The CAS Ad Hoc Division at the Athens Olympic Games

Richard McLaren

Follow this and additional works at: http://scholarship.law.marquette.edu/sportslaw
Part of the Entertainment and Sports Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/sportslaw/vol15/iss1/11

This International Perspective is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
I. INTRODUCTION

The XXVIII Olympiad in Athens was the Games in which the IOC was returning to its roots to refresh and renew its commitments to the ethical standards of sport. The Athens Games were the third Summer Olympic Games to which the Court of Arbitration for Sport (CAS) has dispatched an Ad Hoc Division (AHD). The structure of the AHD at these Games was similar to that of its predecessors. Twelve independent arbitrators were chosen to constitute the AHD and sit on the arbitration panels.

For the AHD it was the Games at which doping and corruption comprised...
only three cases and the administration of the sport by International Sports Federations (IF) occupied its time more than at any other Summer or Winter Olympic Games at which an AHD of CAS had been present. Doping was certainly a very extensive issue during the Games but not so far as the AHD was concerned. There were also a number of doping cases around the world that resulted in members of various Olympic Teams being banned and not attending the “Welcome Home Games.” Of course, those cases could never have become part of the caseload at the Games.

The AHD in Athens heard a total of ten cases. Two cases involved doping offences, one case dealt with corruption and seven cases dealt with the application of the rules of an IF. Surprisingly, fewer cases were heard than were expected. In Sydney, fifteen cases were heard by the AHD, and it was this author’s belief that at least the same number of cases would be heard in Athens. Certain reasons why the number of cases were lower than expected are presented below. This paper discusses the three subject matters argued before AHD Panels in Athens: doping, corruption and sports administration by IFs.

II. DOPING

A. Doping Scandals Before the Games

The most discussed doping scandal involved the American Bay-Area Laboratory Co-operative (BALCO). In June 2003, it was discovered that BALCO was in possession of a designer steroid called THG. A syringe of THG was anonymously sent to the United States Anti-Doping Agency (USADA).

This action allowed chemists to unmask the previously undetectable substance. The discovery sparked an extensive United States grand jury investigation in October 2003. The American sprinter Kelli White was the first athlete suspended based on information from the BALCO investigation. Soon after, Dwain Chambers, a British sprinter tested positive for THG and was suspended for two years.

Other American athletes that

---


3. THG is short for "tetrahydrogestrinone."

4. Trevor Graham only admitted on August 22, 2004, during the Games, that he was the coach who sent the syringe to USADA. Graham was the coach of 2004 Olympic 100 meter gold medalist Justin Gatlin and the former coach of Marion Jones and Tim Montgomery.


have tested positive for THG and have been suspended are: hammer throwers John McEwen and Melissa Price; shot putter Kevin Toth; and middle distance runner Regina Jacobs. Tim Montgomery, Chryste Gaines, Michelle Collins and Alvin Harrison have had so called "non-analytical positive" charges levelled against them by USADA. The legacy of this scandal may be the opening of the door to the use of non-analytical positives to be included as part of the doping control arsenal. It may provide an avenue for the control of doping where the precise substance used cannot be established but there is evidence of some attempt to cheat.

The second major pre-Games doping scandal occurred when a bucket of vials and syringes were found in the room of Australian cyclist Mark French. His room was allegedly being used as a "shooting gallery" for athletes. Newspaper articles suggest that one of the substances injected by the athletes for its performance enhancing effect was a horse growth hormone used to treat aging horses. The Australian Sports Commission and Cycling Australia submitted an application to the Oceania division of the CAS for a hearing to determine whether French had breached each organization's anti-doping policy. The CAS arbitrator found that a breach had occurred and French was fined and suspended for two years. French also received a lifetime ban from Olympic competition by the Australian Olympic Committee. French has appealed this decision to the appeals division of CAS.

7. McEwen and Price challenged their suspensions and filed an appeal before the North American CAS. The panel found them guilty of doping offences and gave them both two-year suspensions. USADA v. McEwen, AAA No. 30 190 01107 03 (2004) and USADA v. Price, AAA No. 30 190 01126 03 (2004).

8. These two cases were to be heard commencing November 1, 2004, in San Francisco, but by mutual agreement of the parties on October 28, 2004, the hearings were postponed indefinitely. Press Release, CAS, Athletics: The CAS Hearing in the Cases USADA/Montgomery and USADA/Gaines Postponed (Oct. 29, 2004), available at http://www.tas-cas.org/en/recherche/frmrech.htm.

9. All these cases were to be heard by CAS International. Under the USADA protocol applicable at the time, but no longer so, athletes could elect to skip the first stage of the USADA process and go directly to the international level. These four cases were among the first to do so. They will also be the last because the USADA protocol has been altered to comply with the World Anti-Doping Agency (WADA) Code and always provides a first instance arbitration, thus precluding a jump to CAS International as the first instance arbitration. Alvin Harrison's case never made it to CAS. He became the second athlete, after Kelli White, to accept a ban based on so-called "non-analytical positives." He accepted a four-year suspension after admitting to multiple doping violations involving anabolic steroids, insulin, human growth hormone, EPO and modafinil. Press Release, USADA, U.S. Track Athlete Harrison Receives Four-Year Suspension for Participation in BALCO Drug Conspiracy (Oct., 19 2004), available at, http://www.usantidoping.org/resources/press/releases.aspx.


11. The CAS Oceania Division rules provide that the decision is not made public.
In his testimony before CAS, French accused five other cyclists of injecting vitamins and supplements. This led to an investigation of the matter by Judge Robert Anderson. All the athletes were exonerated except for Jobie Djaka. This cyclist was removed from the Australian Olympic camp in Germany and the Olympic team for lying about injecting vitamins. Djaka appealed this decision to CAS, but his application was dismissed.  

The Athens Games and the entire Greek population were shocked with a Greek doping scandal only twenty four hours before the opening ceremonies of the Welcome Home Games. Two Greek sprinters, Kostadinos Kenteris, the 200 meter Olympic champion in Sydney, and Ekaterini Thanou, the runner-up in the women’s 100 meter four years ago, failed to show up for a mandatory drug sample at the Olympic Village. The athletes claimed that they were only informed of the drug test four hours after it was originally scheduled. They were later involved in a motorcycle accident that sent them to the hospital. However, it was alleged that the accident never occurred and the athletes were trying to avoid being tested. The IOC opened an investigation into the matter. On August 18, 2004, at their hearing before an IOC disciplinary panel, Kenteris and Thanou withdrew from the Games by returning their accreditations. The IOC Executive Board decided to take no further action in respect to the athletes since they had given up their accreditation and were no longer competing in the Athens Games. The IAAF is currently conducting an investigation into why the athletes missed the drug test.  

Independent of these scandals, there were numerous other doping cases before the Athens Games, for example: Jovino Gonzalez, a Spanish canoeist; Oscar Camenzind, a Swiss cyclist; and Cathal Lombard, an Irish middle distance runner, all tested positive for EPO. Such cases cannot form part of  

12. Here again the CAS Oceania Division rules do not permit the publication of the decision.  
13. On November 18, 2004, following a two month police investigation, the athletes and their coach were charged with misdemeanour counts of obstructing a drugs tests in Chicago and Tel Aviv shortly before the Games, and then in Athens; and making false statements about a motorcycle accident. Also charged were 12 others, including 7 doctors at the state run hospital where the athletes were treated after the alleged accident. These charges involve making false statements. The coach was also charged with illegal import and sale of nutritional supplements. There may also be charges against three former Greek ministers of Sport. Under Greek law such charges may only be brought following a Parliamentary debate on the issues which at the time of writing had not occurred. These matters also appear to be linked to the Balco laboratory scandal in the United States.  
14. These scandals do not only occur before the Olympics. Currently, there is an on-going investigation into alleged drug use in Germany. A German athletics coach faces criminal charges after banned substances were found at his home. Prosecutors believe that the coach was supplying his training group with performance enhancing substances. See East Germany’s Doping Legacy Returns, Jan. 10, 2004, at http://www.dw-world.de/dw/article/0,1564,1344595,00.html.  
15. It was confirmed on October 6, 2004, that Slovak shot put champion Milan Haborak had committed a doping offence before the Games. Haborak was already in Athens when he heard about
the caseload of the AHD.

