the Olympic Village during the decision making process.⁷⁶

The Ross Rebagliati case, brought before the AHD during the Nagano Games, also considered the validity of an IOC ruling.⁷⁷ Rebagliati, a Canadian snowboarder, had his gold medal rescinded because his urine sample contained marijuana metabolites. The IOC based its decision on strict liability: the mere finding of marijuana in Rebagliati's system constituted an offence. The issue before the AHD was whether the finding of marijuana metabolites in Rebagliati's urine, in and of itself, was an offence within the IOC Medical Code or the relevant international sports federation (FIS). In this manner, the case parallels the *Bromantan* cases in Atlanta (discussed below under doping violations).

The AHD concluded that the IOC Medical Code itself did not provide a basis for treating marijuana as a prohibited substance; such as it would justify the sanction. Next, the AHD examined whether an agreement to test for marijuana and impose sanctions in that regard was in effect between the IOC and FIS. According to the AHD, the FIS had adopted the IOC Medical Code in its entirety, and as the IOC Medical Code did not provide a basis for treating marijuana as a prohibited sub-

74. Arbitration CAS ad hoc Division (O.G. Atlanta 1996) 002, A., W. and L. v. NOC Cape Verde (NOC CV), award of July 27, 1996, in *DIGEST OF CAS AWARDS 1986-1998*, *supra* note 1, at 389 (1998) [hereinafter *Cape Verde*].

75. *Id.*

76. *Id.*

77. Rebagliati v. International Olympic Comm. (IOC), CAS arbitration NAG 2 (Feb. 12, 1998) [hereinafter *Rebagliati*].

stance, the sanction imposed against Rebagliati lacked the proper foundation.

The Sydney Games resulted in a number of challenges being raised in regard to IF and IOC suspensions. Two of the cases involved appeals against the International Weightlifting Federation (IWF). The first of these cases addressed the effect of a national court order on IFs. The International Weightlifting Federation (IWF) adopted the Samoan Weightlifting Federation's (SWF) suspension precluding a Samoan weightlifter, Ofisa Jr. Ofisa, from participating in the Olympic Games.⁷⁸ The athlete obtained a Samoan interim court order precluding the enforcement of the suspension imposed by the SWF. The AHD acknowledged that the court order clearly affected the SWF, and as such removed its ability to impose a suspension on the athlete.⁷⁹ The AHD held that the Samoan court order was not binding on the IWF.⁸⁰ However, the keystone to the IWF's suspension was the SWF's decision. Therefore, the Samoan court order removed the foundation of the IWF's suspension and as a result the IWF's decision became invalid. Accordingly, the CAS set aside the suspension.⁸¹

The second case involving the IWF was similar to the one rendered during the Nagano Games in respect to Rebagliati. In both instances, an IF attempted to exercise powers that were not within its rules. In these situations, the AHD continues to find that a federation must have a legal basis for its disciplinary action. The dispute occurred after three athletes of the Bulgarian Weightlifting Federation (BWF) tested positive for banned substances, prompting the IWF to suspend the BWF.⁸² The IOC Executive Board allowed the suspension of the entire team. As a consequence, a "clean" athlete and member of the BWF, Tzagaev became ineligible to compete.

The IWF claimed that it had the power to suspend a federation for one year following three positive drug tests in that year. The AHD noted that the exact provision the IWF relied on only allowed a fine to

78. Arbitration CAS ad hoc Division (O.S. Sydney 2000) 002, Samoa NOC and Sports Federation Inc. v. International Weightlifting Federation (IWF), award of 12 September, 2000, in CAS AWARDS, *supra* note 46, at 23 [hereinafter *Samoa*]. The suspension was based upon alleged "sexual misconduct at the Oceania Weightlifting Championships" (alleged sexual relations with a minor). *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Arbitration CAS ad hoc Division (O.S. Sydney 2000) 010, Alan Tzagaev v. International Weightlifting Federation (IWF), award of 25 September, 2000, in CAS AWARDS, *supra* note 46, at 101 [hereinafter *Tzagaev*].

be imposed on a federation and a suspension resulted only upon failure to pay the fine. The AHD held that the suspension of an entire federation from the Games, including athletes who have not committed a doping offence must have an explicit legal basis.⁸³ Accordingly, the AHD annulled the suspension and Tzagaev went on to win a silver medal.⁸⁴

An application was also brought before the AHD in Sydney by the NOC of Jesus Kibunde, a Congolese boxer.⁸⁵ Kibunde had been barred from competing by the International Amateur Boxing Association (AIBA) after he failed to compete in the boxing preliminaries. Kibunde did not participate in the preliminaries as he missed the initial weigh in and medical examination after personal problems, including a canceled flight and difficulty at customs.

