

TURNING MEDALS INTO METAL: EVALUATING THE COURT OF ARBITRATION OF SPORT AS AN INTERNATIONAL TRIBUNAL

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INTRODUCTION

"I always turn to the sports page first. The sports page records people's accomplishments; the front page, nothing but man's failure."¹

Chief Justice Earl Warren

We live in the age of globalization. We also live in an era where disputes spill over borders and boundaries. As more and more of these transnational disputes arise, we have seen a profusion of international tribunals opening their doors to meet demand. Unfortunately, even the most celebrated of these tribunals are, at best, works in progress.

According to critics, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and its sister court for Rwanda ("ICTR") "have squandered billions of dollars, failed to advance human rights, and ignored the wishes of the victims they claim to represent."² The International Court of Justice ("ICJ") has been harshly criticized for its inability to stop the genocide in Bosnia³ and its powerlessness in the face of U.S. non-compliance in *Nicaragua v. U.S.*⁴ In *United States Diplomatic and Consular Staff in Tehran*, Iran denied ICJ jurisdiction, refused to appear, and ignored the court's order to release American hostages.⁵ Detractors have charged that the International Criminal Court ("ICC") only exacerbated the conflict in Uganda by issuing warrants against top

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¹ See Alec Lewis, *The Quotable Quotations Book* 262 (New York: Simon & Schuster 1980), cited in Matthew J. Mitten, "Sports Law as a Reflection of Society's Laws and Values: Foreword" (1997) 38:4 S. Tex. L. Rev. 999 at 999.

² See Helena Cobban, "Think Again: International Courts" (Mar/Apr 2006) 153 *Foreign Policy* 22 at 22.

³ See Geoffrey S. DeWeese, "The Failure of the International Court of Justice to Effectively Enforce The Genocide Convention" (1998) 26 *Denv. J. Int'l L. & Pol'y* 625 at 628.

⁴ See W. Chadwick Austin & Antony B. Kolenc, "Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare" (2006) 39 *Vand. J. Transnat'l L.* 291 at 313, n. 121.

⁵ See e.g. M.W. Janis, "The Role of the International Court in the Hostage Crisis" (1981) 13 *Conn. L. Rev.* 263.

rebel leaders.⁶ And these are just a few examples of frustrated attempts at international dispute resolution.

However, there is at least one international court that rises above the frustrations that plague its more heralded brethren. This ascendant tribunal is the Court of Arbitration for Sport (“CAS”). Its creators dreamed that the CAS would become the “supreme court for world sport,” and it has largely fulfilled this vision.⁷ Today, the CAS boasts a roster of 250 specialized sports arbitrators from around the world.⁸ The court has permanent offices in Switzerland, the United States, and Australia.⁹ The CAS has jurisdiction over some of the world’s most powerful sports bodies; it is the court of final appeals for Olympic-related matters and arbitrates disputes for the Federation Internationale de Football Association (“FIFA”),¹⁰ and has even settled a contract dispute for the National Basketball Association (“NBA”).¹¹ In a time of increasing global complexity, the CAS represents one of the world’s more successful attempts at bringing order to transnational issues.

Cynics may scoff at the remarkable success of the CAS. Naysayers would focus on the fact that this court speaks on medals and games, rather than atrocities or territorial annexations. But the CAS’ subject matter should not be so easily dismissed, as sports can inspire deep passion in people around the world. For example, in 1969, a controversial World Cup qualifying match sparked a full-blown war between El Salvador and Honduras, a conflict known to history as the “Soccer War.”¹² In 1985, a full-blown soccer riot erupted in Belgium

⁶ *Supra* note 2.

⁷ Ian Blackshaw, “Sport’s court getting right results” *The Guardian (London)* (3 June 2004) at 31 (“[CAS] was the brainchild of the then International Olympic Committee (IOC) president Juan Antonio Samaranch, who envisioned the CAS as a supreme court for world sport”).

⁸ See Lily Henning, “Judging the Games: For banned athletes, their last shot at Olympic Glory lies with a small panel of arbitrators” *Legal Times* (16 August 2004) at 1.

⁹ See Richard H. McLaren, “Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games” (2001-2002) 12 *Marq. Sports L. Rev.* 515 at 520.

¹⁰ In its governing statutes, FIFA has officially recognized CAS “to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players’ agents.” VIII FIFA Stat., art. 59, para. 1 (2005).

¹¹ Jerry C. Harris, “The Iakovos Tsakilidis Dispute Between the Phoenix Suns and Greek AEK Before the Court of Arbitration for Sport” (2001) 19 *Dick. J. Int’l L.* 531 at 531.

¹² See Ronald J. Glossop, *Confronting War: An Examination of Humanity’s Most Pressing Problem*, 4th ed. (Jefferson: McFarland & Company, 2001) at 103. (“In 1969 a three-game series to determine who would represent Central America in

after British fans attacked Italian supporters.¹³ When U.S. speed skater Apollo Anton Ohno entangled himself with a South Korean skater during a race at the 2002 Salt Lake City Olympics, it inspired a wave of anti-Americanism in South Korea.¹⁴ In short, cynics are simply mistaken when they discount the importance of sports. Sport can both inspire and inflame our passions, and have a major impact on our lives.

This article asks why the CAS succeeds while so many international tribunals fail. Part I gives basic background information on the CAS, describing its history, jurisdiction, and procedures. Part II critically evaluates the success of the CAS along two specific dimensions: party preference and speech act theory. Ultimately, it will become apparent that despite looming threats, the CAS remains a hopeful and valuable example of how an international tribunal can succeed. Through creativity and cooperation, sports officials have created a working, functioning international tribunal that can serve as an example for future efforts at transnational dispute resolution.

Perhaps Earl Warren was right when he said that the sports pages record the triumphs of humanity, while the front pages chronicle its failures. Most international tribunals tend to inhabit Warren's front pages — only the CAS can be found in the sports section.

PART I: BACKGROUND ON THE CAS

THE CONCEPT FOR AN INTERNATIONAL COURT OF Arbitration for Sport is widely credited to former International Olympic Committee ("IOC") President Juan Antonio Samaranch. In 1981, Samaranch noted that the Olympic Movement was sinking in a morass of legal disputes around the globe.¹⁵ Consequently, Samaranch approached IOC member Kéba Mbaye, who also happened to be a judge at the ICJ. Samaranch asked Mbaye to create an IOC-sponsored international

the World Cup soccer championship touched off a short "Soccer War" between El Salvador and Honduras.)

¹³ See *ibid.*

¹⁴ See Kang Seung-woo, "Korean Skating Glides into World's Top" *The Korea Times* (2 November 2006).

¹⁵ In just the United States alone, Olympic institutions found themselves embroiled in a number of legal disputes. See *United States Olympic Committee v. International Federation of Bodybuilders et al.* 219 U.S.P.Q. (BNA) 353 (1982); *International Olympic Committee v. San Francisco Arts & Athletics*, 789 F.2d 1319 (1982); *DeFrantz v. United States Olympic Committee*, 492 F.Supp. 1181 (D.D.C. 1980) (athletes challenge the USOC's boycott of the 1980 Moscow Olympic Games).

tribunal, one built for the express purpose of quickly and efficiently handling Olympic sports disputes.¹⁶

Over the next few years, Judge Mbaye built the foundation for the CAS. The full IOC voted to create the CAS in 1983.¹⁷ On 30 June 1984, the IOC approved the statutes and regulations to govern the CAS, thereby formally creating the CAS.¹⁸ Finally, the CAS opened its doors and accepted its first case in 1986.¹⁹

Samaranch's original vision was to create a true "supreme court for world sport."²⁰ Today, his dream has burgeoned into a vibrant, growing court.²¹

Where is the CAS Located?

In order to facilitate its role as a global arbitral body, the CAS currently operates three offices around the world. The CAS was originally founded in Lausanne, Switzerland. It is here that the General Secretary of the CAS still sits, and where most CAS arbitrations take place. In 1996, the CAS expanded by opening decentralized offices in the United States and Sydney, Australia.²² These decentralized offices were vested with all the authority of the Lausanne office, and were primarily intended to make the CAS more convenient to potential parties.

In addition to its three permanent courts, the CAS also operates an ad hoc tribunal at major sports events like the Olympic Games.²³ This

¹⁶ See Michael Straubel, "Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better" (2004-2005) 36 *Loy. U. Chicago L.J.* 1203 at 1208.

¹⁷ *A. & B. v. International Olympic Committee and International Ski Federation* (27 May 2003), reprinted in Matthieu Reeb, ed., *Digest of CAS Awards III 2001-2003* (The Hague: Kluwer Law International, 2004) 674 at 680.

¹⁸ *Ibid.*

¹⁹ Ian Blackshaw *et al.*, eds., "Important Dates in the CAS History" in *The Court of Arbitration for Sport 1984-2004* at xvii (The Hague, The Netherlands: T.M.C. Asser Press, 2006).

²⁰ *Supra* note 7.

²¹ *Supra* note 8 at 1.

²² CAS originally located the American office in Denver, Colorado, a mecca for North American Olympic athletes. Later, this office was moved to New York, its current location. *Supra* note 19 at xvii.

²³ See *Code of Sports-Related Arbitration*, s.6(8) (2004), online: CAS <<http://www.tas-cas.org/en/code/frmco.htm>>. CAS operates an ad hoc division at the Olympic Games, Commonwealth Games, and European Football Championship. *Supra* note 17 at 680. CAS first created the ad-hoc panel for the 1996 Atlanta Games. Since then, the ad-hoc panel has been on-site at every subsequent Olympic Games. See "Panel II: Regulations Governing Drugs and

ad hoc tribunal is composed of 12 CAS arbitrators who are on site and on call to hear cases 24 hours a day.²⁴ If a case should arise during the Games, a panel of arbitrators will convene and issue a ruling within 24 hours.²⁵ The CAS uses these ad-hoc panels because of the time-sensitive nature of the Games. For example, suppose an athlete competing in the 100 meter sprint appeals her disqualification during the preliminary round. The next round of the sprint may be the very next day. Without an ad-hoc tribunal, organizers would have to 1) postpone the entire event until the matter is resolved, 2) keep the athlete from competing, even though her claims may have merit, or 3) allow the athlete to compete, even though she may have been properly disqualified. The ad-hoc panel eliminates the need to make such an unappealing choice. The athlete's appeal can be heard and resolved in a matter of hours.