**B. Doping Cases in Athens**

The Athens Games resulted in an unprecedented amount of positive doping cases. Athletes using banned substances have been caught at previous Summer and Winter Olympic Games, but the results from Athens are without comparison. Over a time period starting at the opening of the Olympic Village and ending at the closing ceremonies, over twenty athletes were charged with doping offences. This resulted in athletes being stripped of three gold, one silver and three bronze medals. The other athletes who committed doping offences, but did not win a medal, had their results annulled and all were barred from competing at the Games.

<table>
<thead>
<tr>
<th>Name</th>
<th>Nationality</th>
<th>Sport</th>
<th>Offence</th>
<th>Sanction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Leonidas Sampanis</td>
<td>Greek</td>
<td>Weightlifting</td>
<td>Tested positive for testosterone</td>
<td>Stripped of bronze medal</td>
</tr>
<tr>
<td>Irina Korzhanenko</td>
<td>Russian</td>
<td>Shot Put</td>
<td>Tested positive for steroid</td>
<td>Stripped of gold medal</td>
</tr>
<tr>
<td>Robert Fazekas</td>
<td>Hungarian</td>
<td>Discus</td>
<td>Tampering with doping test</td>
<td>Stripped of gold medal</td>
</tr>
<tr>
<td>Ferenc Gyurkovics</td>
<td>Hungarian</td>
<td>Weightlifting</td>
<td>Tested positive for steroid</td>
<td>Stripped of silver medal</td>
</tr>
<tr>
<td>Olena Olefirenko</td>
<td>Ukrainian</td>
<td>Rowing</td>
<td>Tested positive for Ethamivan</td>
<td>Stripped of bronze medal</td>
</tr>
<tr>
<td>Adrian Annus</td>
<td>Hungarian</td>
<td>Hammer Throw</td>
<td>Failed to submit sample collection</td>
<td>Stripped of gold medal</td>
</tr>
<tr>
<td>Maria Luisa Calle Williams</td>
<td>Columbian</td>
<td>Cycling</td>
<td>Tested positive for stimulant</td>
<td>Stripped of bronze medal</td>
</tr>
<tr>
<td>Zoltan Kovacs</td>
<td>Hungarian</td>
<td>Weightlifting</td>
<td>Failed to provide a urine sample</td>
<td>Excluded from the Games</td>
</tr>
</tbody>
</table>

the result of the first test. He returned home without competing after hearing this news. The second test confirmed that he tested positive for chorionic gonadotropin, a banned substance, at an IAAF meet in July in Madrid, Spain. Anthony Peden, a New Zealand track cyclist, also withdrew from the Athens Games. Peden admitted to taking a prohibited substance but claimed that he did not know that he needed to request a therapeutic use exemption. He sought a retrospective exemption but was not successful. A hearing into this alleged doping offence was scheduled for the end of November 2004.
<table>
<thead>
<tr>
<th>Name</th>
<th>Nationality</th>
<th>Sport</th>
<th>Test Result</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aleksey Lesnichyi</td>
<td>Belarusian</td>
<td>High Jumper</td>
<td>Tested positive for Clembuterol</td>
<td>Excluded from the Games</td>
</tr>
<tr>
<td>Anton Galkin</td>
<td>Russian</td>
<td>Athletics</td>
<td>Tested positive for Stanozolol</td>
<td>Excluded from the Games</td>
</tr>
<tr>
<td>David Munyasia</td>
<td>Kenyan</td>
<td>Boxing</td>
<td>Tested positive for Cathine</td>
<td>Excluded from the Games</td>
</tr>
<tr>
<td>Mabel Fonseca</td>
<td>Puerto Rican</td>
<td>Wrestling</td>
<td>Tested positive for Stanozolol</td>
<td>Stripped of fifth place finish</td>
</tr>
<tr>
<td>Wafa Ammouri</td>
<td>Moroccan</td>
<td>Weightlifting</td>
<td>Tested positive for banned substance</td>
<td>Suspended by IWF</td>
</tr>
<tr>
<td>Zoltan Kecskes</td>
<td>Hungarian</td>
<td>Weightlifting</td>
<td>Tested positive for banned substance</td>
<td>Suspended by IWF</td>
</tr>
<tr>
<td>Viktor Chislean</td>
<td>Moldovan</td>
<td>Weightlifting</td>
<td>Tested positive for banned substance</td>
<td>Suspended by IWF</td>
</tr>
<tr>
<td>Pratima Kumari Na</td>
<td>Indian</td>
<td>Weightlifting</td>
<td>Tested positive for banned substance</td>
<td>Suspended by IWF</td>
</tr>
<tr>
<td>Sule Sahbaz</td>
<td>Turkish</td>
<td>Weightlifting</td>
<td>Tested positive for banned substance</td>
<td>Suspended by IWF</td>
</tr>
<tr>
<td>Albina Khomich</td>
<td>Russian</td>
<td>Weightlifting</td>
<td>Failed doping test</td>
<td>Excluded from the Games</td>
</tr>
<tr>
<td>Nan Aye Khine</td>
<td>Myanmar</td>
<td>Weightlifting</td>
<td>Tested positive for steroids</td>
<td>Stripped of fourth place finish</td>
</tr>
<tr>
<td>Sanamacha Chanu</td>
<td>Indian</td>
<td>Weightlifting</td>
<td>Tested positive for diuretic</td>
<td>Stripped of fourth place finish</td>
</tr>
<tr>
<td>Derek Nicholson</td>
<td>Greek-American</td>
<td>Baseball</td>
<td>Tested positive for diuretic</td>
<td>Excluded from the Games</td>
</tr>
<tr>
<td>Andrew Brack</td>
<td>Greek-American</td>
<td>Baseball</td>
<td>Tested positive for Stanozolol</td>
<td>Excluded from the Games</td>
</tr>
<tr>
<td>Olga Shchukina</td>
<td>Uzbekistan</td>
<td>Shot Put</td>
<td>Tested positive for Clembuterol</td>
<td>Excluded from the Games</td>
</tr>
</tbody>
</table>

16. Following the Games, the International Weightlifting Federation (IWF) decided to suspend the Weightlifting Federation of India from taking part in any international competitions for a period of one year. The IWF rules allow it to suspend or fine a federation that has three or more offenders in one year. Two Indian weightlifters tested positive in Athens and another tested positive in April 2004. Subsequently, the Indian Olympic Committee banned both the weightlifters and Sandhu, their coach, for life, with Pratima Kumari moving in the Delhi High Court to challenge the ban.
The table is interesting in that it reveals that those caught were not caught using the new methods of doping such as THG, Nesp and r-HuEpo, human growth hormone, or other newer substances. Athletes were caught for using old forms of substances for which tests have been around for some time. These substances, which have been on the list a long time, work and are inexpensive. For those who are going to cheat, why spend a lot of money on the newer substances that are untried, more expensive, and more difficult to obtain. A new test at the Games did reveal an old prohibited method. It involved American cyclist Tyler Hamilton whose blood sample apparently revealed a recent transfusion of someone else’s blood. No offence could be established because the Athens laboratory inadvertently destroyed his B blood sample by freezing it.\(^{17}\)

It is difficult to pinpoint one definitive reason for this dramatic increase in doping cases. One reason might be that more doping tests were conducted in Athens than at any other Games. There were 2,796 tests conducted in Athens\(^{18}\) - a 25% increase over the number of tests conducted at the 2000 Sydney Games. This was the first Olympic Games at which the World Anti-Doping Agency (WADA) was more than just an observer. WADA was, for the first time ever, in charge of doping control procedures instead of the IOC Medical Commission. Many out of competition tests were conducted before the Olympic Games or as the athletes arrived at the Olympic Village when athletes were not expecting to be tested.\(^{19}\)

---

17. A test in September, 2004, at a competition in Spain revealed a similar circumstance involving Mr. Hamilton. Those results may go forward as a doping offence that would have to be pursued by USADA. The Russian International Olympic Committee, supported by the Australian Olympic Committee, has filed an appeal to CAS requesting the annulment of the decision made by the IOC on September 23, 2004, that it would not sanction Mr. Hamilton for a non-conclusive result of a blood anti-doping test. If successful, Hamilton, the gold medalist in the time trial cycling event at Athens, would lose his gold medal to Russian cyclist Viatcheslav Kimov. See Press Release, CAS, Olympic Games 2004: Three Additional Cases Submitted to the Court of Arbitration for Sport (CAS) (Oct. 21, 2004), available at, http://www.tas-cas.org/en/medias/fmmmedias.htm.

