

“Athletes Banned, Athletes Cleared, Athletes Reinstated” The Court of Arbitration for Sport: Does the United States Need a Similar Court for Resolving Issues in Sports?

Richard J. Hunter, Jr.
Professor of Legal Studies
Stillman School of Business, Seton Hall University
South Orange, New Jersey, USA 07079

John H. Shannon
Professor of Legal Studies
Stillman School of Business, Seton Hall University
South Orange, New Jersey, USA 07079

Abstract

This article is a discussion of the Court of Arbitration for Sport (CAS), an international quasi-judicial body which was established in order to settle sports-related disputes in the international arena. The article discusses the jurisdiction of the CAS, outlines its Arbitration and Appeals processes, and its special relationship to the International Olympic Committee. The article provides a sharp focus on doping allegations, controversies involving Russian athletes and others at the 2016 Olympics, and other issues (sex verification and hyperandrogenism) coming before the CAS. The article discusses the major cases that have been decided by the CAS, the effect of the “Osaka Rule,” and the import of the McLaren Reports as they relate to specific state-sponsored doping activities undertaken by Russia. The article contains a glossary of important terms, a list of abbreviations used throughout the piece, and extensive bibliographic references to contemporary web sites, internet articles, a video presentation, cases, a special section containing important CAS organizational documentation, and academic and law review articles

Keywords: Court of Arbitration for Sport; International Olympic Committee; World Anti-Doping Code; Paralympics; Arbitration; Ad Hoc Courts; Osaka Rule; List of Abbreviations; Glossary

1. Introduction

In the United States, the first level of interaction of most citizens with the legal system will be with their states’ “trial courts”—variously known as Superior Courts, District Courts, Courts of Common Pleas, Supreme Courts (in New York)—or a myriad of other names reflecting local traditions and practices. In addition, there are various “specialty courts” known for exercising jurisdiction over any number of discreet cases such as Probate Courts, Family Courts, Justice of the Peace Courts, Tax Courts, Courts of Claim, Administrative Law Courts, Small Claims Courts, etc. Yet, considering the nature of involvement of most Americans with sports—youth, high school, college, professional, recreational, leagues of all types—it may come as a surprise that there are no specialized “sport courts” in the United States that would exercise specialized jurisdiction over disputes, controversies, and other matters relating to the world of sports. However, there is an important international “court,” the Court of Arbitration for Sport, originally organized under the auspices of the International Olympic Committee or IOC, pursuant to its charter.

The Court of Arbitration for Sport or CAS (in French, the Tribunal Arbitral du Sport or TAS) is an international quasi-judicial body which was established in order to settle disputes related to sport, essentially through the process of arbitration. Arachi (2013, p. 8) reported that “The statute of the Court of Arbitration for Sports (CAS) was drafted by a working group of three members of the IOC. H.E Judge Keba Mbaye of Senegal, judge at the time of the International Court of Justice in Hague, acted as a chairman.”

In March 1983, the IOC officially accepted and ratified the statute at its New Delhi Session and the statute of CAS was entered into force on June 30, 1984.

As noted by Louise Reilly (2012, p. 1) who served as Legal Counsel to the Court of Arbitration for Sport:

“The founding purpose of the Court of Arbitration for Sport (CAS) was to take international sports disputes out of national courts and provide a highly specialized forum where those disputes could be heard and decided, quickly and inexpensively, according to a flexible procedure. Since its inception, CAS has gained the recognition and trust of the international sports community and today, is the last instance of appeal for parties involved in a wide-range of sports-related disputes, including those related to all Olympic sports and many non-Olympic sports, football disputes, doping infractions and international commercial contracts. CAS has come to provide sportsmen and women, their respective governing bodies and other entities involved in the sports world with an efficient, cost effective and final resolution to their disputes.”

Nafziger (2004) noted that the CAS has in fact become the “paramount” dispute resolution institution for international sports. Gilson (2006, p. 503-504) underscored this view and noted:

“Since its formation, the CAS has addressed a wide range of sports-related issues, including matters pertaining to the positive drug tests of athletes, the challenges to technical decisions of officials made during competition, and the eligibility of athletes to compete in the Olympic Games. Of significance, CAS awards have been recognized as developing a *lex sportiva*, that is, a set of guiding principles and rules in international sports law.”

The headquarters of the Court of Arbitration is in Lausanne (Switzerland). Individual courts are located in New York City, Sydney, and Lausanne. Temporary or *ad hoc* courts are established in the current Olympic host cities in order to be readily available to settle disputes that may arise at any Olympic games in a timely manner—surprisingly, within twenty-four hours of any appeal.

The relationship between the CAS and the Olympics can not be overstated. The CAS was originally conceived by International Olympic Committee (IOC) president Juan Antonio Samaranch to deal with disputes arising during the Olympics. The CAS was established as part of the IOC in 1984. (Court of Arbitration (Website), 2017b). The Court of Arbitration for Sport became operational as of that time, under the leadership of President Mbaye and the Secretary General, Gilbert Schwaar.