What is the CAS's Jurisdiction

The CAS's jurisdiction is limited to cases that meet two basic conditions. First, the parties must agree, in writing, to let the CAS arbitrate their dispute. Parties can do this in advance, by putting a provision in a contract, or by writing the requirement into the statutes or regulations of a sports organization.²⁶ For example, at the 2004 Athens Games, the IOC required all 11,000 athletes to sign the following clause, whereby signees essentially waived their right to sue in civil courts:

I agree that any dispute, controversy or claim arising out of, in connection with, or on the occasion of, the Olympic Games, not resolved after exhaustion of the legal remedies established by . . . the International Federation governing my sport . . . and the IOC, shall be submitted exclusively to the Court of Arbitration for Sport (CAS) for final and binding arbitration . . . The CAS shall rule on its jurisdiction and has the exclusive power to order provisional and conservatory measures. The decisions of the CAS shall be final and binding. I shall not institute any claim, arbitration or litigation, or seek any form of relief, in any other court or tribunal.²⁷

Performance Enhancers in Sports" (2001-2002) 12 Fordham I.P. Media & Ent. L.J. 337 at 389.

²⁴ *Supra* note 8 at 1.

²⁵ See Urvasi Naidoo & Neil Sarin, "Dispute Resolution at Games Time" (2002) 12 Fordham I.P. Media & Ent. L.J. 489 at 495.

²⁶ *Code of Sports-Related Arbitration*, *supra* note 23, art. R27.

²⁷ "Eligibility Entry Form of the 2004 Athens Olympic Games," cited in Kristin L. Savarese, "Judging the Judges: Dispute Resolution at the Olympic Games"

In addition, parties can agree to utilize CAS after a dispute arises, if they draft a written agreement to that effect.²⁸

Second, according to the CAS Code of Sports-Related Arbitration, the court is only empowered to hear disputes that relate to sports in some way.²⁹ In practice, this has not been a particularly high hurdle to meet; since it was created in 1994, the CAS has never actually dismissed a case because the dispute was insufficiently related to sports.³⁰

What Kinds of Cases Does CAS Hear?

Given the scope of the court's jurisdiction, parties bring three kinds of cases to the CAS: commercial disputes, disciplinary matters, and disputes over the results of a competition.

Commercial disputes usually arise when there is a problem in executing a contract. To this end, the CAS has heard disputes relating to corporate sponsorship of athletic events, the sale of television rights, the staging of sports events, player transfers, relations between players and teams, and relations between players and their agents. The CAS has also heard cases concerning tort liability, such as when an athlete is injured during a sports event.

The CAS also serves as the court of highest appeal for Olympic athletes when they are subject to disciplinary actions. These disciplinary cases are roughly analogous to criminal matters in the U.S. court system. Instead of crimes punishable by jail time, however, the CAS reviews acts that are punishable by suspension from competition. These disciplinary actions most often affect athletes accused of doping. Under current rules, an Olympic athlete who tests positive for a banned substance faces a two-year ban for her first offense and a lifetime ban from competition for her second offense.³¹ Accused athletes can,

(2004-2005) 30 Brook. J. Int'l L. 1107 at 1111. In addition to the entry form, CAS jurisdiction is asserted in Rule 74 of the Olympic Charter; furthermore, many sports bodies have written CAS jurisdiction into their by-laws. Gabrielle Kaufmann-Kohler, *Arbitration at the Olympics: Issues of Fast-Track Dispute Resolution and Sports Law* (The Hague: Kluwer Law International, 2001) at 16, 24-25.

²⁸ *Code of Sports-Related Arbitration*, *supra* note 23, art. R27.

²⁹ "Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests brought into play in the practice or the development of sport and, generally speaking, any activity related or connected to sport." See *Code of Sports-Related Arbitration*, *supra* note 23, art. R27.

³⁰ See Matthieu Reeb, ed., *The Court of Arbitration for Sport: Digest of CAS Awards III 2001-2003*, (The Hague: Kluwer Law International, 2004) at xxxiii.

³¹ See World Anti-Doping Agency, *World Anti-Doping Code* (2003), art. 10.2, online: WADA <<http://www.wada-ama.org/retcontent/document/codev3.pdf>>;

however, appeal a suspension to the CAS and hope that the court overturns their “conviction”. The CAS also hears many other kinds of disciplinary matters. For example, a player may be suspended for committing a violent act on the field of play, or for abusing a referee.³²

When athletes challenge the results of a competition, and claim that they were unjustly cheated from a medal or prize, that is when the CAS is most in the public eye. For example, the CAS had the final word when Korean gymnast Yang Tae Young claimed he, not Paul Hamm, was the rightful winner of the men’s all-around title in the 2004 Athens Games.³³ The CAS also was the final stop for Vanderlei Cordeiro de Lima, the Brazilian marathoner who claimed he would have won a gold medal in Athens, were he not tackled by a crazed spectator.³⁴ In this class of cases, athletes argue that they were robbed of some competitive outcome that should, by right, be theirs.³⁵

How Does the CAS Work?

Unlike American courts, the CAS has relatively simple procedures before a hearing. In order to submit a dispute to the CAS, claimants must first file a request with the court, along with a brief document that describes the dispute.³⁶ At this point, the respondent is expected to file an answer.³⁷ Thereafter, the CAS forms a Panel of one or three arbitrators to hear the case.³⁸ Unless the parties’ arbitration agreement

see also John T. Wendt, “WADA, Doping and THG” (2004) 21:4 Ent. & Sports L. 1 at 29.

³² *Supra* note 30.

³³ See Richard McLaren, “International Sports Law Perspective: The CAS Ad Hoc Division at the Athens Olympic Games” (2004-2005) 15 Marq. Sports. L. Rev. 175 at 199.

³⁴ See *ibid.* at 203-04.

³⁵ Another famous medal dispute arose at the 2002 Salt Lake City Games, when Canadian ice dancers Jamie Sale and David Pelletier were the victims of a judging conspiracy. Sale and Pelletier filed a formal application with CAS, asking the court to award them a gold medal “on the merits of the case.” Before the CAS could rule on the matter, however, the IOC awarded double-gold medals to both the Canadian and Russian ice dancing teams. See Richard Lacayo, “A Sport on Thin Ice: A Bad Call – and Quick Recall – Expose a Darker Side of Olympic Skating” *Time* (25 February 2002) at 24.

³⁶ The complaint should contain: 1) a brief statement of the facts and legal argument, 2) a specific request for relief, and 3) documents that demonstrate that the CAS has jurisdiction over the dispute. *Code of Sports-Related Arbitration*, *supra* note 23, art. R38.

³⁷ This answer can be 1) a brief statement of defense, 2) a challenge to the CAS’ jurisdiction, and/or 3) a counterclaim. *Ibid.*, art. R39.

³⁸ *Ibid.*, art. R40.1.

calls for a specific kind of Panel, the President of the CAS Division will determine the number.³⁹ If the parties use a three-person Panel, each party picks one of the arbitrators; the two selected arbitrators then agree on the identity of the third.⁴⁰ If parties use a one-arbitrator Panel, they are expected to mutually agree on that arbitrator.⁴¹

The President of the Panel then reviews the file, and calls on the claimant to submit a full statement of the claim, and on the respondent to submit a response.⁴² In some circumstances, the Panel may allow each party to file a subsequent rebuttal.⁴³ However, this is usually the extent of the pre-hearing practice, and the Panel sets a hearing date.⁴⁴

At the hearing, the Panel hears sworn testimony from witnesses and experts that the parties have specified in their written submissions.⁴⁵ After all testimony, parties are given the opportunity for a final argument, where the respondent has the final word.⁴⁶

With this, the Panel issues its final judgment. This decision is made by majority vote among the Panelists, and if no majority can be reached, the President of the Panel has the authority to direct judgment.⁴⁷ As a general matter, this judgment is final and binding on all parties.⁴⁸

How Does the CAS Select Its Arbitrators?

At its inception in 1984, the CAS was composed of a maximum of 60 arbitrators, selected for a renewable four-year period.⁴⁹ Fifteen of these arbitrators were appointed by the IOC, fifteen by the International Federations for Olympic sports, fifteen by National Olympic Committees,

³⁹ *Ibid.*

⁴⁰ If the two appointed arbitrators cannot agree on a third arbitrator, then the President of the Division makes an appointment. *Ibid.*, art. R40.2.

⁴¹ If the two parties cannot agree on a sole arbitrator, then the President of the Division will make an appointment. *Ibid.*

⁴² *Ibid.*, art. R44.1.

⁴³ See *ibid.*

⁴⁴ In some cases, the Panel may hold an evidentiary hearing, where discovery issues will be settled. *Ibid.*, art. R44.3. The President of the Panel sets this hearing date. *Ibid.*, art. R44.2.

⁴⁵ *Ibid.*, art. R44.2.

⁴⁶ See *ibid.*

⁴⁷ See *ibid.*, art. R46.

⁴⁸ *Ibid.*

⁴⁹ See *Gundel v. Federation Equestre Internationale and Court of Arbitration for Sport (CAS)*, reprinted in Matthieu Reeb, ed., *Digest of CAS Awards I 1986-1998* 567 (Berne: Stämpfli Editions SA, 1998).

and the final fifteen were appointed by the IOC President.⁵⁰ In essence, all 60 arbitrators were in some way selected by an Olympic institution; athletes had no direct input in this process.

In these early years, CAS hearings were particularly affordable, as the IOC covered all of the CAS's operating expenses.⁵¹ If the CAS heard a pecuniary dispute, parties were expected to contribute some percentage of the award to the CAS, in a proportion the parties would negotiate with the President of the Panel.⁵² However, non-pecuniary disputes were handled at no cost to the parties. No doubt, this made the CAS an enticing proposition for potential litigants.

The First Challenge to the CAS as a Fair and Impartial Arbitral Body

In 1993, the CAS faced the first serious challenge to its legitimacy when the Swiss Federal Tribunal (essentially the Swiss Supreme Court) openly questioned whether the CAS was capable of impartially arbitrating disputes that involved the IOC. The International Equestrian Federation ("FEI") had accused Elmer Gundel — a German equestrian rider — of illegally doping his horse at a major international competition. As a result, FEI stripped Gundel of all his prize money from that competition, and also suspended him for three months.⁵³ After going through an internal hearing with FEI, Gundel appealed his suspension to CAS. CAS reduced Gundel's suspension from three months to one, but Gundel remained unsatisfied and appealed the judgment, as a matter of public law, to the Swiss Federal Tribunal.⁵⁴ Among his many claims, Gundel claimed that the CAS was not a truly independent arbitral body; in Gundel's view, the CAS was essentially controlled by Olympic institutions like the FEI and the IOC.⁵⁵ Though the Swiss court ultimately upheld Gundel's suspension, it expressed great concern over "the organic and economic ties existing between the CAS and the IOC."⁵⁶

In particular, the Swiss Federal Tribunal was disturbed that 1) the CAS was funded almost entirely by the IOC; 2) the IOC appointed half of

⁵⁰ These final 15 members appointed by the IOC President were the only members that could not also be a member of an International Federation, NOC, or IOC. See *ibid.* at 567.