18. Dr. Patrick Schamasch, the IOC Medical Director, reported in a speech to the World Sports Medicine Congress in Indianapolis, Indiana, on October 12, 2004. He also stated that accomplishing that level of testing required a doping control staff of 722 people. See THG Puts Lawyers With Doctors In Forefront of Doping Fight, at http://uk.sports.yahoo.com/041012/3/70k9.html (last visited Nov. 27, 2004).

19. Humans were not the only ones doped with prohibited substances during the Athens Games. Four horses tested positive for banned substances. The horses of Irish gold medallist rider Cian O’Connor, German gold medallist rider Ludger Beerbaum, German rider Bettina Hoy, and Austrian rider Harald Riedl tested positive at the 2004 Games. At the time of writing this article the B sample confirmations had not been performed except for on the Irish horse Waterford Crystal. Therefore, the International Equestrian Federation had not declared any doping infractions. The stories of theft of Waterford Crystal’s B sample, the ransacking of the Irish Equestrian Federation’s offices, and later, the revelation that there was a back up B sample in Waterford Crystal’s case, presented a bizarre twist
For the AHD in Athens, this extraordinary increase in doping cases should have resulted in a record number of applications to the court. Surprisingly, this did not occur. Only one application contesting a doping offence was filed between August 3rd and August 29th — the time frame in which the AHD had jurisdiction over a "dispute arising on the occasion of, or in connection with the Olympic Games . . . ."\(^2\)

David Munyasia, a Kenyan boxer, was the sole athlete to file an application with the AHD.\(^2\)\(^2\) He provided an out of competition urine sample for doping control on his arrival at the Olympic Village seven days before the start of the Games. Through its accredited laboratory WADA reported that it had found an adverse analytical finding for the prohibited substance cathine and informed the chairman of the IOC Medical Commission. The validity of the adverse analytical finding was confirmed, and the chairman of the IOC Medical Commission informed IOC President Dr. Jacques Rogge of the finding. Under Rule 7.2.4 of the IOC Anti-Doping Rules, Dr. Rogge established a Disciplinary Commission. The Disciplinary Commission held a hearing in the presence of Munyasia and found that a doping offence had occurred pursuant to the IOC Anti-Doping Rules. The Disciplinary Commission recommended the exclusion of Munyasia from the Games. The IOC Executive Board followed their recommendation, excluded him from the Games and withdrew his accreditation. Munyasia argued before the AHD Panel that the cathine found in his urine analysis was in it through a mistake or by taking something unknowingly.\(^2\)\(^3\) The athlete requested that a sealed sample be taken to another laboratory for independent analysis and sought the deferral of the decision of the Panel until this further analysis had been undertaken.\(^2\)\(^4\) The Panel found that the presence of cathine in Munyasia’s sample was unchallenged and that a doping offence had been established. In dealing with the athlete’s second request, the Panel concluded that it was not within its competence to order additional laboratory analysis. The jurisdiction of the Panel was only to confirm or reverse the decision of the IOC Executive Board.\(^2\)\(^5\) Therefore, the Panel upheld the decision.

---


21. INTERNATIONAL OLYMPIC COMMITTEE, OLYMPIC CHARTER, Rule 61.


23. Id. at ¶ 1.7.

24. Id. at ¶ 1.9.

25. Id. at ¶ 4.3.
Having been sent home by his National Organizing Committee (NOC), Munyasia was not present at his hearing. In reality, the IOC procedure results in a decision that also explains that the athlete has a right to appeal to the AHD. CAS also informs the NOCs and the IFs of its presence at the Games and its abilities to determine doping appeals. In the absence of a specific right described in the IOC Executive Board decision to ban the athlete from the Games, the athletes are dependent upon the relevant body to describe the right of appeal to the AHD. If the athletes' rights are well described there must be other explanations as well. The fact the athlete is thrown out of the Village and usually sent home, as happened to Munyasia, makes it difficult to launch an appeal to the AHD. This may explain in part why only one person brought their doping case to the AHD.

C. No Fault Or Negligence Or No Significant Fault Or Negligence

A second doping case was heard by an AHD Panel in Athens, sitting as part of the Appeals Division of CAS, but using AHD arbitrators available in Greece. The doping offence occurred in April 2004, almost four months before the Games. Torri Edwards, an American athlete with a distinguished career in track and field, tested positive for the stimulant nikethamide at an International Association of Athletics Federations (IAAF) meet in Martinique. The USADA charged her with a doping offence and suspended her for a period of two years. Unlike the athletes accused of non-analytical positives, Edwards requested that her case be heard before a first instance North American CAS Panel, composed of arbitrators with CAS and American Arbitration Association (AAA) qualifications. Before this Panel, Edwards admitted that she had, by mistake, committed a doping offence, but argued that "exceptional circumstances" existed that should allow her to get a reduction or

26. WORLD ANTI-DOPING AGENCY (WADA), INDEPENDENT OBSERVERS REPORT: OLYMPIC SUMMER GAMES 2004: ATHENS 73 (herinafter "WADA Report").

27. See the discussion of the difficulty of dealing with doping cases at the Games in G. KAUFMANN-KOHLER, ARBITRATION AT THE OLYMPICS: ISSUES OF FAST-TRACK DISPUTE RESOLUTION AND SPORTS LAW 38 (2001). It should be noted that certain athletes waited until after the Games to appeal to CAS rather than to the AHD. This was the case for: Greek weightlifter Leonidas Sampanis; Hungarian discus thrower, Robert Fazekas; Hungarian hammer thrower, Adrian Annus; Hungarian weightlifter, Zoltan Kovacs; and Hungarian weightlifter, Ferenc Gyurkovics. CAS, Olympic Games 2004, supra note 17.


29. Edwards won a bronze medal as a member of the 4x100 meter relay team at the 2000 Sydney Games and was the 100 meter champion and 200 meter runner-up at the 2003 World Championships. See Profile: Torri Edwards, at http://uk.sports.yahoo.com/at/profile/9004.html (last visited Nov. 27, 2004).
elimination of her sanction.\(^3\) The North American CAS Panel concluded that exceptional circumstances may exist and referred the matter to an IAAF Doping Review Board (DRB).\(^3\) The DRB held that the circumstances were not exceptional and ordered the North American CAS Panel to impose a two-year suspension,\(^3\) which it did in a ruling dated August 10, 2004. Ms. Edwards had qualified for the U.S. Olympic Team and was training with it on a Mediterranean island when the first instance level decision was released. In a final effort to be eligible to compete at the 2004 Games, Edwards filed an appeal to CAS in Lausanne, as she had a right to do under the USADA Protocol. In order to hear the case on an expedited basis it was agreed to have the appeal heard by the AHD sitting in Athens.\(^3\)

The source of the nikethamide was two glucose tablets ingested by Edwards when she arrived in Martinique before the meet. Edwards had asked her physical therapist to buy her some glucose tablets upon their arrival. Glucose is not a prohibited substance, however, unbeknownst to her and her physical therapist at the time, this particular brand of glucose also contained a prohibited stimulant.\(^3\) After hearing all the evidence, the AHD Panel confirmed the IAAF DRB’s determination that no exceptional circumstances existed in this case. The AHD Panel found that she was negligent in not conducting further research before ingesting the product. IAAF Anti-Doping Rule 38.12 explicitly states that “it is each athlete’s personal duty to ensure that no prohibited substance enter his body tissues or fluids.”\(^3\) Not only did the packaging have the name “nikethamide” on it, but a leaflet inside the box warned athletes in the French language that the product contained an active

30. INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS, COMPETITION RULES 2004-2005, available at http://www.iaaf.org/newsfiles/23484.pdf (last visited Nov. 19, 2004). IAAF Rule 40.2 states that where “there are exceptional circumstances such that the athlete...bears no fault or negligence for the [anti-doping rule] violation, the...period of ineligibility...[will] be eliminated. \textit{Id.} at 58. IAAF Rule 40.3 states that where "there are exceptional circumstances such that the athlete... bears no significant fault or significant negligence for the [anti-doping rule] violation, the period of ineligibility may be reduced [to no] less than half the minimum period of ineligibility..." A lifetime period of ineligibility cannot be reduced to less than eight years. All of these provisions are in accordance with the source document, the WADA Code. \textit{Id.} at 58-59.