Because of its enormous popularity, prestige, and international coverage, the Olympics have generated a great deal of the activities of the CAS. The stated mission of the International Olympic Committee found in its Charter (International Olympic Committee, 2011) reflects this core symbiotic relationship. The mission of the IOC is:

- “To encourage and support the organization, development and coordination of sport and sports competitions;
- To ensure the regular celebration of the Olympic Games;
- To cooperate with the competent public or private organizations and authorities in the endeavor to place sport at the service of humanity and thereby to promote peace;
- To act against any form of discrimination affecting the Olympic Movement;
- To encourage and support the promotion of women in sport at all levels and in all structures with a view to implementing the principle of equality of men and women.”

The CAS has attempted to aid the International Olympic Committee in the pursuit of these core mission objectives. In 1991, the CAS published a *Guide to Arbitration* (Court of Arbitration for Sport, 1991) which included several *model arbitration clauses*. (Court of Arbitration for Sport, 2017a). Among these was an arbitration clause that was deemed suitable for inclusion in the statutes or regulations of individual national sports federations or clubs. The model clause reads as follows: “Any dispute arising from the present Statutes and Regulations of the ... Federation which cannot be settled amicably shall be settled finally by a tribunal composed in accordance with the Statute and Regulations of the Court of Arbitration for Sport to the exclusion of any recourse to the ordinary courts. The parties undertake to comply with the said Statute.”

2. Jurisdiction

What is the jurisdiction of the Court of Arbitration for Sport? The Website (Court of Arbitration for Sport, 2017b) of the CAS (reveals the following information concerning the responsibilities or jurisdiction of CAS Panels which are:

- “to resolve the disputes referred to them through ordinary arbitration;
- to resolve through the appeals arbitration procedure disputes concerning the decisions of federations, associations or other sports-related bodies, insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide;
- to resolve the disputes that are referred to them through mediation.”

The CAS is composed of two divisions, the Ordinary Arbitration Division and the Appeals Arbitration Division (Reilly, 2012, pp. 2-3):

- “The Ordinary Arbitration Division constitutes Panels, whose responsibility is to resolve disputes submitted to the ordinary procedure, and performs, through the intermediary of its President or her/his deputy, all other functions in relation to the efficient running of the proceedings pursuant to the Procedural Rules.” (Court of Arbitration for Sport, CAS Statute, 2016a, Articles R27 et seq.).
- “The Appeals Arbitration Division constitutes Panels, whose responsibility is to resolve disputes concerning the decisions of federations, associations or other sports-related bodies insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide. It performs, through the intermediary of its President or her/his deputy, all other functions in relation to the efficient running of the proceedings pursuant to the Procedural Rules.” (Court of Arbitration for Sport, CAS Statute, 2016a, Articles R27 et seq.).

Article R47 of the CAS *Code of Sports-Related Arbitration and Mediation Rules* (Court of Arbitration for Sport, 2012) states:

“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of the said body so provide, or insofar as the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.”

As noted by Reilly (2012, p. 65), “Appeals are heard by a Panel of one or three arbitrators, selected from a closed list of 264 CAS members. The list is geographically representative and all CAS members are required to have full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language.” (The “working languages” of the CAS are French and English.)

As a rule, and in keeping with general principles associated with Alternate Dispute Resolution (ADR), a dispute or a controversy may be submitted to the CAS only if there is an arbitration agreement in place between the parties which recognizes the jurisdiction of the CAS. Interestingly, according to rule 61 of the Olympic Charter, all disputes in connection with the Olympic Games are under the *exclusive jurisdiction* of the CAS. In addition, all Olympic International Federations (IF) have recognized the jurisdiction of CAS for at least some disputes that arise outside of the actual Olympic games. (McLaren, 2010). There are currently **73** sport federations recognized by IOC. These include:

- The **29** members of Association of Summer Olympic International Federations (ASOIF);
- The **7** members of Association of International Olympic Winter Sports Federations (AIOWF);
- The **35** members of Association of IOC Recognized International Sports Federations (ARISF); and
- **2** of the members of SportAccord (Fédération Internationale de l’Automobile and International Softball Federation).

Generally, the CAS has been reluctant to overturn “field of play” decisions, although it may do so in cases where there is “clear evidence” that the officials acted in bad faith or with arbitrariness. (*Ferreira v. WTF et al.*, 2012). In *Aino-Kaisa Saarinen* (2010), the CAS Panel explained that the reason for this is not a matter of jurisdiction, but of arbitral self-restraint—or perhaps from an abundance of caution in getting involved in “on field” disputes best left to contest officials. All signatories to the 2009 World Anti-Doping Code (WADA, 2009), under the aegis of the World Anti-Doping Agency (Malcourant et al., 2015), including all Olympic International Federations and National Olympic Committees, have recognized the jurisdiction of CAS for anti-doping rule violations. (International Olympic Committee, 2011; Findlay & Mazzucco, 2010). As reported by Malcourant et al. (2015, p. 451): “Indeed, the World Anti-Doping Agency (WADA) was founded following the Tour de France doping scandal in 1998, with pressure exerted by governments to develop an anti-doping campaign in sport.

It was created as an independent body from the IOC and International Sport Federations. WADA's goal is to harmonize the fight against doping in sport around the world, and therefore, it plays an important role at the international level." Starting in 2016, an anti-doping division of CAS has adjudicated alleged doping cases at the Olympic Games, replacing the IOC disciplinary commission. (Grohman, 2016).