Kibunde referred to fundamental provisions of the Olympic movement, arguing that he was entitled to compete. Assessing the validity of the AIBA's decision the Panel held

. . . that the relevant rule was unequivocal; had a practical foundation; and could not be waived. . . Any such waiver of the rule would have involved a risk to other competitors and a departure from the principle of equality of treatment . . .⁸⁶

Thus, in this instance the AHD concluded that the athlete had been properly barred from competition.

These five cases reveal the independence with which the AHD carries out its adjudicative function. In each case, the AHD affirmed that an athlete can only be suspended where there is an explicit legal basis for the sanction

4. The principle of non-interference with the decisions of sports officials

The case of *Christopher Mendy v. International Amateur Boxing Association* (AIBA), which arose during the Atlanta Games, discussed the principle of non-interference with the decisions of officials made in the course of competition.⁸⁷ Christopher Mendy was a French boxer who

83. *Id.*

84. *Id.*

85. Arbitrage Chambre ad hoc du TAS (J.O. Sydney 2000) 004, Comité Olympique Congolais (COC) et Jesus Kibunde c/ Association Internationale de Boxe Amateur (AIBA), sentence rendue le 18 septembre, 2000, in CAS AWARDS, *supra* note 46, at 41 (2000).

86. Beloff, *supra* note 28, at ¶ 6.13.

87. Arbitration CAS ad hoc Division (O.G. Atlanta 1996) 006, Mendy v. Association Internationale de Boxe Amateur (AIBA), award of August 1, 1996, in DIGEST OF CAS AWARDS 1986-1998, *supra* note 1, at 413 (1998).

was disqualified for punching below the belt. He claimed that video re-plays illustrated the punch was not below the belt, and consequently, his disqualification should be overturned. The AHD held that it was beyond its jurisdiction to review the application of technical rules of a sport.⁸⁸ Such rules are the responsibility of the federation concerned, and the judges and referees are in a far better position to determine the application of such rules. Accordingly, the action was dismissed.⁸⁹

Two cases at the Sydney Games confirmed the application of the non-interference rule developed in Atlanta. Romyana Dimitrova Neykova applied to the AHD on the grounds that the equipment relied upon for the determination of her second place finish in the Women's Single Skull event, was inaccurate.⁹⁰ The AHD applied the principle of non-interference in determining that it could not overturn judgment calls and technical decisions rendered during an event. However, the AHD held that it does have jurisdiction to determine if equipment is faulty.⁹¹ In this instance, the AHD held that the technical equipment was in proper working order and there was no proof indicating otherwise.⁹² Consequently, the application was dismissed.⁹³

The principle of non-interference arose as part of another Sydney case, discussed above under the jurisdiction of the AHD. After finishing in first place a Mexican race walker, Segura, was disqualified from the 20km walk event, some 15 minutes after he had crossed the finish line. While being congratulated on a mobile phone by the president of Mexico, he was disqualified for committing infractions during the course of the event.

The disqualification occurred because three course judges determined that the athlete had failed to keep one foot on the ground at all times, pursuant to the Rules of the event. The AHD decided that the relevant IAAF rules do not provide that disqualifications are invalid if they are not communicated immediately.⁹⁴ Accordingly, the AHD rejected Segura's argument that the way the IAAF officials had dealt with the consequences of the three warnings had violated his rights. The

88. *Id.*

89. *Id.*

90. Arbitration CAS ad hoc Division (O.S. Sydney 2000) 012, Romyana Dimitrova Neykova v. International Rowing Federation (FISA) and International Olympic Committee (IOC), award of 29 September, 2000, in CAS AWARDS, *supra* note 46, at 123 [hereinafter *Neykova*].

91. *Id.*

92. *Id.*

93. *Id.*

94. *Segura*, *supra* note 57.