31. \textit{Id.} at 54, Rule 38.16. The IAAF has such a provision in order to oversee on a worldwide basis the use of the exceptional circumstances provision and thereby reduce or eliminate “home country decisions” favouring the nationals of the doping panel’s nationality. An argument may exist that such provisions are not in accordance with the WADA Code. The facts in this case did not raise the issue.

32. \textit{Id.} at 55, Rule 38.18.

33. This was the same procedure used in Jovanovic, CAS 2002/A/360.

34. Martinique, being a department of France, may be the only country in the world where this substance is contained in an over the counter product.

35. IAAF, COMPETITION RULES, supra note 28, at 53.
principle that could result in a positive doping test. Therefore, the Panel found no exceptional circumstance existed in her case. Edwards’ suspension was upheld and she was not eligible to compete in Athens.

An issue loomed in this case concerning the scope of the CAS powers to review the existence of exceptional circumstances under the IAAF rules. The AHD Panel did not deal with it because it had not found a case of exceptional circumstances. Had the Panel done so then the issue would be whether the IAAF rules apply to take away the jurisdiction of the court and place it in the IAAF DRB or whether the *de novo* hearing of CAS means it has jurisdiction to assess the exceptional circumstances without referral as the first level USADA arbitration board had done. The IAAF Anti-Doping Rules are unique as compared to other sports, as they give the IAAF DRB almost complete discretion over this decision. IAAF Anti-Doping Rule 38.14 states that if the relevant tribunal\(^3\) considers that there may be exceptional circumstances in the athlete’s case, it shall refer the matter to the DRB. The second step is for the DRB to examine the question of exceptional circumstances on the basis of the written materials that have been submitted to it.\(^3\) After reviewing the written materials, if the DRB finds that there are no exceptional circumstances the DRB’s determination will be binding on the relevant tribunal, which shall impose a sanction as prescribed in Rule 40.1.\(^3\) If the DRB’s determination is that there are exceptional circumstances, the relevant tribunal shall decide the athlete’s sanction in accordance with Rules 40.2, 40.3 or 40.4.

The athlete can appeal the finding of the DRB board before CAS, but the IAAF Anti-Doping Rules restrict a CAS Panel’s ability to review the DRB’s determination. Rule 60.27 states that the "hearing before CAS [on this issue] shall be limited to a review of the materials before the [DRB] and to its determination."\(^3\) This rule further provides three grounds on which the CAS can interfere with the determination of the DRB.\(^4\) Firstly, if it is satisfied "that no factual basis existed for the [DRB’s] determination."\(^4\) Secondly, if it is satisfied "the determination reached was significantly inconsistent with the previous body of cases considered by the [DRB], which inconsistency cannot be justified by the facts of the case."\(^4\) Thirdly, if it is satisfied "that the determination reached by the [DRB] was a determination that no reasonable

---

36. The relevant tribunal in this case was the North American CAS Panel.
38. *Id.* Rule 38.18.
39. *Id.* at 75.
40. *Id.*
41. *Id.*
42. *Id.*
review body could reach." The overall effect of these Rules is that the IAAF has full control over the question of exceptional circumstance.

In its decision, the AHD Panel opined "that there is inconsistency between the [AHD Panel’s] ample power to review [the facts] under Article 16 of the CAS ad hoc Rules and the limited grounds for its review under IAAF Rule 60.27." Although this inconsistency had no bearing on the AHD Panel’s final decision, the Panel stated "that CAS, which is bound by its own rules, has an unrestricted authority to review the facts and the law." Furthermore, the AHD Panel noted that the IAAF Rules in regard to CAS’s scope of review are not an adoption of the WADA Code as contemplated by Article 24.3.

The first implication of this case is that it will serve as precedent in future exceptional circumstances cases. This was the first case before the IAAF DRB to determine whether exceptional circumstances existed. The second implication is that the IAAF has set up their rules in a fashion that would eliminate "home town" decisions in favour of a country’s own nationals. The policy goal is understandable. The DRB can develop and administer a world view of exceptional circumstances and place precise boundaries around the concept that can never be achieved by national decision making bodies. Future CAS panels will have to decide if the referral method of the IAAF rules is one that constricts its determination of exceptional circumstances. The compromise would appear to be to restrict first instance tribunals as per the IAAF rules, but permit the CAS, as the appellate body, to review that decision in accordance with the provisions of the IAAF rules, after which it may still modify the penalty for its specific independent reasons. The issue will undoubtedly arise in some future IAAF cases.

D. Doping Cases Filed After the Games

To no one’s surprise, seven athletes did file applications with CAS after the completion of the Games. The first application was by Leonidas Sampanis, the Greek weightlifter who had his bronze medal in the 62kg event removed by the IOC Executive Board. He tested positive for testosterone. In his application, Sampanis requested the annulment of the IOC Executive Board’s decision to exclude him from the Games and withdraw his bronze medal.

The second athlete to file an application was the Hungarian discus thrower Robert Fazekas. The IOC excluded him from the Games and withdrew his

43. Id.
45. IAAF, COMPETITION RULES, supra note 28, Rule 60.27.
46. Id.
men's discus gold medal after Fazekas refused to provide a complete urine sample. He was caught red-handed using a "weightlifters device." This is a balloon and rubber device inserted in the athlete's anus containing someone else's clean urine. Fazekas requested the annulment of this Executive Board decision.

Adrian Annus, the Hungarian hammer thrower who won the gold medal in Athens, was the third athlete to file an application regarding a doping offence during the Games. Annus was excluded from the Games and stripped of his gold medal by the IOC for refusing or failing to submit a sample collection in a doping control. After Fazekas was caught using the weightlifter's device, the IOC asked his training partner Annus to provide a further sample. Annus refused and returned to Hungary. All three cases will be heard as ordinary CAS appeals.

Two Hungarian weightlifters, Zoltan Kovacs, who retired from the men's 105kg event due to an injury, and Ferenc Gyurkovics, who initially won silver in the same event, filed applications requesting the annulment of the decision made by the IOC Executive Board to disqualify and exclude them from the 2004 Olympic Games. The IOC decided to exclude Kovacs from the Games due to his failure to provide a urine sample after the competition and to exclude Gyurkovics further to a positive doping test with oxandrolone.

Columbian cyclist Maria Luisa Calle Williams appealed to CAS the IOC Executive Board's decision to exclude and disqualify her from the Games and to withdraw her bronze medal in cycling track women's points race event.47

Russian cyclist, Viatcheslav Ekimov, was the seventh athlete to file a doping related application to CAS. Along with the Russian Olympic Committee, he requested the annulment of the decision made by the IOC stating that U.S. cyclist Tyler Hamilton would not be sanctioned further to a non-conclusive result of a blood anti-doping test. This application was later supported by the Australian Olympic Committee.

An eighth application was potentially on its way to CAS when American cyclist Tyler Hamilton's A blood sample tested positive for blood doping. Hamilton's A sample apparently contained the blood of another person. If a doping offence was established Hamilton would have lost his gold medal from Athens. However, Hamilton's B sample was considered as non-conclusive because of lack of enough intact red blood cells. His sample was frozen by mistake. Without a positive B sample to confirm the A sample results, the IOC was unwilling to conclude that a doping offence had occurred and would not

47. WADA Report, supra note 26, at 83.
impose sanctions upon him.\textsuperscript{48}

E. \textit{Why So Few Doping Cases During the Games?}

Given the very high number of doping infractions at the Athens Games it is very surprising that only one case was filed before the AHD. Multiple factors could have contributed to this fact. First, the athletes who are found to have committed a doping offence may not be informed of their right to appeal the IOC Executive Board decision before the AHD. The decisions of the IOC Executive Board do make reference to the athlete's right to appeal to the AHD. The WADA Independent Observers Report states that the athletes: "were also notified of their options for legal redress and provided specific information about the opportunity to submit an appeal to the CAS within 21 days after receipt of the decision."\textsuperscript{49} The IOC expects the IF or the NOC to inform the athlete of the right to appeal to the AHD. Indeed, the CAS General Secretary undertakes considerable efforts to advise these organisations of the existence, jurisdiction and rules to appeal to the AHD. One of the consequences for the athlete of these IOC Executive Board decisions can be exclusion from the Games and the consequent loss of the right to be in the Olympic Village. The athlete's own Olympic Committee usually sends the person home immediately, and even if it does not, the athlete is on his or her own to live in the host city. These actions make it very difficult for an athlete to launch an appeal to the AHD. Many athletes may also feel that they had their opportunity to present their case through the new Disciplinary Committee process unveiled at the Games and have no reason to appeal to the AHD. They believe their cases have been heard independently and objectively. Finally, it may only be after reflection at home and further investigation that the athlete believes he or she has a case and then appeals to the Appeals Division of the

\textsuperscript{48} Id. Hamilton's future became even more uncertain when his sponsor, Phonak, terminated his contract on November 30, 2004. Phonak initially supported Hamilton, but dropped him when it failed to meet the anti-doping criteria to be accepted on the new UCI ProTour.