Decisions can be appealed to CAS's *ad hoc* court in the Olympic host city. Reilly (2012, p. 65) notes: "The Ad hoc Division: during the Olympic Games and other major sports events, CAS sets up an ad hoc Division on-site at the event; in practice, this means that a Panel of arbitrators is on-call to hear appeals as they arise and to issue decisions within 24 hours of the appeal being filed." [Besides the Olympics, *ad hoc* courts have been established to decide disputes during the Commonwealth Games, the FIFA World Cup, certain legs of the Europa League, and the Asian Games.] If the *ad hoc* court is no longer available, an appeal made be made to the permanent CAS. (Court of Arbitration for Sport, *Code of Sports-Related Arbitration and Mediation Rules*, 2012; Court of Arbitration for Sport, *Arbitration Rules Applicable to the CAS Anti-Doping Division*, 2016b; Court of Arbitration for Sport, *CAS Mediation Rules*, 2016c). The inaugural anti-doping division handled eight cases, of which seven cases were considered within the jurisdiction of the CAS. (CAS, *Report on the Activities CAS Division*, 2016d).

Because the CAS is organized under Swiss law as an arbitration organization, decisions of the CAS can be appealed to the Federal Supreme Court of Switzerland. As a matter of fact, appeals of an arbitration decision of the CAS have generally not met with much success. (Netzle, 2011). The Supreme Court of Switzerland generally will not conduct an evaluation of the merits of any dispute, and thus will not engage in a *de novo* review of the underlying facts of any dispute. Rather, the review will be based on determining whether procedural requirements have been met, and whether the award is incompatible with public policy. This standard is consistent with rules established in the United States in the *Messersmith-McNally Arbitration (Kansas City Royals Baseball Corporation v. Major League Baseball Players' Association*, 1976) relating to the "reserve clause" in professional baseball, where an Appellate Court will confine its review of the decision of the arbitration panel to answering three questions:

1. Did the arbitration panel have *jurisdiction* to hear and decide the case?
2. Did the panel's award (decision) *draw its essence* from the collective bargaining agreement?
3. Was the relief fashioned by the Arbitration Panel appropriate? (See Fetter, 2012).

2.1 Appeals

There have been seven successful appeals of CAS decisions. As of 2012, six of the appeals which were upheld were procedural in nature; in only one case has the Swiss Federal Supreme Court overruled a CAS decision on the merits of the case. The case of *Gundel v. La Fédération Equestre Internationale* (1992) was decided by the CAS, and then appealed to the Federal Supreme Court of Switzerland. (Generally, Kaufman, 1995). Gundel, a German equestrian, challenged the impartiality of the CAS. The Swiss Court acknowledged the legitimacy and jurisdiction of the CAS as a valid court of arbitration, but recognized the numerous close ties between the CAS and the IOC that called into question the impartiality of the CAS. Blackshaw (2013b) summarized the case as follows:

"A German equestrian competitor appealed a decision of the International Equestrian Federation's ("FEI's") Judicial Commission to the Court of Arbitration for Sport ("CAS"). The decision was disciplinary in nature and involved the imposition of a suspension and fine on the competitor as a result of his horse testing positive for a prohibited substance. Although it reduced the fine (marginally) and the suspension (from three months to one), CAS dismissed the substance of the appeal. Gundel then sought to challenge the CAS award at the First Civil Division of the Swiss Federal Supreme Tribunal ("SFST" or "Swiss Supreme Court") on the grounds that CAS did not offer sufficient guarantees of independence and impartiality to rule in his appeal such that CAS awards could not be deemed recognizable and enforceable as international arbitral awards. The SFST, whose competency to hear a public law appeal against CAS rested in an application of the Swiss Federal Statute on Private International Law, dismissed Gundel's application and held that on balance CAS satisfied the essentials of a "true" arbitral tribunal."

Although the decision of the CAS was upheld in the *Gundel* case, the CAS nevertheless undertook organizational and financial "reforms" in order to assure its independence from the IOC. (Blackshaw, 2013a, p. 5). The most important change may be seen in the creation of an *International Council of Arbitration for Sport* (ICAS), which was designed to oversee the administration and financing of the CAS, thereby "taking the place of the IOC." (Gotlib, 2015, p. 395).

Recent cases adjudicated by the CAS that were appealed to the Swiss Federal Court have dealt with transfer disputes within professional association football or with allegations of doping. An important case was *FIFA v. Matuzalem* (2012), involving a Brazilian football player. Levy (2012) reports that:

“This case is a landmark decision of the Swiss Federal Tribunal. For the first time in history, an award of the Court of Arbitration for Sport (“CAS”) was annulled by the Swiss Federal Tribunal because it violated ‘fundamental principles of law,’ the so called ‘substantive public policy’ (Article 190 (2) I Private International Law Act (“PILA”)). This marks the first time that a CAS award has been overruled based on substantive law and not procedural law.”