⁵¹ See Michael S. Straubel, "Doping Due Process: A Critique of the Doping Control Process in International Sport" (2001-2002) 106:3 Dick. L. Rev. 523 at 541.

⁵² See *supra* note 49 at 568.

⁵³ *Ibid.* at 563.

⁵⁴ See Matthieu Reeb, ed., "The Court of Arbitration for Sport" in *Digest of CAS Awards II 1998-2000* (The Hague: Kluwer Law International, 2002) at xxv.

⁵⁵ *Supra* note 16 at 1209.

⁵⁶ *Supra* note 49 at 570.

all CAS arbitrators; and 3) only the IOC had the power to amend the statutes of the CAS.⁵⁷ The Swiss Federal Tribunal concluded by noting that “it would desirable for greater independence of the CAS from the IOC.”⁵⁸ Had the IOC been a direct party in the action against Gundel, the Swiss court may very well have thrown out the CAS judgment.⁵⁹

While the court in *Gundel* did not throw out the CAS award, the Swiss court’s dicta sent shockwaves through the CAS. “[The Swiss court’s] message was perfectly clear: the CAS had to be made more independent of the IOC both organizationally and financially,” wrote Matthieu Reeb, the CAS General Secretary.⁶⁰ As a result, the CAS underwent three major reforms on 22 June 1994, when top Olympic officials signed the *Paris Agreement*.⁶¹

First Reform: IOC puts control of the CAS in the hands of ICAS

As the centerpiece of the 1994 *Paris Agreement*, a newly formed “International Council of Arbitration for Sport” (“ICAS”) replaced the IOC as the governing body of the CAS. Essentially, the IOC surrendered its total authority over the CAS to this newly created body. ICAS membership is both limited and prestigious; at any time, it has only 20 members who are “high level” judicial figures worldwide, appointed for renewable four-year terms.⁶² ICAS members cannot themselves participate in CAS arbitrations. Instead, their primary functions are to: a) adopt and amend the CAS Code, b) manage the court’s finances, c) manage the roster of CAS arbitrators, d) decide when to remove arbitrators from a case because a party objects, and e) appoint the Secretary General of the CAS.⁶³

⁵⁷ *Supra* note 16 at 1209.

⁵⁸ *Supra* note 49 at 570.

⁵⁹ See James H. Carter, “The Law of International Sports Disputes” (Speech to the Annual Meeting of the Indian Society of International Law, 4 November 2004), online: ASIL <<http://www.asil.org/pdfs/carterspeech0411.pdf>> (noting that “[i]f the IOC had been a party, the result could have been different”).

⁶⁰ *Supra* note 54 at xxvi.

⁶¹ The Presidents of the IOC, Association of Summer Olympic International Federations (ASOIF), the Association of International Winter Sports Federations (AIWF) and the Association of National Olympic Committees (ANOC) enacted these reforms when they signed the *Agreement concerning the constitution of the International Council of Arbitration for Sport* during a meeting in Paris. The agreement is widely known as the “*Paris Agreement*.” See *ibid.* at xxvi.

⁶² *Supra* note 59 at 4.

⁶³ See *Code of Sports-Related Arbitration*, *supra* note 23, art. S6.

Second Reform: The CAS expands its pool of arbitrators

Second, the CAS greatly expanded its pool of arbitrators.⁶⁴ Whereas the CAS originally had a maximum of 60 available arbitrators, redrafted CAS regulations now require a minimum of 150 active arbitrators appointed for renewable four-year terms.⁶⁵ In fact, the CAS now employs 250 such jurists. These arbitrators are supposed to exhibit legal experience with sports issues, and should, if possible, hail from many different parts of the world.⁶⁶ With this expanded roster, the CAS can better handle its burgeoning docket while also giving parties a wider selection of sports law experts to choose from.

Third Reform: The CAS expands its base of funding

Originally, the CAS was entirely bankrolled by the IOC. As a third reform, the CAS tried to sever its total financial dependence on the IOC by splitting CAS costs between Olympic sports federations, the IOC, National Olympic Committees, and private parties that used the CAS.⁶⁷ The CAS has diversified its funding, and several different organizations are now responsible for the CAS' \$4 million annual budget.⁶⁸

PART II: IS THE CAS A SUCCESSFUL INTERNATIONAL TRIBUNAL?

TO EVALUATE THE CAS' SUCCESS AS AN INTERNATIONAL arbitral tribunal, we must examine the court along two dimensions. First, we must look at party preference for the tribunal. In order to be successful, the court must offer a superior dispute resolution method for potential parties, such that these parties will prefer the tribunal over the available alternatives (*i.e.* domestic courts or self-help). If the tribunal cannot offer a better 'product', so to speak, parties in conflict will simply go elsewhere, and the tribunal will be left with an empty courtroom and a non-existent docket. For example, over much of its early history, few nations were willing to utilize the International Court of Justice ("ICJ"),

⁶⁴ *Supra* note 59 at 4.

⁶⁵ *Code of Sports-Related Arbitration*, *supra* note 23, arts. S13 & S18., see Matthieu Reeb, "The Role and Functions of the Court of Arbitration for Sport (CAS)" at 32, reprinted in Ian Blackshaw, *et al.*, eds., *The Court of Arbitration for Sport* (1984-2004), (The Hague, The Netherlands: T.M.C. Asser Press, 2006).

⁶⁶ *Ibid.*, art. S14 (legal competence) & art. S16 (different continents).

⁶⁷ *Supra* note 59 at 4.

⁶⁸ *Supra* note 8.

and as a result, the ICJ's docket was notably sparse.⁶⁹ In the end, if parties do not believe that a tribunal will be sufficiently fair, efficient, or otherwise superior to other means of dispute resolution, that court will be a lonely place indeed.

Along the second dimension, we must ask whether the tribunal in question is capable of performing effective speech acts (the "speech act dimension"). Namely, when the court speaks, do people actually listen? The history of international dispute resolution is littered with cases where a transnational court issues a judgment that falls on deaf ears. For example, in *United States Diplomatic and Consular Staff in Tehran*, the ICJ ordered Iran to release American hostages; Iran simply refused to comply.⁷⁰ Other times, neither party respects the judgment, and ultimately end up negotiating an agreement that looks very different from the resolution dictated by the court; this behaviour is occasionally seen in disputes heard by the World Trade Organization Dispute Settlement Body.⁷¹ For an international court to be successful, it must speak with words that have force.

PART III: THE CAS ALONG THE FIRST DIMENSION - PARTY PREFERENCE

THE CAS RATES HIGHLY ALONG THE FIRST DIMENSION, by virtue of its vast superiority over its alternatives for resolving Olympic sports disputes. Before the CAS became the single, supreme body for adjudicating Olympic disputes, these matters were handled in two different kinds of forums.

Some disputes — usually disciplinary matters involving individual athletes — were handled by in-house panels.⁷² These panels decided: how to punish athletes for cheating during competition, whether an athlete was guilty of a doping infraction, and whether an athlete was eligible to compete for a particular country. For example, after Canadian sprinter, Ben Johnson, famously tested positive for steroids at the 1988

⁶⁹ See *e.g.* Heidi K. Hubbard, "Separation of Powers Within the United Nations: A Revised Role for the International Court of Justice" (1985-1986) 38 *Stan. L. Rev.* 165 at 183. (noting that "the ICJ is almost never used").

⁷⁰ See *e.g. supra* note 5.

⁷¹ See Steve Charnovitz, "Rethinking WTO Trade Sanctions" (2001) 95 *Am. J. Int'l L.* 792 at 794.

⁷² See *e.g.* Anthony T. Polvino, "Arbitration as Preventative Medicine for Olympic Ailments: The International Olympic Committee's Court of Arbitration for Sport and the Future for the Settlement of International Sporting Disputes" (1994) 8 *Emory Int'l L. Rev.* 347 at 352-53 (describing how internal hearings were used in the *Reynolds* case).

Seoul Olympics, he vehemently denied ever using a banned substance.⁷³ An internal IOC panel adjudicated Johnson's case, and decided to strip the Canadian of his gold medal after a few frantic hours of deliberation.⁷⁴

Olympic disputes have also found their way into domestic courts around the world. For example, the Olympics experienced a wave of litigation in American courts prior to the 1984 Los Angeles Games.⁷⁵ U.S. courts were asked to intercede in issues concerning athlete eligibility, adding new events, and changes to amateur rules.⁷⁶ In more recent years, American courts were called on to adjudicate licensing disputes and employment discrimination claims, among other things.⁷⁷

Parties are drawn to the CAS because it retains most of the benefits offered by domestic courts and internal hearings, while eliminating the drawbacks. With the CAS, disputants get speed, uniformity, and authority. Olympic institutions get public relations insurance. On balance, the CAS is a value-adding institution.

Domestic Courts Are Sub-Optimal for Resolving Sports Disputes

From the perspective of all sides, domestic courts have proven themselves to be ill-suited for handling Olympic disputes.

For Olympic institutions, domestic courts are essentially legal minefields, to be avoided at all cost. At the moment, 203 countries participate in the Olympic Movement; for comparison, the United Nations can claim a membership of only 191 member states.⁷⁸ Were the institutions of the Olympics subject to the laws and jurisdiction of every one of its 203 member nations, the entire enterprise could be paralyzed by conflicting laws and constant litigation. Olympic institutions, as a

⁷³ See Daniel Benjamin, "Shame of the Games: Ben Johnson is stripped of his gold in the Olympics' worst drug scandal" *Time* 132:15 (10 October 1988).

⁷⁴ See *ibid.*

⁷⁵ Samuel Pizar, "The Olympics and the Law" (June 1985) Olympic Message at 15-18.

⁷⁶ *Ibid.*

⁷⁷ See *Jedrejic v. Croat. Olympic Comm.*, 190 F.R.D. 60 at 65 (E.D.N.Y. 1999) (action for breach of an exclusive licensing agreement between a New Jersey resident and the Croatian Olympic Committee); *Lee v. U.S. Taekwondo Union*, 331 F. Supp. 2d 1252 (D.C. Haw. 2004) (coach claims that USA Taekwondo terminated him for discriminatory reasons).