In a bizarre twist, someone seems to have decided to capitalize on the theory used here by stealing the B sample in transit. The Irish horse Waterford Crystal had an A positive result announced in early October relating to the individual jumping event at Athens. It was announced on October 31, 2004 that the B sample had been stolen in transit. It was subsequently announced on November 9 that there was a B sample back up which was in fact tested in New York and was positive.

\textsuperscript{49} WADA Report, \textit{supra} note 26, at 73. A pool of pro-bono lawyers was once again available to parties seeking help. In Athens these lawyers were only used in a few cases before the AHD. The various parties, especially athletes, are not officially notified of this pool of lawyers. An athlete unfamiliar with the AHD application process may be reluctant to file an appeal. However, with the help of a pro-bono lawyer's professional advice, the athlete may be willing to submit an application to the AHD.
CAS after the Games. This happened in the seven doping cases filed after the Games.

Time may be a further reason why athletes did not file applications to the AHD. In many of these doping cases the athlete had already competed in the Games. Therefore, there was no urgency to file an application before the AHD and utilize the twenty four hour time limit imposed on the AHD Panel to render a decision. The Kenyan, Munyasia, filed his application to the AHD because his doping offence occurred before the Games began. If he wanted to compete in Athens he needed to have his appeal heard and decided before the boxing competition was to commence. Therefore, he was required to file an application with the AHD. This is similar to the Torri Edwards case. There were several out of competition tests before the Games that resulted in doping offences, but no appeal was launched by those athletes to the AHD.

Additionally, the scientific and factual elements of these doping offences are often very complex. Given the short time frame to prepare an appeal, it may be to the applicant’s advantage to file an ordinary appeal with CAS after the Games. This will allow the applicant to conduct further research into the facts of the offence, the source of the doping offence and scientific information about the prohibited substance. Expert scientific witnesses are also often called in doping cases and may not be available on the short notice required by the AHD.

The four major doping infractions arising from the Salt Lake City Games were all heard after the Games as ordinary CAS appeals.50 The Baxter case involved the prohibited substance methamphetamine, and the Muehlegg, Lazutina and Danilova cases were the first cases to deal with the prohibited substance darbepoetin (EPO). Given the complex issues in these cases, it may have been impossible for an AHD Panel to gather all the information required to make an informed decision within the time frame of its rules for the Games.

III. CORRUPTION

The IOC’s efforts to extinguish allegations of corruption and bribery following the Salt Lake City scandal were potentially seriously undermined right before the start of the Athens Games. A Bulgarian IOC member, Mr. Ivan Boris Slavkov, was secretly filmed by a group of undercover British journalists. The journalists posed as representatives of London-based clients desirous of London being chosen as the host city for the 2012 Games. In his conversation with the journalists, Slavkov appeared to indicate that he was

open to negotiations on how votes for a bid city could be bought. This scandal erupted only nine days before the start of the Games when the interview was featured in a British Broadcasting Company (BBC) Panorama programme entitled *To Buy the Games*. On August 7th, 2004, the IOC Executive Board unanimously adopted the recommendations of the Ethics Commission to deprive Slavkov of all his rights, prerogatives and functions deriving from his membership in the IOC. Slavkov’s accreditation as an IOC member was withdrawn for the duration of the Games. Slavkov filed an application with the AHD challenging the decision of the IOC Executive Board and its Ethics Commission.51

Slavkov presented several arguments to support his position that his accreditation was wrongfully withdrawn. First, he claimed that the IOC Executive Board withdrew his accreditation without taking cognisance of his written evidence.52 Second, he argued that it withdrew his accreditation without furnishing the legal ground of its decision.53 Third, Slavkov argued that his conduct in the interview was not in lack of respect of the IOC Code of Ethics.54 Fourth, Slavkov argued that he should have been able to retain his accreditation as "chef de mission" of the Bulgarian Olympic Team.55 Finally, Slavkov questioned the IOC's authority to withdraw his accreditation in so far as the Ethic Commission had not specifically recommended it.56 The primary relief sought by Slavkov was to have his accreditation as an IOC member returned. The alternative relief sought was to permit him to be accredited as chef de mission of the Bulgarian Olympic Team.

His appeal was dismissed by the AHD Panel. The AHD Panel found that the IOC Executive Board acted within its powers by depriving him of his accreditation as an IOC member. His accreditation was clearly one of the rights accruing to him as an IOC member and could be removed by the IOC. Additionally, the AHD Panel found that Slavkov was provided an opportunity to present his explanation of the events before the decision to impose a sanction was made. He was provided an opportunity to state his defence to the Ethics Commission. In regards to Slavkov’s alternative relief sought, the AHD Panel noted that it was debatable whether he was entitled to such accreditation if he had been deprived of all his rights as an IOC member. The AHD Panel concluded that “there was no bar to his applying for such reduced

52. *Id.* at ¶ 3.1.
53. *Id.*
54. *Id.* at ¶ 3.2.
55. *Id.* at ¶ 3.3.
56. *Id.* at ¶ 3.4.
accreditation which, we assume, will be dealt with in the usual way through the usual channels.\footnote{\textit{Id.} at \textsection 6.8. On November 26, 2004, the IOC Executive Board decided that Slavkov violated the ethical principles set out in the OLYMPIC CHARTER and the INTERNATIONAL OLYMPIC COMMITTEE'S CODE OF ETHICS, thereby seriously tarnishing the reputation of the Olympic Movement. Therefore, the IOC Executive Board proposed the expulsion of Slavkov at the 117th IOC Session to be held in Singapore in July 2005. Until the Session's decision, Slavkov continues to be suspended and deprived of all his rights, prerogatives and functions deriving from his IOC membership.}

IV. SPORT ADMINISTRATION BY AN IF

\textit{A. Introduction}

The Court of Arbitration for Sport, through its regular appeals and AHD, has become a watchdog over International Sports Federations. Seven out of ten cases heard in Athens by the AHD related to the administration of a sport by an IF. The cases in Athens can be divided into several areas. Selection and participation rules were the subject of several decisions. A corollary of those and some other cases is that the IFs must cease to make the rules up as they go along. It is also increasingly apparent from the AHD cases that many NOCs are willing to take on a dispute with the IFs in their role as administrator of the sport; and, are no longer willing to go along with the private club atmosphere of the past. Indeed, in six of the seven cases before the AHD, the NOC was the primary moving party accompanied by the athlete\footnote{The lone exception to this statement was the Canadian Olympic Committee (COC) in the Canadian rowers case, \textit{Calder and Jarvis v FISA}, CAS Ad Hoc Div. (O.G. Athens 2004) 2004/005, who appealed the field of play decision that they had interfered with the South African skull in the next lane and were disqualified but given a right to race in the B final race. It is uncertain whether the COC was merely timid in supporting its athletes or felt that there was no genuine case to answer. The AHD certainly unequivocally took the latter point of view.} in dealing with the dispute. The IFs were also taken to task regarding administration of their own competition rules. There were, of course, the usual expected field of play decisions\footnote{See Richard H. McLaren, \textit{The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes}, 35 VAL. UNIV. L. REV. 379, 398 (2001).} and, despite the shifting strands of the doctrine, there were no new substantive developments in the CAS/AHD jurisprudence.