3. Doping

Not surprisingly, issues relating to doping have occupied a great deal of the work of the CAS. In 2000, the CAS decided the case of Andrea Raducan in a dispute with the International Olympic Committee. (*Raducan v. IOC*, CAS 2000/011). This was a controversial anti-doping case, as it became clear that Raducan had received cold and flu tablets from her doctor. However, this nevertheless resulted in a positive urine test. The CAS concluded: “The Panel is aware of the impact its decision will have on a fine, young, elite athlete. It finds, in balancing the interests of Miss Raducan with the commitment of the Olympic Movement to drug-free sport, the Anti-Doping Code must be enforced without compromise.” (Reported in Wong, 2010, Note 5.3.9).

In March 2011, the CAS decided its first case on *athlete biological passports* (ABP) (Viret, 2015; Schumacher, et al., 2015) (See Glossary Entry I) when it suspended two Italian cyclists, Franco Pellizotti and Pietro Caucchioli, for two years based on evidence from their blood profiles. (Macur, 2011). Prior to 2011, the case of skater Claudia Pechstein had been decided (*Pechstein v. International Skating Union*, 2009) on similar grounds. (See Mavromati, 2011/2012). Writing in the 2011/2 *CAS Bulletin* regarding the institution of the ABP program, CAS Counsel Despina Mavromati (2011/2012) differentiated between the two types of cases:

“It is noteworthy that CAS had already issued an award suspending an athlete based on the longitudinal profiling of the biological markers before the adoption of the ABP by the Ifs [international federations]: in CAS 2009/A/1912& 1913 [Pechstein], the Panel suspended an Olympic athlete after the biological data showed irregular blood values. According to CAS, those abnormal values were not caused by an error occurred in a laboratory, as the athlete asserted, but due to the banned manipulation of the athlete’s blood. The essential difference between ABP judgments and the CAS 2009/A/1912 & 1913 consists in that in the latter case the athlete’s blood data was drawn from a sample the athlete gave at the federations championships and therefore not from data gathered by an official systematic program run by the athlete’s union.”

In October 2011, in a case affecting the 2012 Summer Olympics, the CAS determined that a part of the Olympic Charter had itself violated the World Anti-Doping Code. (*USOC v. IOC*, 2011). The “Osaka Rule” had prevented athletes suspended for at least six months for anti-doping rule violations from competing at the Olympic Games following the expiration of the suspension. (Generally, Jacobs, 2011; Mackay, 2012; Owen, 2016). The CAS determined that the IOC rule “does not respect the athletes’ right of natural justice” and amounted to sanctioning someone twice for the same offense. (Associated Press (CBS News), 2016b). Walden (2011) noted that “the three man panel consisting of Prof. Richard H. McLaren (CAN), Mr. David W. Rivkin (USA), and Mr. Michele Bernasconi (SUI), concluded that the Osaka Rule was more of a disciplinary sanction than a condition of eligibility to compete in the Olympic Games.”

The CAS later re-affirmed this decision, when it struck down a long-standing by-law of the British Olympic Association (BOA), which had prevented the selection of athletes sanctioned for doping. (*BOA v. WADA*, 2011; BBC Sports (Olympics), 2012; Singh, 2013). The text of the BOA Rule (By-Law 7.4, cited in Wendt, 2012) was as follows: “Any British athlete “who has been found guilty of a doping offence . . . shall not . . . thereafter be eligible for consideration as a member of a Team GB or be considered eligible by the BOA to receive or to continue to benefit from any accreditation as a member of the Team GB delegation for or in relation to any Olympic Games, any Olympic Winter Games or any European Olympic Youth Festivals.”

Both the IOC and BOA had responded to the ruling of the CAS by actively campaigning to add a similar rule at the next update of the Code, which would be in effect for the 2016 Summer Olympics. However, as Mackay (2012) noted, the controversial rule was “dropped from the latest draft World Anti-Doping Code in favour of doubling the length of bans from two to four years.” (See also Corder, 2012).

4. The Russian Controversies and their Relationship to Doping

In July 2016, the CAS confirmed that the Russian Olympic Committee (ROC) could not enter its track and field athletes for the 2016 Summer Olympics, with the exception of those cleared by the IAAF under the new competition rules regarding “neutral athletes.” [A *neutral athlete* is one who is given the opportunity to prove he or she is not directly implicated “by their national federation’s failure to put in place adequate systems to protect and promote clean athletes.” (Axon, 2017).]

As the IOC was not a party to the case, the panel found it lacked jurisdiction to decide whether the IOC could allow such cleared athletes to represent Russia, allow them to compete independently, or refuse their participation entirely. (CAS, 2016a). The claimants disputed the validity and enforceability of IAAF Competition rule 22.1(a), regarding the suspension of the national federation (RusAF, formerly ARAF), and rule 22.1A, regarding the eligibility of athletes from suspended federations. The panel found that neither rule could be construed as sanctions, and for this and other reasons they were consistent with the World Anti-Doping Code to which Russia was a party. The panels commented on the “futility” of the challenge to rule 22.1A, noting that as the rule provided athletes from Russia a new route to participation (Bloom, 2015), a successful challenge would lead to the exclusion of athletes eligible under the rule, not the inclusion of other athletes.