⁷⁸ For a comprehensive list of U.N. Member States, see UN, Press Release, ORG/1360/Rev.1, "List of Member States" (10 February 2004), online: UN <<http://www.un.org/news/Press/docs/2004/ORG1360.rev.1.doc.htm>>. For an up-to-date tally of nations participating in the Olympic Movement, see "Organisation of the NOCs," online: Olympic Movement <http://www.olympic.org/uk/organisation/noc/index_uk.asp>.

practical matter, simply cannot defend its myriad of decisions in the courts of every single member nation.⁷⁹ Further, in-court litigation over sports disputes often leads to unpredictable and inefficient outcomes.⁸⁰

For athletes, domestic courts are also far from ideal. It is true that domestic courts offer a “home field advantage” for athletes.⁸¹ They can litigate in their own nation, with fellow countrymen acting as judge or jury. But this advantage must be balanced against the considerable time, cost, and frustration endemic to domestic litigation. Further, even if an athlete is victorious in domestic court, there is no guarantee that powerful transnational bodies like Olympic institutions will even recognize or comply with the court’s decree.

As such, it should come as no surprise that Olympic organizations go to great lengths to avoid being dragged into domestic courts. Similarly, most athletes also decline to resort to litigation. The case of American sprinter Butch Reynolds aptly illustrates just how domestic courts can be a negative sum game for all involved.

The Butch Reynolds Case: highlighting the unsuitability of domestic courts

Butch Reynolds was considered one of the greatest sprinters of his time.⁸² Not only was he a multiple medal winner at the 1988 Olympics, but he also broke a twenty-year old world record in the 400 meters.⁸³ Of course, the personal qualities that made Reynolds a track & field success story also predisposed him to be a ferocious courtroom litigant.⁸⁴ Unfortunately, the IAAF did not fully appreciate this quality in Reynolds when it suspended him for two years following a failed drug test in 1990.⁸⁵

⁷⁹ See Craig A. Masback, “Fairness and Finality: The Court of Arbitration for Sport and the Resolution of Disputes in International Sports” (12 January 1994) at 75 [unpublished].

⁸⁰ *Ibid.* at 58.

⁸¹ See Bruce D. Landrum, “The Globalization of Justice: The Rome Statute of the International Criminal Court” (2002) *Army Law*. 1 at 3.

⁸² See Ed Gordon, “Reynolds Slashes WR to 43.29” *Track & Field News* (October 1988) at 24.

⁸³ See *supra* note 79 at 56-57.

⁸⁴ See *ibid.* at 57 (quoting Kenny Moore, “Chasing the Dream” *Sports Illustrated* (22 August 1988) 20 at 20 & 22 (“Quarter-milers are sprinters who must carry their speed. They succeed according to how well they practice a brutal fitness.”)).

⁸⁵ Reynolds tested positive for the anabolic steroid nandrolone after competing at the Herculis Meeting in Monte Carlo, Monaco, on 12 August 1990. See *supra* note 79 at 59.

Had Reynolds accepted the IAAF ban, this would have been just another doping case. Instead, in 1991, Reynolds hired a law firm and filed the first of many law suits in U.S. federal district court.⁸⁶ Reynolds claimed that the IAAF falsely accused him of steroid use and wrongfully suspended him from competition.⁸⁷ The IAAF simply chose to ignore the federal case, perhaps incredulous that an eighty-seven year old senior judge in Reynolds' hometown of Columbus, Ohio, could have jurisdiction over an international organization that spanned 204 nations.⁸⁸ Informed by the IAAF's deafening silence, the district court sympathized with Reynolds' argument. It first granted an injunction against the IAAF in June of 1992, allowing Reynolds to compete in the United States. Judge Joseph Kinneary then went on to award Reynolds a massive judgment of \$27,356,008 for compensatory and punitive damages against the IAAF.⁸⁹

At this point, Olympic officials finally sat up and took notice. Kinneary's ruling simply stunned the Olympic Movement. In press releases, the IAAF maintained that Reynolds was guilty of doping, and found it unfortunate that "the courts of Mr. Reynolds' hometown" would rule in his favour.⁹⁰ Perhaps more importantly, Reynolds' courtroom victory did little to affect his ban worldwide; Reynolds was not allowed to compete abroad until 1993. IAAF also had no intention of actually paying Reynolds \$27 million. When then-IAAF President Pablo Nebiolo commented on Reynolds' chances of ever seeing the money, he said "Never, never. He [Reynolds] can live 200 years."⁹¹

⁸⁶ Reynold's first suit was dismissed as a result of his failure to exhaust all the administrative remedies afforded to him by the IAAF. *Reynolds v. The Athletic Cong. of the U.S.A., Inc.*, No. C-2-91-0003, 1991 U.S. Dist. LEXIS 21191 at 11-12 (E.D. Ohio March 19, 1991).

⁸⁷ Reynolds eventually settled on the following claims: 1) breach of contract; 2) breach of contractual due process; 3) defamation; and 4) tortious inference with business relations. *Reynolds v. Int'l Amateur Athletic Fed'n*, 841 F. Supp. 1444 at 1448 (E.D. Ohio 1992) ("Reynolds II").

⁸⁸ *Ibid.* at 1455. See also *supra* note 79 at 60 ("Judge Joseph P. Kinneary, an eighty-seven-year-old on senior status, heard the case . . ."). As Masback points out, under Rules of Federal Procedure, IAAF could have filed a "special appearance" simply for the purposes challenging the court's jurisdiction, and would have likely won on this issue. *Supra* note 79 at 76 (citing *Data Disc, Inc. v. Sys. Tech. Assoc., Inc.*, 557 F.2d 1280 at 1285-86 & n.2 (9th Cir. 1977)).

⁸⁹ See *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110 at 1114 (6th Cir. 1994). District Judge Kinneary was merciless in his criticism of the IAAF, noting that it acted with "ill will and a spirit of revenge" towards Reynolds and with "spite and conscious disregard" for his rights.

⁹⁰ See *supra* note 79 at 73, citing "Harry 'Butch' Reynolds," *IAAF News* (Jan. 1993) at 5.

⁹¹ See Richard O'Brien, "Kiss, Kiss" *Sports Illustrated* 79:10 (6 September 1993) 21.

Finally, in March of 1993 — months after Reynolds ban was over — the IAAF filed an appearance in U.S. federal court in order to appeal the \$27 million judgment.⁹² This seemed to do the trick, as the Sixth Circuit ruled that the district court never had personal jurisdiction over the IAAF and threw out the award.⁹³ After four years of winding its way through the federal system, the Reynolds case died due to a simple procedural matter that could, and probably should, have been dealt with at the outset.

The Reynolds case is a perfect example of how everyone can lose when sports disputes end up in the hands of domestic courts. Here, the IAAF and the Olympic Movement lost considerable credibility in its anti-doping program when the district court ruled in favour of Reynolds.⁹⁴ And for Reynolds, his courtroom victory was ultimately an empty one. Perhaps Reynolds enjoyed a “home field advantage” by bringing suit in Columbus, Ohio, with fellow Americans acting as judges. And Reynolds may have even enjoyed some measure of satisfaction by winning in district court, thereby shining the media spotlight on the deficiencies plaguing IAAF’s drug-testing regime.⁹⁵ But on the other hand, Reynolds’ victory did nothing to change his lengthy ban from international competition, and he never received a dime in compensatory or punitive damages from the IAAF. No doubt, the litigation process was financially costly, and the outcome was in limbo for over four years. For an Olympic athlete, four years is practically an eternity. Ultimately, this case proves that litigation in domestic courts is worse than a zero-sum proposition; it can be a negative-sum game for all parties involved. Given the hard lessons of the *Reynolds* case, it should come as no surprise that all sides involved in Olympic disputes generally disfavour domestic courts.

Internal Hearings Are Sub-Optimal for Resolving Sports Disputes

Internal hearings are also sub-optimal for all parties involved. For athletes, an internal hearing is the nightmare scenario; their accusers also happen to be the prosecutor, judge, jury, and executioner. For Olympic institutions as well, internal hearings are far from ideal. By taking on final decision-making authority, Olympic institutions also expose themselves to public scrutiny and criticism of its judgments.

⁹² Randall Edwards & Derek Monroe, “Judge Upholds Reynolds’ Claim against IAAF” *The Columbus Dispatch* (14 July 1993) 5D; see also *Reynolds v. Int’l Amateur Athletic Fed’n*, *supra* note 89 at 1114.

⁹³ *Reynolds v. Int’l Amateur Athletic Fed’n*, *supra* note 89 at 1121.

⁹⁴ See Dick Patrick, “Reynolds’ Gain Puts Drug Testing IAAF at a Loss” *USA Today* (8 October 1991) 4C.

⁹⁵ See *supra* note 79 at 81.

Given the controversial nature of Olympic disputes, this exposure may just not be worth it.

Why are internal hearings sub-optimal for athletes?

For athletes, there are obvious disadvantages to having the international federation or other Olympic institution act as the final decision-maker, given that they are also the ones bringing charges against the athlete. This conflict was at the heart of the *Ngugi Affair*. In February of 1993, the IAAF banned Kenyan distance runner John Ngugi for four years after he refused to take a random drug test for an IAAF medical team that showed up at his home.⁹⁶ Ngugi was one of Kenya's greatest distance runners, winning the 5000 meter gold at the 1988 Olympics, along with five other world cross-country championships.⁹⁷ Ngugi was also a soldier in the Kenyan army, and argued that Kenyan army regulations did not permit him to take a drug test without a superior officer present.⁹⁸ The Kenya Amateur Athletic Federation agreed with Ngugi and cleared him of the charges.⁹⁹ But the IAAF internal panel refused to lift the ban.¹⁰⁰

Kenyan politicians led by Moses Wetangula, an MP from the ruling Kenyan African National Union, criticized the IAAF for high-handedness. Wetangula noted, "The IAAF was the complainant, the prosecutor and the judge in the Ngugi trial."¹⁰¹ Ngugi's agent, John Bicourt, threatened to sue the IAAF if the ban was not lifted.¹⁰² Surely, athletes like John Ngugi have reason to complain when their principle accuser also holds the power to pass final judgment.

Why are internal hearings sub-optimal for Olympic institutions?