IFs have the responsibility to develop and maintain the rules and regulations for their sport. These rules cover all aspects of a sport including competition rules, athlete eligibility and selection guidelines, qualification standards, disciplinary and appeal procedures, anti-doping and many other aspects. Once the rules are in place, there are contractual agreements between
the IF, the National Federation (NF) of each country and the athletes, that these rules will govern the sport. A potential problem with this structure is that one athlete may not have any leverage against a powerful IF. Therefore, it was possible for IFs to deviate from their rules to their advantage but to the detriment of certain athletes. The more forceful approach of NOCs to the various disputes is reflected in the large number of sports administration cases heard by the AHD in Athens involving IFs.

The growing recognition of CAS as the "supreme court for international sport" has thrust it into the role of reining in an IF’s ability to deviate from its own rules and regulations. When a dispute is brought forward to the AHD, it is the Panel’s responsibility to ascertain the facts of the case, interpret the applicable sporting rules and, finally, apply the rules to the factual circumstances the Panel has determined to exist. Therefore, the independent CAS Panel will overturn any deliberate or accidental deviations from the rules. The presence of the AHD of CAS has had an impact on IFs. They are more diligent to reach decisions that are in compliance with their own rules and regulations.

The CAS AHD at the past five Olympic Games has had an impact on the conduct of IFs during the Games. The AHD has consistently overturned decisions of IFs, NOCs and the IOC that were not supported by a proper legal foundation. The mere presence of the AHD at Athens, proved to be enough to force IFs to rectify a situation before they found themselves in front of an AHD Panel. Hence, the earlier description of the AHD as the ‘watchdog’ over the IFs. The impact that CAS and the AHD have on IFs also has, and will continue to have, a trickle down effect on NFs. The national sports bodies are bound by their own rules which are a micro version of the IFs rules, for which any deviations will likely reflect adversely upon the NF. This reality leads to one possible reason why the AHD did not hear as many cases as it expected.

60. The NOCs are linked to the contractual network referred to and sanctioned by the New South Wales Court of Appeal in Angela Raguz v. Rebecca Sullivan & Ors NSWCA 240 (2000), by Article 3.2, 28 and 61 of the Olympic Charter. The AHD has jurisdiction over the NOCs by the foregoing provisions and over IFs by reason of Article 3.3, 26, 27 and 61 of the same instrument. In short, by reason of the benefits which accrue to each organisation by reason of their recognition by the IOC; each can be deemed to have subscribed to the arbitration clause in Article 61. This conclusion is fortified by the undertaking of each to promote the Olympic Charter in the particular manner set out in it. INTERNATIONAL OLYMPIC COMMITTEE, supra note 20.

Athletes or NFs were not required to seek the jurisdiction of the AHD, because the IFs complied with their obligation to apply their rules as they are drafted, or reached negotiated settlements when there were problems. However, every unique set of factual circumstances cannot be predicted when rules are drafted and it is for this reason that the AHD in Athens still heard seven cases related to the application and administration of sport by IFs.

B. IF Cases Heard by the AHD

(i) Apply the selection rules as drafted or agreed without error

The AHD heard its first IF sports administration case on the day of the opening ceremonies. The Russian Olympic Committee (ROC) applied to include one of its equestrian riders in the Olympics.\(^6\) It argued that the International Federation for Equestrian Sports (FEI) had not properly applied its rules, the “FEI Regulations for Equestrian Events at the Olympic Games.” The FEI was required to use its “fill-up of quota” rules when two nations, who had already qualified for the Olympics, waived their places in the Olympic Dressage competition. The FEI filled these empty entries with an Australian and a French rider. The Russians submitted that in accordance with the FEI rules, one of its riders should have been selected because she ranked higher than the riders from Australia and France. The Panel accepted the appeal and found that the FEI had made an error, albeit in good faith, in allocating the two open positions to France and Australia. The Panel rendered an order entitling the ROC to one of the entry positions, which would have resulted in the exclusion of the French rider. By way of recommendation only, the Panel requested that an additional place be allocated so that all three nations could enter their riders. It seemed unjust to now, on the very eve of the Games, exclude the French rider, who had already incurred effort and expense to participate in the Olympics. The Panel would have preferred to make an order of addition rather than substitution but it was not in its discretion to do so. Happily, the IOC, whose discretion it was, followed the recommendation of the AHD Panel and decided to add one position to the dressage competition and no athlete was excluded at the last minute due to a mistake of the FEI.

(ii) Don’t make up the rules as you go along

A similar case arose later in the Athens Games when the Australian Olympic Committee (AOC) requested an order from the AHD directing the

IOC to enter the Australian kayaker Amanda Rankin in the women’s K1 500 meter of the Games. Rankin had initially been entered in the K4 500 meter and K2 500 meter events before the stipulated deadline of July 21, 2004. However, her entry in these events was conditional upon the potential allocation of two additional women quota positions for the K2 500 meter event for the AOC. On July 26, 2004, the Secretary General of the International Canoe Federation (ICF) conceded that it had erroneously not allocated the proper amount of K2 quota women places to the AOC. Therefore, on July 26, 2004, the AOC modified its original entries and Rankin was entered into the K1, and two new athletes were entered into the K2 500 meter event. On August 16, 2004, only eight days before the women’s K1 500 meter competition, Rankin and the AOC were informed that her entry into this event had been rejected by the ICF on the ground that it was submitted after the entry deadline. Nevertheless, the entry of the two other athletes on July 26, 2004, was accepted by the ICF.

The AHD Panel stressed the importance of respecting clear and publicized entry deadlines but held in this case that the ICF was estopped from relying on her late entry form. It was the error of the ICF to not allocate two additional quota positions for the AOC that lead to her late entry. Therefore, the ICF could not rely on her late entry form as a ground to reject her entry. Had the ICF not committed this error her entry form would have been submitted before the deadline had passed. In essence, the AHD said that the ICF was not to make up the rules as it went along, but abide by published standards and commitments made.

The final case involving the athlete selection rules was brought by the French NOC against another decision of the ICF. The ICF denied the request of the French Canoe Kayak Federation to obtain two extra places in the canoe competition. A few days before the canoe competition four quota slots became available and the French wanted to fill two slots with French athletes. The French NOC submitted that the ICF was obliged to fill the four unused quota slots. It was also alleged that the ICF did not strictly follow the reallocation rule and the French team should have been considered in a previous round of quota distribution.

The AHD Panel concluded that the ICF rules made it clear that reallocation of unused quota places was only obligatory up to July 20, 2004. After this time, the rules did not contemplate a compulsory reallocation of any

64. All NOCs were required to enter all athlete entry forms to the Organizing Committee for the Olympic Games Athens 2004 by July 21, 2004.
The AHD Panel found that after this date, the reallocation of unused quota places was no longer obligatory but at the discretion of the ICF. Therefore, there was no abuse of discretion in declining the French request for adding athletes to the competition heats, less than twenty four hours before the competition commenced. In regards to its second argument, the Panel held it was too late to argue that the ICF had not properly applied its participation criteria. The French NOC left itself no room to manoeuvre and was the author of its own misfortune. The implication would be that had the case been brought at an earlier stage there might well have been an examination of the reallocation rule. Additionally, this case shows that there is also a duty on an NOC to ensure that the federation follows its rules. The French NOC waited until the last possible minute to file its appeal and the AHD Panel had no choice but to dismiss it.

These two canoeing/kayaking cases further support the reality that the AHD serves as an effective body to overlook the activities of the IFs. Similarly to what was done in the equestrian case between the RNOC and the FEI, the AHD Panel did not hesitate to properly apply the rules of an IF and correct the errors of the federation. The cases at the Games have begun to form a recognition amongst the federations that CAS is watching and will intervene where legally appropriate to do so. Thus, the mere threat of going to the AHD was sufficient to cause some IFs to settle matters they might have been unwilling to deal with in previous Olympics.