At the same time, in a separate decision, the panel rejected the appeals of 68 Russian athletes against the decisions of the IAAF denying their applications to appear as “neutral athletes” at the 2016 Summer Olympics. (CAS, 2016a).

Darya Klishina who competed in the long-jump, was the only Russian athlete initially cleared by both the IAAF and the IOC, but the IAAF later declared Klishina ineligible on August 12, 2016, based on “new information.” On August 15, 2016, on the eve of the long jump event, Klishina’s appeal was upheld, once again allowing her to compete in the Olympics. (Stubbs, 2016). She qualified to the long jump final and finished 9th. Incidentally, Klishina’s finish marked the first time in 20 years that a Russian woman failed to medal in the long jump event.

In 2016, the International Paralympic Committee (IPC) banned Russia from the 2016 Summer Paralympics due to the findings of the *McLaren Report* of July 15, 2016 (McLaren I) (WADA, 2016a). [A summary of the findings of the McLaren Report (Parts I and II) (WADA, 2016a; 2016b) may be found in Appendix I. An explanation of the McLaren Reports may be found in the Glossary Entry II.] The Russian Paralympic Committee (RPC) filed an appeal of the ban. It was dismissed by the CAS on August 23. (BBC (Disability Sport), 2016). The CAS found that the suspension had a basis in the rules established by the IPC, and stated that the ban “was proportionate in the circumstances.” The panel noted that it had made no decision regarding the rights of individual athletes. (BBC (Disability Sport), 2016). The panel stated that adverse consequences for the individual athletes represented by the Russian Committee was not a reason to absolve the *organization* from its legal responsibilities and obligations to the IPC.

5. Notable Doping Cases of the 2016 Summer Olympics Ad Hoc Court

Again, not surprisingly, the 2016 Summer Olympic Games resulted in a flurry of activities—and controversies—before the CAS. The *ad hoc* court for the 2016 Olympics had registered 18 cases by August 3, surpassing the previous record two days before the Opening Ceremony. Eleven of the cases were related to the various bans on Russian athletes relating to the allegations of state-sponsored doping later documented in the McLaren Report (McLaren II). (WADA, 2016b; CAS, 2016d (Media Release)). By the end of the Summer Games the total number of cases reached 28, 16 of which were related to the eligibility of Russian athletes.

On August 3, the *ad hoc* court dismissed the appeal of the Russian Weightlifting Federation against its complete suspension under article 12.4 of the International Weightlifting Federation (IWF) anti-doping rules. The panel stated that the findings of the McLaren Report (McLaren I) constituted “conduct connected with or associated with doping,” and found that the IWF had acted within its discretion when it decided that the RWF had “brought the sport of weightlifting into disrepute.” The panel noted that the re-analysis of doping tests from the 2008 and 2012 Olympics had found nine cases of Russian athletes testing positive for Turinabol (See Glossary Entry III) and stated that this indicated a *centralized intentional doping program* conducted by the Russian Weightlifting Federation, under the auspices of the Russian Government. The panel established under the rules of the *ad hoc* court decided that the positive tests for Turinabol were consistent with the evidence provided by Dr. Grigory Rodchenkov for the report.

The McLaren Report I (WADA, 2016a) had found that “Dr. Rodchenkov, in the context of the subject matter within the IP mandate, was a credible and truthful person.” A separate panel of the *ad hoc* court found that the International Rowing Federation (FISA) had correctly applied the eligibility criteria outlined in the IOC decision of July 24 when it denied the entry of 17 athletes. (CAS, 2016c (Media Release)). One of the criteria in the IOC decision was that the ROC could not enter athletes that had previously served a doping ban. The CAS panel, deciding the case involving the rowers Anastasia Karabelshikova and Ivan Podshivalov, found this criterion providing for an automatic ban based on serving a suspension under a prior ban unenforceable, and ordered FISA to evaluate the athletes according to the remaining criteria. The panel referred to previous decisions on the “Osaka Rule” and the BOA by-law. The panel compared the IOC decision with the IAAF decision on Russian athletes, and noted that the IOC, unlike the IAAF, had left athletes with a previous doping conviction without any path to participation, in contravention of what it had termed “principles of natural justice.” (*Balandin v. FISA & IOC*, 2016). The same conclusion was reached in the case of swimmer Yulia Efimova, who subsequently competed and won a silver medal at the Games. (*Efimova v. ROC, IOC & FINA*, 2016); BBC Sport (Olympics), 2016).

In the cases of canoeists Natalia Podolskaya and Alexander Dyachenko and rower Ivan Balandin the panels dismissed the applications, upholding the part of the IOC decision of July 24 that removed the presumption of innocence from Russian athletes. Balandin challenged the legality of the IOC decision, while Podolskaya and Dyachenko only challenged its application. The panel in Balandin’s case found no reason to annul the second paragraph of the IOC decision which, among other criteria, established that nobody implicated in the McLaren Report I was eligible for participation at the Games. The panel noted that while the decision establishes a presumption of guilt, this presumption is rebuttable by individual athletes. (See generally Netzle, 2006). All three athletes were found to have benefitted from the “*Disappearing Positive Methodology*” (See Glossary Entry IV) described in the McLaren Report (McLaren I) and thus had failed to meet the eligibility criteria of the IOC decision. The panels differed as to which standard of proof they required for the athletes’ rebuttal of this presumption, which is an issue that the CAS will no doubt be called upon to clarify at a future date. (Compare *Balandin v. FISA & IOC* with *Podolskaya & Dyachenko v. ICF*, 2016).