AHD held that it could not review a determination of the "rules of the game" unless the rules had been applied in bad faith.⁹⁵ In this respect, the AHD concluded that it could not reverse the judges' decision unless it was shown that the error on the part of the judges, in failing to communicate the disqualification to Segura promptly, would compel the reversal of the decision.⁹⁶ There was no basis for such an outcome and the disqualification was upheld.

5. Doping violations and the existence of strict liability regime

The requisite burden of proof for the determination of a doping offence can be found in the rules of the IFs. During the Olympic Games, however, a strict liability regime applies to doping offences by application of Chapter II, Article 2 of the *Olympic Movement Anti-Doping Code*.⁹⁷ Article 2.2 provides that "[d]oping is. . . the presence in the athlete's body of a Prohibited Substance." Thus, if a prohibited substance is confirmed to be present in an athlete's body, a doping offence is committed irrespective of any other factors. Article 3.3 automatically applies to invalidate any competition results achieved when an offence occurs during an event.⁹⁸ However, the subjective elements of each case are something that the IOC can consider when determining the appropriate sanction.⁹⁹ In this respect, once a positive finding of a prohibited substance is confirmed, there are very few legal issues for the AHD to consider.

The case of Andreea Raducan¹⁰⁰ at the Sydney Games demonstrates the application of a strict liability regime. Raducan, a Romanian Gymnast, placed first in the Women's Individual All-Round Event. Follow-

95. *Id.*

96. *Id.*

97. *The Anti-Doping Code*, *supra* note 2, available at <http://www.olympic.org/ioc/e/org/medcom/medcom%5Fantidopage%5Fe.html> (last visited Nov. 2, 2001).

98. Whether or not doping has occurred during a competition depends on the facts of each case. In *Haga v. Federation Internationale De Motocyclisme (FIM)*, TAS 2000/A/281 (2000), a Superbike rider tested positive for a Prohibited Substance after the second race on the same day. The facts of the case were such that the athlete was only found to have committed a doping offence in respect to one of the races and as a consequence only the results from that race were invalidated.

99. *The Anti-Doping Code*, *supra* note 2, at ch. 2 art. 3, available at <http://www.olympic.org/ioc/e/org/medcom/medcom%5Fantidopage%5Fe.html> (last visited Nov. 2, 2001) (providing a great deal of latitude in regard to the appropriate sanctions to be imposed in addition to the invalidation of any competition results).

100. Arbitration CAS ad hoc Division (O.S. Sydney 2000) 011, *Andreea Raducan v. International Olympic Committee (IOC)*, award of 28 September, 2000, in *CAS AWARDS*, *supra* note 46, at 111 [hereinafter *Raducan*].

ing her victory, she tested positive for the prohibited substance pseudoephedrine. Despite the high publicity this case received, from a legal perspective the case was not complex. Raducan argued that she bore no responsibility for the doping violation because the positive test resulted from pills given to her by the team doctor. She also claimed that the level of the drug in her system was not sufficient to have been performance enhancing. The AHD sympathized with the applicant, but acknowledged that doping is a strict liability offence and an element of intention is not required for the commission of a violation.¹⁰¹ The Panel also stated that whether or not a competitive advantage is achieved does not affect whether there has been a doping offence.¹⁰² The AHD found that a doping offence had occurred and the applicable rules resulted in the invalidation of Raducan's performance.¹⁰³ A great deal of sympathy was generated for the athlete amongst the public, but the AHD noted that an appreciation of the subjective elements of individual cases is allowed in the IOCs determination of what disciplinary sanction will arise following the necessary disqualification.¹⁰⁴

As noted above, Rebagliati had his gold medal performance initially invalidated by the IOC. However, a doping offence can only be committed if a prohibited substance is found in an athlete's body. With respect to Rebagliati the AHD found that marijuana was not a prohibited substance within the applicable rules at the time of the alleged infraction. Thus, prior to an application of the strict liability regime it must first be shown that the substance complained of is in fact prohibited. This issue was discussed extensively in two disputes at the Atlanta Games.¹⁰⁵

In Atlanta, two Russian Athletes, a wrestler and swimmer, were stripped of their bronze medals. Both athletes tested positive for Bro-

101. *Id.*

102. However, it should be noted that it is often difficult to determine when a competitive advantage has been achieved. On the facts of this particular case Raducan had concentrations of pseudoephedrine of 90.6 and 88.0. The reporting threshold is 25.

103. *Raducan, supra* note 100.