Olympic institutions also have good reason to shy away from internal hearings, though their reasons for doing so are complex. The status quo before the CAS was for Olympic institutions to resolve disputes in-house. Olympic institutions maintained exclusive control over those who sat on their dispute resolution panels, and thereby kept fairly strong control over the actual outcome of the dispute. For example, during the Olympic

⁹⁶ *Ibid.* at 18.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.* at 19.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ "IAAF's dual roles attacked in Kenyan Parliament" *Athletics Today* (23 June 1993) 6.

¹⁰² See John Rodda, "Athletics: Ngugi Chases IAAF to Lift Ban and Pay" *The Guardian (London)* (25 November 1993) 21.

Games, each sport would empanel a “Jury of Appeal” to hear any dispute that might arise.¹⁰³

As such, it may seem puzzling that Olympic institutions would want to voluntarily give up the power to control the outcome of cases. Observers of the CAS, in pondering this question, have suggested that Olympic institutions divested themselves of this final authority because they fear that domestic courts might overrule internal findings out of fairness concerns. For example, a court hearing the Ngugi case might accept the argument that the IAAF was simply too biased to be a fair judge of Ngugi’s guilt.

However, this concern over domestic courts nullifying “unfair” internal hearings seems largely overblown. Prof. James Nafziger, an expert in international law, has noted that:

Ordinarily, courts recognize and enforce rules and decisions of appropriate national governing bodies and IFs [Olympic institutions]. Courts in the United States, for example, have been reluctant to find either express or implied rights of action in claims by individual athletes against national governing bodies and IFs. They therefore have generally deferred to private processes for resolving disputes. Courts are particularly reluctant to intervene in disciplinary hearings by private bodies.¹⁰⁴

A survey of U.S. case law supports Nafziger’s claim. Again and again, American courts have refused to overturn the results of internal hearings.¹⁰⁵ Therefore, the threat of intrusive domestic courts does not appear to be a viable reason for Olympic institutions to prefer the CAS as opposed to its own internal review boards.

¹⁰³ See Olympic Charter (entered into force 1 September 2004), Bye-law to Rule 49, 4.2 – 4.5.

¹⁰⁴ James A.R. Nafziger, “Dispute Resolution in the Arena of International Sports Competition” (2002) 50 Am. J. Comp. L. Supp. 161 at 170.

¹⁰⁵ See *Jacobs v. U.S. Assoc. for Track & Field*, 374 F.3d 85 (2d Cir. 2004) (an athlete could not compel arbitration under commercial rules of arbitration); *Slaney v. Int’l Amateur Athletic Fed’n*, 244 F.3d 580 (7th Cir. 2001) (court upheld the result of an IAAF arbitration panel); *Reynolds*, *supra* note 89 at 1121 (overturning an award for punitive damages against the IAAF for suspending the athlete for doping); *Michels v. U.S. Olympic Comm.*, 741 F.2d 155 (7th Cir. 1984) (court rules that the USOC could properly suspend the athlete after he tested positive for performance-enhancing drugs); *Barnes v. Int’l Amateur Athletic Fed’n*, 862 F.Supp. 1537 (S.D.W.Va 1993) (court dismissed suit against IAAF for lack of subject matter jurisdiction, because the athlete had failed to exhaust all administrative remedies).

Internal hearings come at great cost for Olympic institutions

What observers of the CAS have thus far failed to appreciate is a far more subtle reason why internal hearings are less than ideal for Olympic institutions. The power to make final decisions comes at a significant cost: Olympic institutions must also be willing to endure the inevitable public criticism of their decisions, along with the possibility that poorly received decisions will erode the legitimacy and popularity of the entire Olympic Movement.

Consider a small selection of Olympic cases that were adjudicated “in-house,” before the IOC turned over final authority to the CAS:

Olympic Controversies Adjudicated by Internal Panels

- In 67 AD, the Roman emperor Nero competed in the Games’ chariot race. Unfortunately, he fell and failed to complete the course. The Jury of the Games, perhaps under some duress, declared Nero the victor anyway.¹⁰⁶
- In 1896, during the first modern Olympic Games, Greek bronze medalist Spiridon Belokas was stripped of his medal by Olympic organizers after it was alleged that he rode part of the marathon course in a carriage.¹⁰⁷
- In 1960, American Lance Larson was controversially denied gold in the 100 meter Olympic freestyle swim, despite the fact that he had the fastest official time.¹⁰⁸ The IOC Jury of Appeal turned down Larson’s protest, much to the anger of the American contingent, who protested for years afterwards.¹⁰⁹
- In 1968, Austrian skier Karl Schranz, competing in Grenoble, claimed that he should be declared the Olympic champion after a French soldier allegedly

¹⁰⁶ See Mike Barnes, *Sports News Focus*, UPI (27 September 1988).

¹⁰⁷ See Jim Holden, “Where Is the Appeal of Winning in Court?” *The Sunday Express* (22 August 2004) 95.

¹⁰⁸ See Ian Thorley, “When fractions of a second make all the difference” *Financial Times* (London) (10 June 2005) 3.

¹⁰⁹ See *ibid.*

interfered with him on the course. Again, the IOC Jury of Appeal controversially denied Schranz' request.¹¹⁰

- In 1972, the United States basketball team lost the gold medal game to the Soviet Union, after the referee shockingly gave the Soviets three last-gasp chances to win the game. Three members of the IOC's five-man Jury of Appeal were from Communist states, and all three voted to uphold the Soviet victory. With the 3-2 vote, the United States lost an Olympic basketball game for the first time. Out of protest, all the members of that team refused to accept their silver medals, which are still being held by the IOC.¹¹¹
- At the 1988 Seoul Olympics, South Korean boxer Park Si-Hun made it to the finals after four controversial wins (including one in which he disabled an opponent with a low blow to the kidney. In the final, he faced Roy Jones, Jr., an American who would go on to become one of the greatest professional fighters in history. Jones dominated all three rounds, landing 86 blows to Park's 32. Despite this, in a decision called "the most offensive episode of judging in Olympic history," three of the five judges awarded Park the gold medal.¹¹² One coach claimed he saw a judge being offered a gold bar after the fight.¹¹³ Park himself even apologized to Jones afterwards for the egregious decision.¹¹⁴ However, the IOC upheld the controversial

¹¹⁰ The IOC Jury's decision was particularly controversial because, were Schranz declared the winner, he would have displaced Frenchman Jean-Claude Killy atop the medal stand, and also would have derailed Killy's historic quest to sweep all three men's alpine skiing events. The matter was portrayed as a conspiracy by the French to illegally boost their countryman's chances of accomplishing the historic feat. See Jim Murray, "Olympic Pressure Perfectly Amazing" *Los Angeles Times* (10 February 2006) S11.

¹¹¹ See Ronald J. Krotoszynski, Jr., "The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making" (1999) 77 *Wash. U.L.Q.* 993 at 1020, n. 94.

¹¹² Michael Wilbon, "On Judgment Calls, Different Answers" *The Washington Post* (20 August 2004) D11.

¹¹³ Christine Brennan, "Seoul Bids Athletes Adieu; Olympics End With Revelry and Solemnity" *The Washington Post* (3 October 1988) A1.

¹¹⁴ Paul Majendie, "There Are No Allies in Sport" *The Toronto Sun* (22 August 2004) 7.

result, most recently in 1997 when it revisited the incident due to public pressure.¹¹⁵

The ties that bind all of these controversies are that 1) there is no clear-cut, obvious resolution, and 2) no matter how the dispute is resolved, some faction will be very unhappy with the outcome. For example, suppose the IOC stripped Park Si-Hun of his gold and handed it to Roy Jones, Jr. The host nation of South Korea would be outraged at the Olympic Committee. If the IOC kept the status quo (as it did), it would appease the South Koreans, but also infuriate millions of Americans (as it did). For the decision-maker, this is a classic “no-win” situation. Whatever the resolution, the fallout from a difficult decision like this inevitably caused a crisis of legitimacy in the Olympic Movement as a whole. To criticize the final judgment was also to criticize the Olympics itself.

Why CAS Appeals to Potential Parties

Why CAS is value-adding for Olympic institutions

It is uncontroversial that Olympic institutions prefer the CAS to litigation in domestic courts. The CAS offers a uniform set of rules, while domestic courts require knowledge of the laws and procedures of hundreds of different member countries. The CAS is, in theory, neutral, while domestic courts are staffed by the countrymen of the athlete or party opposing the Olympic institution.

However, what CAS observers have yet to understand is that for Olympic institutions, the court also solves a serious problem posed by internal hearings. Essentially, when Olympic institutions outsource final decision-making authority to the CAS, Olympic institutions also divest themselves of the inevitable criticism that will result from having to make these decisions. The benefit of such ‘public relations insurance’ should not be underestimated. Consider the controversies that arose *after* the CAS was installed as the Supreme Court for world sports:

Olympic Controversies During the CAS Era

- In 1998, Canadian Ross Rebagliati won the first Olympic gold ever awarded in the sport of

¹¹⁵ George Vecsey, “Sports of the Times: Nice Gesture Substitutes for Justice” *The New York Times* (26 September 1997) C1.

snowboarding.¹¹⁶ However, three days after his victory, it was revealed that Rebagliati had tested positive for marijuana in a subsequent drug test. Many were up in arms that Rebagliati could lose his medal because of a substance that – if it had any effect – probably hurt his performance. The IOC deferred to CAS for a final judgment on the matter. CAS, basing their decision on a technicality, quashed Rebagliati's disqualification, and ordered that his medal be returned.¹¹⁷

- At the 2000 Sydney Games, Romanian gymnast Andreea Raducan was stripped of her gold medal after she tested positive for pseudoephedrine, following her victory in the individual all-around competition. Her positive test was due to a cold medication she was accidentally given by her team physician, who assured her it was safe to use. Making matters even worse, “Raducan said rather than give her an edge over her rivals, the pill had even made her feel dizzy.”¹¹⁸ With public support growing behind her, the Romanian appealed to CAS for the return of her medal.¹¹⁹ For its part, the IOC said that it would abide by whatever decision CAS issued. CAS subsequently upheld the punishment, and was mercilessly criticized for doing so. One commentator noted, “It is surely desirable that if an athlete like Andrea (*sic*) Raducan . . . is morally innocent of doping, then . . . no penalty should be imposed.”¹²⁰ Many observers noted that CAS' decision seemed unduly harsh,¹²¹ or simply “ludicrous.”¹²²

¹¹⁶ See Kevin Paul DuPont, “Rebagliati gets to keep his gold” *The Boston Globe* (13 February 1998) E1.