6. Other cases

The CAS has adjudicated other important case beyond those relating to doping. Many have dealt with international football or soccer. The CAS ruled in 2006 that Gibraltar had valid grounds for its application to join UEFA (The Union of European Football Associations), forcing the organization to grant it provisional membership. At the next UEFA Congress, however, Gibraltar was overwhelmingly rejected in a vote, due to lobbying from Spain, in defiance of the CAS ruling. (BBC Sport (Football), 2007). Gibraltar subsequently became a member of UEFA in 2013. In May 2016, CAS partially upheld Gibraltar’s appeal against a decision by FIFA (Federation International de Football Association) denying membership. The CAS did not grant FIFA membership to Gibraltar, but ruled that *FIFA* should grant a full membership as soon as possible. ((The) Guardian, 2016). Gibraltar was subsequently granted membership at the FIFA Congress held later the same month. (BBC Sport (Football), 2016).

In another case, the Association of Northern Ireland took its case to CAS after FIFA failed to prevent the Football Association of Ireland or FAI (representing the Republic of Ireland) from selecting Northern Irish-born players who had no blood link to the Republic. (BBC Sport (Football), 2010a). The CAS ruled in favor of the FAI and FIFA by confirming that they were correctly applying the regulations. (BBC Sport (Football), 2010b). In July 2015, in a case involving the issue of sex verification in sports, the CAS issued an interim arbitral award suspending the regulations used by the IAAF (International Association of Athletics Federations) to determine whether athletes with *hyperandrogenism* (See Glossary Entry V) were eligible to compete in professional women’s athletics. The regulations stated that athletes with testosterone levels above 10 nmol/L were not allowed to compete in the female category. The Associated Press (2016a) reported: “Under the rules, the IAFF would initiate a three-step medical examination process if it suspected a female athlete had hyperandrogenism. Often a sudden and dramatic improvement in performance led to the suspicion. The IAFF believes testosterone is the most significant factor influencing athletic performance, and so feels a hyperandrogenic woman have an unfair advantage over other females and their testosterone should be lowered.” The regulations were challenged by Indian sprinter Dutee Chand on the ground that they were discriminatory, arguing that “the dividing line between men and women when it comes to testosterone wasn’t as clear as the IAFF suggested.” (Associated Press, 2016a). The panel recognized that the case involved much more than a usual complaint for “doping.” It stated:

“The case raises complex legal, scientific, factual and ethical issues. The parties ‘submissions draw upon a diverse range of expert scientific evidence, factual accounts of the evolution of the Hyperandrogenism Regulations and the experiences of female athletes who were subjected to their “gender testing” and “sex verification” predecessors, and philosophical arguments about the meaning of fairness in sport.” (*Chand v. IAAF*, 2014). The panel ordered the IAAF to file scientific evidence regarding the connection between athletic performance and elevated testosterone levels within two years (July 2017) of the issuance of the interim award. (*Chand v. IAAF*, 2014; Branch, 2015).

7. Some Commentary and Conclusions

The CAS has been involved in many important and notorious controversies relating to sports—doping, hyperandrogenism, the athlete biological passport, eligibility for participation as an “individual athlete”—through its process of arbitration. In the international arena, the operation of the CAS seems to have resulted in a sense of fair, impartial, and objective adjudication and perhaps more importantly, the acceptance of its determinations by the international sporting community—although there certainly are exceptions. Of course, much more research needs to be undertaken—especially in areas relating to gender identity and gender verification in sports. (Martinez-Patino, et al., 2016).

Because the United States is a member of the IOC, for example, any dispute between our USOC and the IOC or adjudicating the eligibility of an American athlete to participate in international competitions would fall within the purview of the CAS—and would not fall under the jurisdiction of an American court. This may be troubling to some because of the uncertainty regarding the nature and burden of proof required in adjudicating such cases, the effect that adjudication of issues may have on the constitutional rights of American athletes (Koller, 2008), and the nature of expert testimony in the process in cases before the CAS. (E.g., Netzle, 2006). However, individual disputes relating to sports within the United States will continue to be adjudicated in our American court system according to norms and procedures established for deciding such cases. This seems to be a satisfactory delineation of jurisdictional questions between domestic and international matters and will continue into the future.