104. Dissatisfied with the result, the matter was taken to the Swiss Federal Tribunal. *Raducan*, 5P.427/2000. The Court found that factual issues about the quantity of urine supplied did not infringe the applicant's right to be heard by restricting its answers on the factual issues. It was determined that it could not be reasonably considered as having any impact on the analysis of the AHD panel. It was also found that there had been no unequal treatment inconsistent with the public order which was another grounds of appeal. Therefore, the Swiss Tribunal Court refused to interfere in the findings or the result of the AHD and would not declare a breach of the Olympic Movement Anti-Doping Code for failure to have the required 75ml minimum quantity of urine.

105. *Korneev & Gouliev v. International Olympic Comm. (IOC), CAS Arb. ad hoc Division O.G. Atlanta (1998).*

mantan. Neither athlete contested the finding of the substance in his or her body; rather they argued that Bromantan was not a prohibited substance. The drug was not included on the banned substance list at the time of the Games and the question before the AHD was whether the drug was prohibited as a “. . . a related substance.”¹⁰⁶ It was argued before the AHD that Bromantan was a stimulant within the meaning of the Medical Code, and therefore, a prohibited substance regardless of the fact that it was not specifically listed. The AHD held that while further research might demonstrate that Bromantan was a stimulant, the evidence presented was not sufficient to draw that conclusion.¹⁰⁷ Accordingly, the athlete's medals were returned.

6. The resolution of commercial advertising issues at the Games

Two cases before the AHD have involved commercial advertising issues. The *Viking* case arose during the Nagano Games and was discussed above in connection with the jurisdiction of the AHD. As noted, Skate Manufacturing Corporation alleged that Article 61 of the Olympic Charter had been breached.¹⁰⁸ The AHD found that the Charter had not been breached and it did not have the requisite jurisdiction to award relief.

The Sydney Games also gave rise to a commercial based dispute.¹⁰⁹ The dispute arose in relation to the size of a logo on a French gymnast's leotard. Pursuant to Rule 61 of the Olympic Charter, articles of clothing worn by athletes cannot be marked conspicuously for advertising purposes and specific size requirements must be maintained. The major determination for the AHD was whether the Rule should be read to apply to clothing as it is manufactured or as it is worn. The AHD concluded that the Rule included the phrase “. . . worn by the athletes,”¹¹⁰ and therefore, applied to clothing as worn, not as manufactured. However, the Panel did find that the Rule had been applied inconsistently in

106. The lists of prohibited substances are not exhaustive and any substance that is found to be related to the substances included within the list will be deemed to be a prohibited substance. The Olympic Movement Anti-Doping Code 2000 had, by the time of the Sydney Games, included Bromantan as a banned substance thus eliminating the argument of the case in Atlanta.

107. *Korneev & Gouliev*, CAS Arb. ad hoc Division O.G. Atlanta.

108. Article 61: *Propaganda and Advertising* addresses a wide array of advertising issues.

109. Arbitration CAS ad hoc Division (O.S. Sydney 2000) 014, *Federation Francaise de Gymnastique (FFG) v. Sydney Organizing Committee for the Olympic Games (SOCOG)*, award of 30 September, 2000, in CAS AWARDS, *supra* note 46, at 137 [hereinafter *FFG*].

110. THE OLYMPIC CHARTER, *supra* note 2, at R. 61.

that it had, incorrectly, not been applied to other competitors.¹¹¹ This factor did not alter the determination of the AHD that the Rule had been correctly applied to the athlete in this case. The FFG application was dismissed.

The Nagano and Sydney commercial disputes demonstrate the range and breadth of cases arising from the Games that may come before the AHD.

7. The manipulation of sporting rules for strategic advantage

Sometimes an IF, NOC or an athlete will seek to gain a strategic advantage by manipulating sporting rules. Such activity occurred in Atlanta and Nagano.

In Atlanta, the German and Netherlands swimming teams supported an application by United States Swimming that sought a ruling to prohibit Irish Swimmer, Michelle Smith, from entering the 400-meter freestyle.¹¹² The parties alleged that Smith's application had been submitted past the deadline. The AHD decided that, despite the strict interpretation of the rules, it was common practice for competitors to switch between events once they were already entered in the Games.¹¹³ This was an unusual case as it demonstrates an obvious move to manipulate the rules in order to eliminate a rival athlete from competition.