(iii) Administer the Competition Rules as published

The Equestrian Federation was involved in a controversy relating to the decision of its judges at the individual jump competition, which is also part of the overall team competition. This application, filed jointly by the French, British, and American NOCs, involved the decision of the Appeal Committee of the FEI. The Equestrian Eventing Competition is judged by a Ground Jury made up of three persons. One of the Ground Jury's responsibilities is to rule on all times and penalties in the show jumping events. A German rider, Bettina Hoy, was penalized thirteen time penalties by the Ground Jury for

66. Id. at ¶ 7.13.
69. After the Athens Games it was reported that the horse she rode had tested positive in the Animal Doping Control tests. It may well be that her results under the CAS AHD ruling may be eliminated due to the doping of the horse. The outcome of this issue was not determined at the time of writing this article.
going over the allotted time for completing the course in the individual jumping event. There was confusion in regards to her time because Hoy crossed the starting line twice, which resulted in the stadium clock being reset but not the computerized timing device. The Ground Jury found that the computerized timing device was the official time and Hoy had gone over the allocated time by almost thirteen seconds. This decision prompted Hoy and her German federation to appeal to the FEI’s Appeal Committee. The Committee concluded that it had the required jurisdiction to review the decision since it felt that the case was not of a factual nature but constituted an issue of interpretation of the FEI rules.\footnote{70} The Committee held that the countdown had been restarted resulting in a clear injustice to the rider. The Committee therefore removed the time penalties. The removal of the time penalties resulted in Hoy and the German team winning the gold medal in the individual and team competition.

The three NOCs argued that the Appeals Committee erred in holding that the appeal before it involved a question of interpretation of rules. Article 163.6.1 of the FEI rules, read with Article 170.2.1, clearly indicated that an issue of fact was not appealable. The AHD Panel allowed the appeal and held that the Ground Jury’s decision in deciding to impose a time penalty on Hoy was purely factual in nature and could not be appealed to the Appeal Committee under a proper construction and interpretation of the rules. The rules in this sport did not permit an appeal from the Ground Jury unlike the rules in gymnastics.\footnote{71} Therefore, the Panel would not inquire into the lack of due process argument presented by the joint applicants because the competition rules did not provide for an appeal.

In effect, the AHD was advising the FEI to administer the Competition Rules as they were written. There cannot be an ad hoc appeal process where none exists in the rules and there is no reference to a discretionary power to establish one in some circumstances. The Ground Jury had determined the outcome of the two starts and that was the end of the matter. Any arguments that the Appeal Committee had jurisdiction by virtue of a clash in the rules was rejected by CAS.

A Greek windsurfer, Nikolaos Kaklamanakis, and the Hellenic Olympic Committee (HOC) filed the ninth AHD application against the International Sailing Federation (ISAF).\footnote{72} The dispute involved the abandonment of Race 1 of the Men’s Windsurfer Mistral competition. After the race, three athletes protested and requested that the race be abandoned. The International Jury (IJ),

\footnote{71} Yang Tae Young & KOC v. FIG, CAS 2004/A/704.
a protest committee comprised of the highest level of experienced sailors with independence from the Race Committee, decided that the conditions surrounding the race were such that the race should be abandoned. They did so because they found that there was confusion about the finish signal and no windsurfer completed the required number of laps other than Kaklamanakis, who also claimed to be the winner of what was held to be the "incomplete" Race 1. He protested the IJ’s decision to abandon the race. His protest was denied. Therefore, Kaklamanakis appealed to the AHD. Kaklamanakis and the HOC had three requests for the AHD Panel: (i) the results of the original Race 1 be reinstated; (ii) the re-sailed Race 1 results be counted as a valid following race; and (iii) that a twelth race be added to the competition. In essence, Kaklamanakis was attempting a strategic manoeuvre through the use of the AHD Panel to increase his chances of winning a gold medal.

The first issue before the AHD Panel was whether or not the decision of the IJ was reviewable. It held that Rule 70.4 of the ISAF Racing Rules of Sailing clearly indicates that a decision of an IJ was unappealable. Even if the decision of an IJ could be appealed, Rule 70.1 limits an appeal to the committee’s interpretation of the rules but not the facts in its decision. The second issue determined by the AHD Panel was whether the IJ’s decision lacked good faith or was not in accordance with due process. Although IF rules may limit the scope of a CAS Panel’s powers to review a decision, CAS will always have jurisdiction to overrule the rules of any sports federation, if the bodies conduct themselves with a lack of good faith or not in accordance with due process. In this case, the Panel found that the facts did not constitute sufficient reason for establishing lack of due process. For these reasons, the AHD Panel dismissed the appeal. The decision of the Panel was provided orally to the parties on the evening of the hearing because the competition was to continue the following day. A written decision was provided to the parties on the following day.

Once again the CAS is telling the IFs to administer their rules in accordance with the way in which they are written. If that is done CAS will

73. Kaklamanakis had also finished first in the re-sailed Race 1. Therefore, he would have significantly increased his chances at a gold medal if his first place finish in both the abandoned Race 1 and in the re-sailed Race 1 would have been counted.

74. This third request was presented orally in the AHD hearing.


76. This rule was similar to one found in the rules of the equestrian federation. See CNOSF, BOA and USOC, CAS Ad Hoc Div. (O.G. Athens 2004) 2004/007.

not intervene. The only exception to such intervention would be if internal decisions lacked due process. The same point was raised in the Hoy and the German Equestrian case, but was never required to be addressed in the decision.

(iv) Field of play remains unaltered

The approach of CAS in the field of play decisions has been very constant throughout the history of CAS decisions. As the Yang decision indicates, the AHD or the CAS has the jurisdiction to hear such cases, but as a matter of policy will generally decline to do so unless there was evidence of fraud or impropriety.

The first of the field of play decision was brought by two Canadian rowers against the Fédération Internationale des Sociétés d'Aviron (FISA). The Canadians appealed their exclusion from the A Final for interfering with the South African boat in the adjacent lane in the semi-final race. The interference caused the South African boat to finish fourth, only one position away from making the A Final. Immediately after the race, the South Africans protested the interference and the umpire decided to exclude the Canadian pair from the race. The exclusion meant that the Canadians would not be able to compete in any subsequent races in that event. The applicants appealed the umpire’s decision to the FISA Executive Committee, a process contemplated by the rules of the sport. The Executive Committee decided that the appropriate measure was not to exclude them but to allow the Canadian pair to race in the B Final. This decision disallowed their participation in the A final but at least gave them the opportunity to race one more time in the B Final. After having exhausted all internal processes, the two rowers filed an application with the AHD.

The first challenge facing the Canadians was to attempt to distinguish this case from a "field of play" case. CAS AHD precedent has clearly established the principle that a Panel will not interfere with officials’ decisions on the field of play. With the help of its pro-bono lawyers, the Canadians argued that


80. In the A Final, the pair won the Bronze medal.

they were not contesting the field of play decision but the decision of the Executive Committee. The Canadians argued that the Executive Committee improperly applied its discretion in placing them in the B Final and not the A Final. Given the exceptional circumstances, the Executive Committee should have allowed the pair to compete as a seventh boat in the A Final.

The AHD Panel found that the Executive Committee correctly applied its rules. The Executive Committee has broad discretionary power to impose a sanction and this decision did fall within the powers granted to it under its rules. The AHD Panel stated that it could only review a decision based on this discretionary power if the committee acted arbitrarily or outside its powers. The athletes already benefited from a less severe penalty (relegation to the B Final versus an exclusion or disqualification) for their infraction. The Executive Committee did not err in the exercise of its discretion and it was not for the AHD Panel to second guess its decision.

The implication of this case is that it reinforces two important principles in all CAS arbitrations. The first is the non-interference with the decision of sports officials. The officials on the field of play are the most qualified and in the best position to make field of play decisions. An AHD Panel should only interfere if the official’s decision was made in bad faith. The second important principle is that an AHD Panel should not overturn a decision based on discretionary powers simply to substitute its own assessment of a just result. The Panel can only reserve the decision-maker’s decision if it was done arbitrarily or outside of its powers. In both cases, the person claiming an improper decision will have the burden of proof.