Table of Key Abbreviations

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| ABP | Athlete Biological Passports |
| ADR | Alternate Dispute Resolution |
| AFI | Athletic Federation of India |
| AIOWF | Association of International Recognized Sports Federations |
| ARISF | Association of Recognized International Sports Federations |
| ASOIF | Association for Summer Olympic International Federations |
| BOA | British Olympic Association |
| CAS | Court of Arbitration for Sport |
| FAI | Football Association of Ireland (representing the Republic of Ireland) |
| FEI | Federation Equestre Internationale (International Equestrian Federation) |
| FIFA | Federation International De Football association (Governing body of international soccer) |
| FINA | Federation Internationale de Natation (International Swimming Federation) |
| FIS | Federation Internationale de Ski |
| FISA | International Rowing Federation |
| FSI | Finnish Ski Association |
| IAAF | International Association of Athletics Federations |
| ICAS | International Council of Arbitration for Sport |
| ICF | International Canoe Federation |
| IOC | International Olympic Committee |
| IF | International Federations |
| IPC | International Paralympic Committee |
| ISU | International Skating Union |
| IWF | International Weightlifting Federation |
| PILA | Private International Law Act |
| ROC | Russian Olympic Committee |
| RPC | Russian Paralympic Committee |
| SFST | Swiss Federal Supreme Tribunal (Swiss Federal Supreme Court) |
| TAS | Tribunal Arbitral du Sport (the CAS, in French) |
| UEFA | Union of European Football associations |
| USOC | United States Olympic Committee |
| WADA | World Anti-Doping Agency |
| WTF | World Taekwondo Federation |

Glossary

Entry I:

“**The Athlete Biological Passport (ABP)** is an individual electronic document that represents a collation of all data regarding a specific athlete that is useful in establishing whether that individual has doped. The fundamental principle of the ABP is based on the monitoring over time of selected biomarkers which can reveal either the effects of doping or a pathology. Because fair-play and athletes’ health protection are fundamental in any anti-doping program, the benefits of adopting the ABP concept are far-reaching.” (Swiss Laboratory for Doping Analysis, 2017).

Entry II:

The McLaren Reports: On 18 July 2016, Richard McLaren, a Canadian attorney, was retained by WADA to investigate allegations made by Grigory Rodchenkov (the director of a Moscow laboratory named the Anti-Doping Centre) published a 97-page report covering significant state-sponsored doping in Russia. The initial Report is termed McLaren I. The investigation found reviewed thousands of documents and other evidence, conducted witness interviews, initiated cyber analysis of hard drives, undertook forensic analysis of urine sample collection bottles, and laboratory analysis of individual athlete samples. McLaren I concluded "beyond a reasonable doubt" that Russia's Ministry of Sport, the Centre of Sports Preparation of the National Teams of Russia, the Federal Security Service (FSB), and the WADA-accredited laboratory in Moscow had "operated for the protection of doped Russian athletes" within a "state-directed failsafe system" using "the disappearing positive [test] methodology." McLaren stated that urine samples were opened in Sochi in order to swap them "without any evidence to the untrained eye." (See Thomas, 2016). On December 9, 2016, McLaren published the second part of his report (McLaren II). The Report stated that from 2011 to 2015, more than 1,000 Russian athletes in various sports (including summer, winter, and Paralympic sports) directly benefited from the cover-up.

Entry III:

Turinabol: “Best known as Oral **Turinabol**, OT or Pro Turinabol the actual Steroid De Hydro Chloro Methyl Testosterone is basically Dianabol which doesn’t promote water retention or estrogenic unintended effects. Increases in size the majority of people experience are usually very high quality but a bit within the slow side.” “Oral Turinabol is one of the slower anabolic steroids, usually when running a Oral Turinabol cycle you will not witness overly dramatic potency, mass and also weight increases, however the trade off there’s the gains you need to do see will be of the higher fine quality with a much lower risk of gyno or estrogenic side effects like water retention or gynecomastia.” “During studies preformed to figure out the effectiveness and potential side effects of Oral Turinabol, Male athletes received 10 milligrams each day more than a six week period, in that time no negative ill effects were reported by some of the study participants” (Legal-Anabolics.org., 2017).

Entry IV:

Disappearing Positive Methodology: "Upon embarking on our investigation we soon discovered a wider means of concealing positive doping results than what had been described for Sochi in the New York Times article. We uncovered a system that ensured if any of the lead performing athletes who were doped did not achieve protection by the various in-the-field mechanisms in place during the sample collection and transportation process, and previously described by the three person investigation committee, then their doping would be covered up at the laboratory stage. The Moscow lab's 'disappearing positive methodology', as we have dubbed it, was the state's fail-safe strategy. The system was set up after Russian authorities felt it was an abysmal medal count by the Russian Olympic team at the 2010 Vancouver Winter Olympics and it was in place until at least August of 2015. In essence, the 'disappearing positive methodology' allowed for the transformation of positive analytical results into a negative one by an order from the Deputy Minister of Sport that the operational analytical processes of the Moscow laboratory be altered and a false record filed with WADA (The World Anti-Doping Agency) and in the laboratory records." (7M Sports (Video), 2016).

Entry V:

“**Hyperandrogenism** is a medical condition which causes a person to produce high levels of hormones. There are various forms, but the one the IAFF regulated was hyperandrogenism in intersex women that led the, having testosterone levels that were much higher than the average for females. Men and women produce testosterone, but men produce much more.” (Associated Press, 2016a)

APPENDIX

Summary (Excerpts) of Findings of the McLaren Report I (World Anti-Doping Agency, 2016a).