A similar case went before the AHD of CAS at the Nagano Games.¹¹⁴ Ulf Samuelson, a National Hockey League Player, competed for Sweden in the Olympic Hockey tournament. Following the first three games, the International Ice Hockey Federation (IIHF) discovered that by operation of Swedish Law, Samuelson had lost his citizenship when he became an American citizen. The IIHF excluded Samuelson from competing in the rest of the tournament.

The Swedish Olympic Committee appealed to the AHD to allow Samuelson to compete. The Czech Olympic Committee also appealed to the AHD requesting the invalidation of the games in which Samuelson took part. A ruling in favour of the Czech Olympic Committee would

111. *FFG*, *supra* note 109.

112. Arbitration CAS ad hoc division (O.G. Atlanta 1996) 001, *US Swimming v. Federation Internationale de Natation Amateur (FINA)*, award as of July 22, 1996, in *DIGEST OF CAS AWARDS 1986-1998*, *supra* note 1, at 377 (1998) [hereinafter *Smith*].

113. *Id.*

114. Arbitration CAS ad hoc division (O.G. Nagano 1998) 004-005, *Czech Olympic Committee & Swedish Olympic Committee v. Samuelson v. International Ice Hockey Fed'n (IIHF)*, award of February 18, 1998, in *DIGEST OF CAS AWARDS 1986-1998*, *supra* note 1, at 435 (1998) [hereinafter *Samuelson*].

have reordered the playoff round to the Czechs advantage. Thus, there was an attempt to manipulate the rules to one Country's advantage.

The AHD upheld the decision of the IIHF and Samuelson was excluded from play for failure to meet the eligibility requirements.¹¹⁵ The AHD dismissed the Czech application stating that the Czechs lacked sufficient involvement to challenge the decision.¹¹⁶ However, the AHD noted that the outcome could have differed if the application had been brought by either of the two teams Sweden defeated while Samuelson was competing.

B. Developed Principles of Lex Sportiva

The Olympic Decisions make up part of a growing body of *lex sportiva*. Within this body, specific rules have been developed and continually applied; the Olympic cases illustrate many of the fundamental principles that the CAS has developed.

The decisions rendered during the Games have made it clear that the AHD has full jurisdiction over any dispute arising at the Games. Only a very limited number of disputes are outside of its prescribed jurisdiction. As indicated by the *Viking* case, the AHD will decline jurisdiction to render awards relating to disputes centered upon commercial issue, which do not directly impact athletes or require immediate resolution. These disputes should be addressed in civil courts. The *Steele* case illustrates that only certain types of persons, capable of entering legal relationships, will be able to apply to the AHD. However, the scope of "persons" is broad and appears to be within the jurisdiction of the AHD to hear any sports-related dispute during the Games, so long as the applicant party is more than a member of the public and has a direct connection to the Olympic Games.

The Sydney Games decisions established the breadth of the AHDs Jurisdiction. NOs and IFs with clauses providing for CAS arbitration are explicitly within its jurisdiction. Further, the IOC, athletes, and other sports organizations, including IFs that do not provide for CAS arbitration, are subject to the AHDs jurisdiction pursuant to the Olympic Athlete Entry Form-Eligibility Conditions and Articles 29 and 74 of the Olympic Charter.¹¹⁷

The AHDs jurisdiction over doping offences committed prior to the Games, however, is unclear. It appears that the AHD will assess an al-

115. *Id.*

116. *Id.*

117. *Baumann, supra note 46; Melinte, supra note 51.*

leged infraction on its face and render a provisional decision with respect to the accused athlete's eligibility to compete in the Games. The ultimate determination of the athlete's case will fall within the appropriate jurisdiction outside of the games, where the positive drug test occurred.¹¹⁸

A variety of applications brought before the AHD in Sydney concentrated on Article 46 of the Olympic Charter and raised issues about the principles of *res judicata* and *estoppel*.¹¹⁹ In this regard, these decisions suggest that the AHD will entertain an application by a party even where the application addresses issues that have already been heard by it. However, as demonstrated in *Perez 3*, so long as an interested party has been served notice and has had an opportunity to participate in the arbitration proceedings, the AHDs award will be binding upon that party and they will be estopped from bringing further applications.