The final application submitted to the AHD was from a Korean gymnast, Yang Tae Young. This case involved one of the most publicised incidents of the 2004 Games. During the Men’s Individual Gymnastics Artistic All-Around Event Final, a judge in the parallel bars routine incorrectly ranked the starting value of the Korean gymnast’s routine. As a consequence, the start value of his routine was 9.9 when it should have been 10.0. Yang won the bronze, but had the additional 0.10 been added to his total score he would have finished in first place ahead of the American, Paul Hamm. Yang argued that the judges were notified of this error before the end of the competition and that the judges admitted that it had occurred. However, Yang argued that the judges refused to take any action during the event and told him to file a complaint in writing to the Technical Committee of the International Gymnastics Federation (“FIG”). In his arguments to the AHD, the Korean athlete argued that he was not

---

82. A team of Greek and American lawyers were available in Athens to assist anyone wishing to appear before the AHD. In this matter the American pro bono lawyers appeared.

entitled to an appeal review of the judges’ decision. Therefore, he brought his claim to the AHD in Athens.

This application was filed ten days after the competition had finished but only one day before the end of the Games. An AHD panel was immediately constituted and presented with the application. The arbitrators met to discuss the case and to decide whether or not the case should be heard in Athens or as a regular appeal in Lausanne. The Panel was ready and capable of conducting a hearing on the last day of the Games, but it held that to ensure fairness to all the parties, the case should be heard at a later time. Many technical delegates of the FIG, as well as the American Paul Hamm, had already left Greece. An important principle of any just and fair proceeding, is a party’s ability to fully present his or her case before the Panel. This would not have been possible given the absence of certain parties. The hearing of this case was rescheduled for September 27, 2004, at the head offices of CAS in Lausanne.

C. Strategic Use of the AHD

Several of the cases in Athens reveal that strategy and legal manoeuvring becoming part of the process involving the AHD. Kaklamanakis, the Greek windsurfer, was trying to use the AHD to increase his chances of winning a gold medal. The Canadian rowers had similar motives as they tried to obtain a seventh position in the A final. The BOA, USOC and CNFOS wanted a re-allocation of equestrian medals in their favour. It is not surprising that this would be the case. Most lawyers deploy such tactics within their own national legal systems. Therefore, it is likely to emerge as a trend in the AHD decision making process. The cases clearly show that the AHD is now being used very strategically by athletes and NOCs.

These strategic uses of the AHD in Athens parallels previous cases from Atlanta and Nagano. In Atlanta, US Swimming sought a ruling to prohibit Irish swimmer Michelle Smith’s entry in the 400 meter freestyle because her application had been allegedly submitted out of time. US Swimming was trying to eliminate Smith from the competition so that she would not compete against her American rival Janet Evans. The AHD Panel dismissed the appeal because it was common practice for competitors to switch between events if they were already entered in the Games.

In Nagano, Ulf Samuelson was a member of the Swedish Olympic hockey team. It was only after three qualification games that Samuelson discovered

that he lost his Swedish citizenship when he became an American citizen. The International Ice Hockey Federation (IIHF) decided to exclude him from the remainder of the Olympic hockey competition. The Swedish Olympic Committee appealed to the AHD to allow Samuelson to continue to compete. Additionally, the Czech Olympic Committee submitted an appeal for a different reason: to invalidate the games in which Samuelson took part. The Czech team had not played against the Swedish team and Samuelson but wanted a reordering of the playoff draw to their advantage. The Czech Olympic Committee was clearly trying to gain strategic advantage through the manipulation of the rules. The AHD Panel held that the Czech Olympic Committee lacked sufficient involvement in order to challenge the IIHF’s decision.

The large number of sports administration cases before the AHD in Athens shows that parties are trying to utilize the powers of the Panel for their strategic advantage. This could be done before a competition has commenced or after the final results have been tabulated. Although the Panels were very careful to not go beyond the relevant Federation rules in applying their discretion, the precedent left by these cases will certainly entice others to file similar appeals at future Games.

D. IF Cases Heard After the Games

The only case that was completed at the time of writing this article was the Korean gymnast case. The circumstances were previously described. The Panel held that under the established gymnastics rules the Koreans needed to protest the start value for the routine on the parallel bars apparatus while the competition was ongoing. They had not done so and had focused on challenging the results after the event had ended and the medals had been awarded, with Paul Hamm of the USA being given the gold medal. The CAS Panel noted that it was not asked to second guess an official, but rather to consider the consequences of an admitted error by an official. In this regard this case was different than many of the previous field of play decisions. The Panel wrote:

An error identified with the benefit of hindsight, whether admitted or not, cannot be a ground for reversing a result of a competition . . . . However, quite apart from the consideration, which we develop

---

86. Part of the Men's Individual Gymnastics Artistic All-Around Event Final. The start value awarded at the time was 9.9 and was originally accepted by FIG after the medal ceremony, although it should have been a 10. Before the case was argued the FIG had resiled from that position.
below, that no one can be certain how the competition in question would have turned out had the official’s decision been different, for a Court to change the result would on this basis still involve interfering with a field of play decision . . . [t]he solution for error, either way, lies within the framework of the sport’s own rules; it does not licence judicial or arbitral interference thereafter. If this represents an extension of the field of play doctrine, we tolerate it with equanimity.\(^87\)

In essence, without evidence of fraud or impropriety, changing a result after the fact was a dangerous and slippery slope. The Panel also noted that it was not fair to declare that Yang would have won the gold if the start value had been corrected. There was one more apparatus to go and those results might have been different if the parallel bars results had been different. It is not a simple mathematical matter. There is the dynamics of the competition, the positioning of who proceeds in what order on the next apparatus and the other personal intangibles that mix into the competition outcome on the next apparatus. Therefore, the gold medal for American Paul Hamm was preserved.

Two additional IF sports administration cases arising from the Athens Games were brought to CAS only weeks after the Games closed. The first involved the Canadian gymnast Kyle Shewfelt. Gymnastics Canada, on behalf of Shewfelt, challenged the decision of the FIG with respect to the rankings of the men’s vault final. Gymnastics Canada claimed that the FIG did not evaluate the performance of Marian Dragulescu, who finished third, in accordance with its rules. The appeal requests that CAS order FIG to grant a bronze medal to Shewfelt.\(^88\)

The second application involved one of the most shocking events during the Athens Games. Brazilian marathon runner, Vanderlei Cordeiro de Lima, was leading the race and only three miles from the finish line when he was

---


88. Kyle Shewfelt (also a gold medalist in floor exercise) was edged off the podium by Marian Draqulescu despite the fact the Romanian muffed his landing. Canadian officials first attempted to protest the result at the event in Athens. They felt it was mathematically impossible for Dragulescu to receive the score he was awarded on his second vault and that the marks were improperly tabulated. An appeal was submitted to CAS. The application was withdrawn on November 4, 2004, because it was unlikely the case would be successful after the CAS rejection of the South Korean appeal on behalf of silver medalist Yang. See Gymnastics Canada Drops Shewfelt Appeal, CANADIAN PRESS (Nov. 4, 2004), available at http://www.theglobeandmail.com/servlet/Page/document/v4/sub/MarketingPage?user_URL=http://www.theglobeandmail.com%2Fsfervlet%2Fstory%2FRTGAM.20041104.wgymn4%2FBNStory%2FSports%2F3Fquery%3DGymnastics%2BCanada%2Bdips%2BSHewfelt%2Bappeal&ord=1102628247676&brand=theglobeandmail&force_login=true (last visited December 9, 2004).
grabbed by a spectator. De Lima was able to break free and continue the race but finished third. The Brazilian Olympic Committee and de Lima requested that a gold medal be awarded to de Lima in order to remedy the damages he suffered in the marathon race. Unfortunately, this case was completed at the time of writing this article.

V. CONCLUSION

The year 2004 was the twentieth anniversary of the CAS. It was the fifth appearance of the AHD at the Olympic Games. The court has acquitted itself well over the years and has gained a solid reputation as the fair arbiter of sports disputes. The cases in Athens are further evidence of the balanced approach of the CAS. The Court is adhering to principle and assisting all members of the sports community by evolving the lex sportive. The principles are being clarified and refined and assist everyone in predicting the likely outcome of cases that result in appeals not being heard.\textsuperscript{89} Well done and Happy Anniversary!

\textsuperscript{89} The Canadian gymnast Shewfelt had a dispute with the B judges in gymnastics as opposed to the A judges which was the dispute of the Korean athlete Yang previously referred to in this article. The application of principle and the consistency of outcome resulted in the COC and the Canadian gymnast recognising that no appeal to CAS was necessary for the answer to the situation could be found in the Yang decision of the CAS.