Key Findings:

1. The Moscow Laboratory operated, for the protection of doped Russian athletes, within a State-dictated failsafe system, described in the report as the Disappearing Positive Methodology.
2. The Sochi Laboratory operated a unique sample swapping methodology to enable doped Russian athletes to compete at the Games.
3. The Ministry of Sport directed, controlled and oversaw the manipulation of athlete's analytical results or sample swapping, with the active participation and assistance of the FSB, CSP, and both Moscow and Sochi Laboratories.

Findings with respect to Witnesses:

1. Dr. Rodchenkov, in the context of the subject matter within the IP mandate, was a credible and truthful person.
2. All other witnesses interviewed by the IP investigative team were credible. Their evidence was only accepted where it met the standard of beyond a reasonable doubt.
3. The Moscow Laboratory personnel did not have a choice in whether to be involved in the State directed system.

Findings with respect to Moscow Laboratory:

1. The Moscow Laboratory operated under State directed oversight and control of its anti-doping operational system.
2. The Moscow Laboratory personnel were required to be part of the State directed system that enabled Russian athletes to compete while engaged in the use of doping substances.
3. The Moscow Laboratory was the final failsafe protective shield in the State directed doping regime.
4. Sample bottles stored in the Moscow Laboratory from 10 September to 10 December 2014 were tampered with by having their urine swapped.
5. The Disappearing Positive Methodology was planned and operated over a period from at least late 2011 until August 2015.
6. Russian athletes from the vast majority of summer and winter Olympic sports benefited from the Disappearing Positive Methodology.

Findings with respect to the Sochi Laboratory:

1. The planning for the unique Sochi Laboratory sample swapping involved the Ministry of Sport, FSB, CSP, and the Moscow Laboratory.
2. A pre-selected group of Russian athletes competing at Sochi were protected by the Sochi sample swapping methodology.
3. The Laboratory analytical analysis has established that some samples had salt levels in excess of what can be found in a healthy human urine analysis, thereby confirming interview evidence that salt had been added.
4. Every sample bottle the IP investigation team examined revealed evidence of tampering consistent with the caps being removed and reused.
5. The DNA analysis confirmed 3 samples where the DNA did not match that of the athlete.

Findings with respect to the Ministry of Sport:

1. The Ministry of Sport made the determination as to which athletes would be protected by the Disappearing Positive Methodology.
2. The Deputy Minister of Sport in his discretion made the save or quarantine order.
3. Russian officials knew that Russian athletes competing at Sochi used doping substances.

Findings with respect to the FSB:

1. The precise method used by the FSB to open the Sochi sample bottles is unknown. The IP experts conclusively established that the caps can be removed and reused later."

Key Highlights (Excerpts) of 2nd McLaren Report (World Anti-Doping Agency, 2016b).

Institutionalised Doping Conspiracy and Cover Up

“1. An institutional conspiracy existed across summer and winter sports athletes who participated with Russian officials within the Ministry of Sport and its infrastructure, such as the RUSADA, CSP and the Moscow Laboratory, along with the FSB for the purposes of manipulating doping controls. The summer and winter sports athletes were not acting individually but within an organised infrastructure as reported on in the 1st Report.

2. This systematic and centralised cover up and manipulation of the doping control process evolved and was refined over the course of its use at London 2012 Summer Games, Universiade Games 2013, Moscow IAAF World Championships 2013, and the Winter Games in Sochi in 2014. The evolution of the infrastructure was also spawned in response to WADA regulatory changes and surprise interventions.

3. The swapping of Russian athletes’ urine samples further confirmed in this 2nd Report as occurring at Sochi, did not stop at the close of the Winter Olympics. The sample swapping technique used at Sochi became a regular monthly practice of the Moscow Laboratory in dealing with elite summer and winter athletes. Further DNA and salt testing confirms the technique, while others relied on DPM.

4. The key findings of the 1st Report remain unchanged. The forensic testing, which is based on immutable facts, is conclusive. The evidence does not depend on verbal testimony to draw a conclusion. Rather, it tests the physical evidence and a conclusion is drawn from those results. The results of the forensic and laboratory analysis initiated by the IP establish that the conspiracy was perpetrated between 2011 and 2015.

The Athlete Part of Conspiracy and Cover Up

5. Over 1000 Russian athletes competing in summer, winter and Paralympic sport, can be identified as being involved in or benefiting from manipulations to conceal positive doping tests. Based on the information reported to International Federations through the IP to WADA there are 600 (84%) summer athletes and 95 (16%) winter athletes.

London Summer Olympic Games

6. Fifteen Russian athlete medal winners were identified out of the 78 on the London Washout Lists. Ten of these athletes have now had their medals stripped.

IAAF Moscow World Championships

7. Following the 2013 IAAF Moscow World Championships, 4 athletics athletes’ samples were swapped. Additional target testing is in progress.

Sochi Winter Olympic Games

8. Sample swapping is established by 2 female ice hockey players’ samples with male DNA.

9. Tampering with original sample established by 2 [sport] athletes, winners of four Sochi Olympic Gold medals, and a female Silver medal winner in [sport] with physiologically impossible salt readings.

10. Twelve medal winning athletes (including the above 3) from 44 examined samples had scratches and marks on the inside of the caps of their B sample bottles, indicating tampering.

11. Six winners of 21 Paralympic medals are found to have had their urine samples tampered with at Sochi.”

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