The extent to which an affected third party is bound by a CAS award strikes at the very heart of the contractual underpinnings of CAS arbitration. While the matter has been addressed on an ad hoc basis, it will require further refinement of the Code and the related OG Rules to address the problem more completely. In the meantime, the practice of the CAS and its jurisprudence, supported by the New South Wales Court of Appeal, will remain the benchmarks by which to resolve the affected third party issue.¹²⁰

A great number of the applications before the AHD are requests for an order of the IOC or an IF to be overturned. In this regard, the AHD has dealt extensively with the validity of suspensions and orders from the IOC and IFs. In all of these disputes, the AHD has ensured that there is a valid foundation upon which an order or suspension is based and that any action taken by the IOC or IFs comply with the relevant rules. If these requisite elements exist, the AHD is constrained entirely by law. However, this does not mean that the AHD applies blind law. Where an

118. *Melinte*, *supra* note 51.

119. *Perez 1*, *supra* note 62; *Perez 2*, *supra* note 62; *Perez 3*, *supra* note 62; *Miranda 1*, *supra* note 63; *Miranda 2*, *supra* note 63.

120. This is a point that The Law Commission for England and Wales, *Working for Better Law*, available at <http://www.lawcom.gov.uk/library/lc242> (last visited Feb. 1, 2001) addresses in Part XIV of their report, at 14.15, 14.16. The Commission notes the problem of binding third parties to arbitration awards when they have not agreed to be so bound. The Commission flirts with the idea that "an arbitration agreement . . . could operate as a procedural benefit to a third party and could also constitute a procedural condition on the third parties right to enforce the substantive promise." However, the commission ultimately put aside this possibility noting the difficulties arising out of the contractual nature of arbitration agreements.

injustice is committed, through a strict application of the law, the AHD may exercise judicial interpretation to provide relief to the aggrieved parties.¹²¹ However, this does not allow the AHD to step outside of the legal realm and, thus the law still causes injustices for some parties. In these situations, the AHD can only recommend that the IOC alter the Olympic Charter.¹²²

The decisions of the AHD during the Olympic Games developed and affirmed the principle of non-interference with decisions made in the course of competition.¹²³ The Games have also indirectly addressed the issue of doping on a number of occasions.¹²⁴ In each of these cases, the applicant did not dispute the reliability of the finding of a prohibited substance within his or her body. Rather, each dispute focused on whether the finding of the substance constituted a doping offence. Where the Panel was satisfied that the presence of the substance equated a doping offence, the strict liability regime was applied. In these cases, the AHD noted that a consideration of the subjective elements of each case is left in the hands of the IOC.

Finally, the AHD has addressed applications based on the Manipulation of IF rules.¹²⁵ These cases illustrate that the AHD will be reluctant to allow its adjudicative function to be used to achieve a strategic advantage, not otherwise obtainable in the field of competition. The *Samuelson* case illustrates that it is not the application of IF rules that should be guarded against, rather it is the exercise of such rules by a party who is not directly affected. Thus, an application by a party who is not directly affected by an event cannot be allowed to alter the competitive scheme of the Games.

VII. CONCLUSION

The AHD addressed three times the number of disputes in Sydney as it did in Atlanta. The drastic increase in the AHDs caseload indicates an increase in the knowledge and familiarity of the CAS within the sports community. Future Olympic Games will likely see a continuance of this trend as athletes and sports bodies are now aware of the existence of an

121. *Perez 2*, *supra* note 62, at ¶ 32. The Panel interpreted the word "change," within Article 46 of the Olympic Charter, broadly so as to allow Perez to compete.

122. *Miranda 1*, *supra* note 63.

123. For examples, see the Atlanta decision, *Mendy*, *supra* note 87, and the Sydney Cases: *Segura*, *supra* note 57; *Neykova*, *supra* note 90.

124. *Raducan*, *supra* note 100; *Rebagliati*, *supra* note 77; *Korneev & Gouliev*, CAS Arb. ad hoc Division O.G. Atlanta.

125. *Samuelson*, *supra* note 114; *Smith*, *supra* note 112.

expedient forum where they can assert their rights. Athletes and sports bodies alike can rest assured that each dispute before the AHD will be addressed within the fundamental principles of fairness and due process as well as through the application of the established principles of *lex sportiva*. The current body of *lex sportiva* is by no means exhaustive and the CAS will undoubtedly face new and complex issues that will lead to the further development of *lex sportiva*.