¹¹⁷ *Supra* note 25 at 513.

¹¹⁸ “Court Supports IOC Over Raducan” *BBC News* (28 September 2000), online: BBC Sport <<http://news.bbc.co.uk/sport1/hi/olympics2000/gymnastics/944362.stm>>.

¹¹⁹ *Ibid.* (reporting that “Nadia Comaneci has joined in the growing support for Raducan”).

¹²⁰ “Athletes should not lose medals on technicalities” *The Irish Times* (16 October 2004) 15.

¹²¹ Alex Wade, “When will the world take a hard line on drugs?” *The Times (London)* (28 October 2003) 3.

¹²² Alison Kervin “Raducan in from the cold” *The Times (London)* (19 June 2001).

- In 2004, one of the most publicized incidents of the Athens Games was the gymnastics controversy involving American Paul Hamm and South Korean Yang Tae Young. Both were competing in the individual all-around event when a judge in the parallel bars routine incorrectly ranked the “start value” of Yang’s routine.¹²³ As a consequence of this unfair, but unintentional error, Yang ended up receiving the bronze medal when he should have won gold.¹²⁴ Paul Hamm was instead declared the victor. The result of this error was a near international incident between South Korea and the United States. U.S. Congressman James Sensenbrenner loudly championed Hamm’s cause, saying “[his] role in this is not just to prevent Paul Hamm from having the gold medal stolen from him but to ensure that no future athlete is ever put in the unfair position Paul Hamm has been placed in by these organizations.”¹²⁵ For its part, Olympic officials took a middle-of-the-road approach. “FIG President Bruno Grandi wrote to Hamm, stating that while Grandi could not change the results [read: Hamm was technically the gold medalist], he believed Yang was the true all-around champion.”¹²⁶ Yang ultimately appealed to CAS for relief. CAS denied his application, and the fallout was swift and severe. As Oliver Holt wrote: “The court rejected [Yang’s] appeal on the bizarre grounds that it was filed too late. But we all know that if the roles were reversed and an American had been the wronged party in Greece, the South Korean gymnast would have had the gold medal ripped from his neck quicker than you could say ‘stitch-up’.”¹²⁷

¹²³ See Richard McLaren, “International Sports Law Perspective: The CAS Ad Hoc Division at the Athens Olympic Games” (2004-2005) 15 Marq. Sports. L. Rev. 175 at 200.

¹²⁴ Yang’s parallel bar routine was incorrectly given a start value of 9.9 when it should have been a 10.0. Had the judge properly set the value, Yang would have received an additional 0.1 on his final score, an amount sufficient to pass Paul Hamm for first place. See *ibid.* at 201.

¹²⁵ See Jill Lieber, “Congressman rips USOC in Hamm controversy” *USA Today* (1 September 2004) 2C.

¹²⁶ See *ibid.*

¹²⁷ Oliver Holt, “Hamm-Fisted Gold Robbery” *The Mirror* (3 November 2004) 49.

In the end, Olympic institutions are likely to be more or less indifferent to how individual disputes with athletes turn out, as it is the health, popularity, and success of the Olympic Movement as a whole that really matters. The IOC awards hundreds of medals in any given Olympics, and at last count, has issued 32,321 medals overall.¹²⁸ Individual medals are, in this sense, cheap. But as an overall enterprise, the Olympic Movement itself is essentially a cash cow, worth billions of dollars.¹²⁹

So by outsourcing final decision-making authority to the CAS in these inevitably unpopular, tricky cases, Olympic institutions are able to insulate themselves from the criticism that is sure to follow. Olympic officials can essentially foist any blame on the CAS. This is perhaps best evidenced by the aftermath of the CAS' controversial decision in the *Raducan* case. IOC President Jacques Rogge, in a classic 'sorry, my hands are tied' moment, commented, "[t]his is one of the worst experiences I have had in my Olympic life. Having to strip the gold medal from the individual gymnastic champion for something she didn't intentionally do was very tough."¹³⁰ The mantra, "the rules are the rules," applied. Rogge was able to appear magnanimous, but was also grudgingly beholden to the final interpretation of the "rules" by an independent, international court. For Rogge and the IOC, this was the safest position available.¹³¹

Why CAS is value-adding for athletes

At the most brutal level of analysis, athletes consent to CAS jurisdiction because they simply have no choice in the matter. Before competing in the Games, athletes must sign an Entry Form which states

¹²⁸ "Olympic Medal Winners," online: Official Website of the Olympic Movement <http://www.olympic.org/uk/athletes/results/search_r_uk.asp> (author's calculation).

¹²⁹ The IOC will take in \$3.5 billion in television revenues for the 2010 Winter Games and the 2012 Summer Games. The IOC also will take in \$866 million in marketing revenue for 2005-2009. Every Olympics since the 1984 Los Angeles Games has turned an operating profit. See Lynn Zinser, "Costly Race Reaches Its Frenzied Finish" *The New York Times* (6 July 2005) D1.

¹³⁰ Karen Rosen, "Romanian Fights for Lost Gold" *The Atlanta Journal and Constitution* (28 September 2000) 3F.

¹³¹ In many ways, the IOC's wisdom in outsourcing final decision-making authority is analogous to a corporation that hires an outside consulting firm to handle downsizing. Rather than have remaining and former employees upset at the corporation itself, the business can redirect any blame or criticism onto the outside consulting company that made the decision of who to keep and who to fire.

that any dispute will go to the CAS for “final and binding arbitration.”¹³² If athletes hesitate to waive their right to sue in domestic court, Olympic institutions respond with intense pressure.¹³³ Ultimately, athletes that refuse to sign are simply excluded from the Games.¹³⁴

However, regardless of the relatively involuntary nature of athletes’ consent, the CAS is still preferable to domestic courts and internal hearings from the athlete’s perspective. The CAS is, in theory, a neutral court that may be more receptive to the arguments of athletes than internal hearing panels. In fact, there have been several instances where the CAS has surprised many by ruling in favour of athletes.¹³⁵

And unlike domestic courts, the CAS is fast, cheap, and efficient.¹³⁶ It usually decides cases within four months after an application is filed with the court. Further, unlike domestic courts, when the CAS rules in favour of an athlete, Olympic institutions are generally willing to respect the outcome.¹³⁷ As such, the CAS offers aspects that appeal to athletes as well.

¹³² See Melissa R. Bitting, “Mandatory, Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for ‘Job Security?’” (1998) 25 Fla. St. U.L. Rev. 655 at 663; citing Atlanta Comm. for the Olympic Games, Entry by Name 1 (1996).

¹³³ Mark Fish, “IAAF Talking Tough in Johnson Case” *The Atlanta Journal & Constitution* (18 May 1996) E9 (even an athlete as popular and influential as Michael Johnson could not avoid signing the CAS clause).

¹³⁴ See *ibid.*

¹³⁵ See *e.g.* James A.R. Nafziger, “American Law in a Time of Global Interdependence: Dispute Resolution in the Arena of International Sports Competition” (2002) 50 Am. J. Comp. L. Supp. 161 at 169 n. 28 (noting how CAS restored Ross Rebagliati’s gold medal after the snowboarder tested positive for marijuana at the 1998 Nagano Games).

¹³⁶ See Nancy K. Raber, “Dispute Resolution in Olympic Sport: The Court of Arbitration for Sport” (1998) 8 Seton Hall J. Sport L. 75 at 88.

¹³⁷ The question of why parties comply with CAS judgments is considered in greater depth in Part IV, below.

Table 1: How Does CAS Stack Up to Domestic Courts and Internal Hearings?				
Party		Domestic Courts	Internal Hearings	CAS
Olympic Institutions	Advantages	+ Public Relations Insurance	+ Fast + Inexpensive + Finality + Retain overt control over outcome	+ Public Relations Insurance + Fast + Inexpensive + Finality + <i>Retain covert control over outcome</i>
	Disadvantages	- Slow - Costly - Requires knowledge of local law - Must deal with hometown judges	- Exposure to public criticism over decisions	None
Individual Athletes	Advantages	+ “Home field” advantage	+ Fast + Inexpensive + Finality	+ Fast + Inexpensive + Finality + Somewhat neutral panel
	Disadvantages	- Slow - Costly - Lack of finality	- Biased panel - Prosecutor is also judge, jury, executioner	- CAS may not be entirely neutral

Ultimately, the CAS succeeds because it preserves most of the advantages of other forms of dispute resolution, while minimizing or outright eliminating the drawbacks. In this sense, the CAS is theoretically a value-adding institution for both athletes and Olympic institutions alike.

A Looming Threat to the CAS’ Value-Adding Status – Questions About CAS Independence

Lingering doubts about the CAS’ neutrality may undermine the CAS’ universally value-adding nature. Specifically, some athletes and observers complain that, in spite of the reforms following the *Gundel* case in 1994, the CAS remains heavily biased in favour of Olympic institutions.¹³⁸ There appears to be at least some merit to this claim, as

¹³⁸ See *e.g. supra* note 16 at 1232 (speculating that CAS will develop a “doctrine that favors governing bodies, over time stacking the deck against an athlete”). Athletes have expressed serious doubts about CAS’ neutrality. See *supra* note 8.

Olympic bodies continue to exercise a great deal of influence in the workings of the CAS.

Olympic institutions continue to influence ICAS

Prior to 1994, the IOC exercised direct oversight of the CAS.¹³⁹ After the *Paris Agreement*, however, ICAS was created to take on this duty. Nevertheless, Olympic institutions are still very much in the picture, retaining substantial influence over the ICAS appointment process. In fact, ICAS' entire twenty-person roster is appointed either directly or indirectly by Olympic institutions:

Table 2: How are ICAS members selected? ¹⁴⁰		
Appointing Body	Number of Appointments	Conditions
International Olympic Committee	4 members	None (ICAS member can also be an officer or member of the IOC)
International Sports Federations	4 members	None (ICAS member can also be an officer or member of an international sports federation)
National Olympic Committees	4 members	None (ICAS member can also be an officer or member of a National Olympic Committee)
12 Members of ICAS Appointed Above	4 members	"After appropriate consultation with a view towards safeguarding the interests of athletes"
16 Members of ICAS Appointed Above	4 members	ICAS members must be independent of the IOC, international sports federations, or national Olympic committees

Based on its membership requirements, there are four ways that ICAS (and therefore the CAS) remains firmly entangled with Olympic institutions. First, Olympic institutions directly appoint 60 percent (12 out of 20 total) of all CAS governors. Second, the twelve ICAS members appointed by Olympic institutions have sole discretion in appointing the remaining eight members. Third, up to sixteen members of ICAS can be,

¹³⁹ *Supra* note 16 at 1209.

¹⁴⁰ This table was created using information from the Code of Sports-Related Arbitration, *supra* note 23, art. S4. See also *supra* note 17 at 680.

and mostly are, members of Olympic institutions. In fact, at last check, twelve current members of ICAS are also high ranking members of some Olympic institution.¹⁴¹ Finally, there is no life tenure in ICAS; members are only guaranteed a four-year term. If their appointing body (most likely, an Olympic institution) is not satisfied with their performance after four years, Olympic bodies can simply refuse to re-appoint a recalcitrant member. Assuming that the *Paris Agreement* was intended to truly emancipate CAS from Olympic institutions, ICAS appears to be a feeble attempt to accomplish this goal.

Olympic institutions continue to directly influence CAS

The make-up of the CAS' pool of 250 arbitrators also remains heavily influenced by Olympic institutions. Under the CAS Code, ICAS must select arbitrators based on the following distribution:¹⁴²

Table 3: How Are CAS Members Selected?		
Nominating Body	Number of Arbitrators	Conditions
International Olympic Committee	1/5 th must be nominated by the IOC	None (arbitrator can also be an officer or member of the IOC)
International Sports Federations	1/5 th must be nominated by international sports federations	None (arbitrator can also be an officer or member of an international sports federation)
National Olympic Committees	1/5 th must be nominated by National Olympic Committees	None (arbitrator can also be an officer or member of a National Olympic Committee)
ICAS	1/5 th	Arbitrator must be independent of the IOC, IFs, or NOCs.
ICAS	1/5 th	Arbitrator chose with "a view to safeguarding the interests of the athletes."

Based on these figures, it is apparent how Olympic institutions leave their imprint on the CAS. Three-fifths of all CAS arbitrators are directly nominated by an Olympic institution. The same three-fifths can be, and

¹⁴¹ See "International Council of Arbitration for Sport," online: CAS <<http://www.tas-cas.org/en/membres/frmmemb.htm>>.

¹⁴² *Code of Sports-Related Arbitration*, *supra* note 23, art. S14.

often are, members or officers of Olympic institutions as well. Finally, ICAS, a body already heavily influenced by Olympic institutions, is allowed to pick the remaining arbitrators. Though Olympic institutions are no longer in direct control of who gets selected as a CAS arbitrator, significant ties persist.

The CAS remains heavily funded by Olympic institutions

The 1994 *Paris Agreement* was also supposed to reduce the CAS' financial dependence on Olympic institutions. As the Swiss Federal Tribunal reasoned in the *Gundel* case, it would be hard for a court to be impartial in a case involving its primary financial benefactor. As such, the CAS' \$4 million annual budget is now funded according to the following formula:¹⁴³

Table 3: Who Pays for CAS/ICAS?	
Source of Funding	Amount of Funding
International Olympic Committee	4/12 th of CAS budget
Summer Olympic International Federations	3/12 th of CAS budget
Winter Olympic International Federations	1/12 th of CAS budget
National Olympic Committees	4/12 th of CAS budget
Private Parties	Based on usage

The CAS is also essentially subsidized by its arbitrators, who are limited to only charging a nominal hourly rate, currently pegged at 135 euros per hour.¹⁴⁴ As far as achieving independence, this funding scheme is a minor improvement over the situation where the CAS was utterly dependent on one frequent litigant (the IOC) for financial survival.¹⁴⁵ Now, the CAS is almost completely dependent on *four* frequent litigants for financial viability. The value of 'diversifying' funding in this manner seems dubious at best. The IOC still provides one-third of the CAS' total budget. Meanwhile, the other two-thirds are still paid by some other Olympic institution. If the CAS is at all motivated to keep its deep-

¹⁴³ *Supra* note 17 at 680.

¹⁴⁴ See *ibid.*

¹⁴⁵ See *ibid.* at 3.3.3.2.

pocketed patrons satisfied, serious questions of arbitral independence must persist.

The Future for CAS Along the First Dimension

The IOC has, in the past, claimed that all legal experts agree that the CAS is fair and impartial.¹⁴⁶ This claim is patently false; many scholars around the world remain skeptical.¹⁴⁷ And the IOC's protestations are probably of little comfort to athletes themselves. Imagine if a large corporation established a grievance panel, one that was supposed to independently settle any disputes that might arise between the corporation and its workers. One would be hard-pressed to think that the panel would be fair and balanced if 1) the corporation installs its own officers in half of the seats, and 2) subsequently allows those sitting panelists (its own officers) to pick the other half of the panel "with a view to safeguarding the interests of workers." If I were a worker for this corporation, I would expect the final grievance panel to look like a 'stacked deck.'

Legally speaking, athletes appear to have limited recourse for challenging the fairness of the CAS. When the Swiss Federal Tribunal considered the issue in 2001, it strongly concluded that the 1994 reforms were sufficient to separate the CAS from the IOC.¹⁴⁸ Instead, if the athletes' grumbling over the CAS' lack of impartiality grows louder, and other forms of dispute resolution appear more and more attractive as a consequence, we might expect to see athletes take extra-legal steps to remedy the situation. To this end, we may very well see an Olympic athlete union in the future.¹⁴⁹ This way, athletes can gain greater leverage in protecting their rights, thereby demanding a voice in the CAS appointment process.¹⁵⁰

¹⁴⁶ See *ibid.* at 3.3.2.

¹⁴⁷ Mark Schillig, *Schiedsgerichtsbarkeit von Sportverbänden in der Schweiz* 157 (1999); Margereta Baddeley, *L'association sportive face au droit* 272 n.79 (1994); Dietmar Hantke, *Brauchen wir eine Sport- Schiedsgerichtsbarkeit?*, Spurt, 1998, at 187; One scholar has described the reforms as a "Symptombekämpfung" which does nothing to change the fundamental problem (Schillig at 159).

¹⁴⁸ See *supra* note 17 at 682.

¹⁴⁹ *Supra* note 16 at 1232 ("one unique solution . . . is the creation of monitoring groups comprised of athletes and athletes' attorneys, perhaps akin to a union."); Edward E. Hollis III, "The United States Olympic Committee and the Suspension of Athletes: Reforming Grievance Procedures Under the Amateur Sports Act of 1978" (1995-1996) 71 *Ind. L. J.* 183 at 194; Joe Drape, "Olympic Watch: Countdown to 1996 Atlanta Games Track War Likely Leading to Union" *The Atlanta Journal & Constitution* (4 December 1994) H5.

¹⁵⁰ *Supra* note 16 at 1232.

Part IV: The CAS Along the Second Dimension: Effective Speech Acts

Party preference is only one dimension along which to evaluate the CAS' success as an international tribunal. We must also consider how effective the CAS is at actually delivering judgments that have force.

Speech act theory provides a straightforward way to evaluate the CAS along this second dimension. The theory, perhaps most associated with philosophers J.L. Austin and John Searle, has been broadly used to evaluate problems in international adjudication.¹⁵¹ Speech act theory aims to do justice to the fact that even though our words encode information, we do more things with words than merely convey information.¹⁵² When we speak, we do not just describe; we speculate, request, and demand, for example. And perhaps most germane to the CAS, we can also declare and create; Searle called these "performatives of declaration."¹⁵³

For example, one of Searle's favourite examples of a performative declaration happens when a priest utters the words, "I pronounce you man and wife" at a wedding.¹⁵⁴ By speaking those words, the priest is doing much more than simply *describing* a state of affairs. Rather, the priest is in fact *altering* the state of affairs to fit his words. By speaking, he actually joins the man and the wife and creates the bond of matrimony. Similarly, when an umpire in a baseball game yells, "He's out!" after a play at the plate, the umpire effectively makes the runner "out" by virtue of the spoken words.¹⁵⁵ It hardly matters whether the runner actually touched the base before the ball arrived; the umpire's final pronouncement makes the runner "out" nonetheless.¹⁵⁶ To use

¹⁵¹ See generally Dick W.P. Ruiter, *Institutional Legal Facts: Legal Powers and Their Effects* (Deventer: Kluwer Academic Publishers, 1993).

¹⁵² For a more extensive discussion of speech act theory, see Peter M. Tiersma, "The Language of Offer and Acceptance: Speech Acts and the Question of Intent" (1986) 74 Cal. L. Rev. 189 at 194-96.

¹⁵³ John R. Searle, *Expression and Meaning: Studies in the Theory of Speech Acts* (Cambridge: Cambridge University Press, 1985) at 26.

¹⁵⁴ Robert M. Harnish, "Are Performative Utterances Declarations?" in *Speech Acts, Mind, and Social Reality: Discussions with John R. Searle* ed., Güntner Grewendorf & Georg Meggle (Dordrecht: Kluwer Academic Publishers, 2002) 41 at 60.

¹⁵⁵ This is, of course, assuming that the umpire is upheld on appeal to the head umpire.

¹⁵⁶ *Supra* note 153 at 19.

Searle's semi-serious phrase, the priest and the umpire have a "quasi-magical power" to make the world fit his statement.¹⁵⁷

Of course, not anyone can invoke these words and change the world in any meaningful way. Suppose, for example, that a raving lunatic spotted a man and woman walking down the street, and screamed "I pronounce you man and wife!" Such an utterance would certainly not be effective, beyond perhaps upsetting the couple. Suppose a belligerent fan in the stands of a baseball game yelled, "He's safe!" The game would continue unaltered and the runner would still be out.¹⁵⁸ In this way, the lunatic and the fan make attempts at performative declarations that simply fail to "get off the ground."¹⁵⁹

Speech Acts and the Law

Searle himself thought of judicial declarations as a quintessential performative declaration. For him, it was obvious that a judge who declares, "I find you [the defendant] guilty" is on par with the priest or the umpire, as opposed to the raving lunatic or the belligerent fan. However, what Searle perhaps failed to appreciate was just how often judicial declarations fail to "get off the ground."¹⁶⁰

Looking internationally, scores of 'declared' war criminals continue to go unpunished, despite having been declared guilty of atrocities. For example, in 1995, Croatian police officer Josip Budimcic was, in absentia, convicted as a war criminal by a Croatian court. According to the court, Budimcic tortured and executed prisoners while he was a member of the Serbian paramilitary police in 1991.¹⁶¹ The only problem is that he, like at least 72 other convicted war criminals currently living in Canada, has little chance of being extradited.¹⁶² Merely being declared a war criminal has done little to impact the life of Budimcic, who continues to work as a handyman in British Columbia.¹⁶³

¹⁵⁷ John R. Searle, *Consciousness and Language* (Cambridge: Cambridge University Press, 2002) at 170.

¹⁵⁸ Of course, fans may cause the judge to reconsider. For example, at the 2004 Olympics, those attending the men's gymnastics competition were shocked when judges gave Russian Alexei Nemov (a.k.a "Sexy Alexei") a low score after he completed a revolutionary high bar routine. Fans were so irate that their jeers caused a ten-minute delay in the competition, and forced the judges to revise their score. See Joy Goodwin, "The Athletes Shouldn't Take the Fall" *The Washington Post* (29 August 2004) B01.

¹⁵⁹ *Supra* note 153 at 18.

¹⁶⁰ *Ibid.*

¹⁶¹ Juliet O'Neill, "Lacking Conviction" *Ottawa Citizen* (13 April 2002).

¹⁶² *Ibid.*

¹⁶³ Norman Gidney, "War-crimes conviction in absentia was bogus, Croatian suspect maintains" *The Montreal Gazette* (11 November 2005).

The ICJ is also familiar with failed speech acts. Although Article 94(1) of the *Charter of the United Nations* obliged every state “to comply with the decision of the International Court of Justice in any case to which it is a party,”¹⁶⁴ several states have refused to obey adverse court rulings.¹⁶⁵ Albania refused to pay reparations to Great Britain in the *Corfu Channel* case.¹⁶⁶ Iran disregarded the Court’s order to refrain from nationalizing a British corporation pending a final judgment of the Court or agreement between the parties in *Anglo-Iranian Oil Co.*¹⁶⁷ Iceland refused to obey an order not to enforce a 50-mile fishing zone until the Court ruled on suits brought by West Germany and the United Kingdom in *Fisheries Jurisdiction*.¹⁶⁸ In the case of *Diplomatic and Consular Staff*, Iran rejected the ICJ’s Order that it release American hostages.¹⁶⁹ The United States ignored the Court’s ruling in *Military and Paramilitary Activities*.¹⁷⁰

Even the U.S. Supreme Court is vulnerable to failed speech acts. For example, in 1832, the Court decided in *Worcester v. Georgia* that Cherokees living in Georgia could not have their land seized from them by the state government.¹⁷¹ As legend has it, U.S. President Andrew Jackson — no friend to the Cherokee — responded by announcing, “John Marshall has made his decision; now let him enforce it.”¹⁷² Jackson would subsequently write about the *Worcester* case:

The decision of the Supreme Court has fell *still born*, and they find that it cannot coerce Georgia to yield to its mandate . . . [I]f orders were issued tomorrow one regiment of militia could not be got to march to save [the Cherokee] from destruction and this the opposition know, and if a collision was to take place between them and the Georgians, the arm of the government is not sufficiently strong to preserve them from destruction.¹⁷³ (emphasis added)

¹⁶⁴ See Mark Weston Janis, “Somber Reflections on the Compulsory Jurisdiction of the International Court” (1987) 81:1 Am. J. Int’l L. 144 at 145.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Worcester v. Georgia*, 31 U.S. 515 (1832).

¹⁷² See Stephen Breyer, “The Legal Profession and Public Service” (2000) 57 N.Y.U. Ann. Surv. Am. L. 403 at 414.

¹⁷³ See Barry Friedman, “The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy” (1998) 73 N.Y.U.L. Rev. 333 at 400, n.269 (quoting Letter from Andrew Jackson to Brigadier-General John Coffee (7 April

Jackson eventually did send troops, but those troops were sent to evict the Cherokees.¹⁷⁴

What these “still born” speech acts have in common is that they require an extensive alliance of extra-linguistic institutions to animate the judicial declaration with authority. In the case of Josip Budimcic, the Canadian government must also extradite the declared war criminal, and Serbia officials must also be willing to imprison him. When the ICJ ordered that Iran release American hostages, its words fell still-born without backing from the U.N. Security Council. In *Worcester v. Georgia*, the U.S. Supreme Court’s words were just ink on paper after the President refused to animate them with the police power of the United States.

Evaluating the CAS’ Speech Acts

Does the CAS rise above this deficiency? If we examine the CAS using speech act theory, it becomes clear that the court does in fact enjoy the power to effectively change the world with its mere words. There are two reasons for this. First, the most high-profile CAS cases, those involving the disposition of Olympic medals, are particularly amenable to resolution by speech acts. Second, in other kinds of CAS cases (namely disciplinary and commercial disputes), the CAS is able to effectively harness the necessary extra-linguistic institutions by leveraging the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the “*New York Convention*”).

However, we will also see that the CAS must still tread carefully, as it is still vulnerable to having its speech acts fail. Namely, as the CAS relies on broader and broader networks of extra-linguistic institutions to give force to the tribunal’s words, it increases the chances that its speech acts will fail.

The CAS’ High Profile Cases are Particularly Amenable to Speech Acts

The CAS derives part of its success from the fact that its most high profile disputes are unusually amenable to ‘speech act’ treatment. When the CAS is asked to resolve a dispute regarding the disposition of Olympic medals, it deals with a unique kind of dispute that can be

1832), in 4 Correspondence of Andrew Jackson 429 at 430 (John Spencer Bassett ed., 1927)).

¹⁷⁴ *Supra* note 172 at 414.

resolved through speech alone. Consider, for example, the case of Jerome Young.

Jerome Young was a U.S. sprinter who was a member of the gold-medal winning 1600 meter relay team at the 2000 Sydney Olympics.¹⁷⁵ Unfortunately for him, Young also tested positive for steroids. As part of the fallout from Young's doping conviction, on 20 July 2005, the CAS ruled that because Young should not have run at the Sydney Games, he should be stripped of his gold medal.¹⁷⁶ Normally at this point, duly chastened athletes simply return the medal to Olympic officials.¹⁷⁷

However, a very curious thing happened. Jerome Young simply said no. He scoffed at the notion that anyone would take his gold medal away; his lawyer proclaimed, "They [Olympic officials] can knock on my door and they will not receive it."¹⁷⁸ Olympic officials were at a loss, as they had no legal right to search Young or his whereabouts in hopes of finding and seizing the medal. A lawsuit against Young was also considered but was deemed overly costly and likely fruitless, given that Young was both destitute and "basically homeless."¹⁷⁹

When a party refuses to comply with an ICJ decision, the ICJ's legitimacy is seriously threatened. But Young's refusal to hand back his medal never caused anyone to worry about CAS' impending demise. Why? Because the most important thing to note about these medal disputes is that they hardly have anything to do with *possession*. What Young failed to grasp, and what makes him such a tragic, King Lear-esque figure, is that the physical medal itself means almost nothing, once stripped of the fact that it is a totem for being the official 'Olympic medalist.' In cold material terms, the financial value of the actual gold medal pales in comparison to the earning power of being "the gold medal winner." For example, it is reported that gold medals from the 2004 Athens Games contained less than \$100 worth of gold.¹⁸⁰ In comparison,

¹⁷⁵ The *Young* case is discussed in far greater detail later in this paper.

¹⁷⁶ *U.S. Olympic Comm. v. Int'l Olympic Comm.*, CAS 2004/A/725 (20 July 2005).

¹⁷⁷ On two previous occasions, U.S. Olympic medalists had been asked to return their medals. In 1912, Jim Thorpe returned his decathlon gold medal because it was later discovered that he did not meet the IOC's strict definition of an "amateur athlete." In 1972, swimmer Rick DeMont returned his gold medal from the Munich Games after his asthma medication resulted in a positive drug test. See Alan Abrahamson, "Young Must Return Medal: IOC orders sprinter to give back gold he won as part of 1,600-relay team, which he won a year after positive test. His agent refuses" *Los Angeles Times* (28 November 2005) D1.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ William J. Kole, "Winning gold could mean jackpot for athletes" *Associated Press* (19 August 2004).

'the gold medal winner' — not the 'gold medal *holder*' —has the potential to earn millions in endorsement dollars.¹⁸¹

However, being an 'Olympic medalist' is much more than just a financial boondoggle. As Justice John Paul Stevens eloquently noted, "a decent respect for the incomparable importance of winning a gold medal in the Olympic Games convinces me that a pecuniary award is not an adequate substitute for the *intangible values* for which the world's greatest athletes compete."¹⁸² The metaphysical value to which Justice Stevens refers, that of being the true and legitimate Olympic champion, cannot be fully embodied by a mere circlet of metal, any sum of money, or any other physical form. What really matters, being a 'gold medalist,' is a social fact, not a physical one.

And this status is precisely what the CAS can strip away with a mere utterance. If the CAS makes a performative declaration invested with enough authority — something along the lines of, "Geoff is the gold medal winner" and its correlate, "Sam is NOT the gold medal winner" — this is, in and of itself, enough to accomplish all meaningful ends. Nothing more needs to be done in order to make Geoff "the gold medal winner," and remove Sam's status as "the gold medal winner." No nation or organization needs to dispatch enforcers to pry the medal from Sam's hands. Through its words, the CAS has already stripped the medal he holds of any symbolic or totemic value; at best, it only stands as a pathetic symbol of Young's delusions of grandeur.

To put it another way, the CAS, with its words alone, wields a seemingly "quasi-magical" power to transmutate the item Jerome Young holds from a coveted 'medal' to a mere piece of 'metal.'

In this way, the CAS is dramatically different from less successful tribunals. For example, compare the CAS' relatively easy task in the *Young* case to the daunting challenge faced by the ICJ in *Diplomatic and Consular Staff*. When the ICJ unequivocally ordered Iran to release its hostages, the words perhaps had some symbolic effect.¹⁸³ However, this was hardly enough to actually bring the hostages back to American soil. The physical state of affairs was at the crux of the dispute. And the ICJ, with words alone, could not effectively deliver the hostages from the possession of their captors and into the United States.

¹⁸¹ See Tomoeh Murakami Tse, "Gold Futures Rise; But Not All Olympic Winners Get Big-Money Deals" *The Washington Post* (15 February 2005) D01.

¹⁸² *Reynolds v. Int'l Amateur Athletic Fed'n*, 505 U.S. 1301 at 1302 (1992) [emphasis added].

¹⁸³ *Supra* note 164 at 145.

The CAS and recent medal decisions

The CAS has gone on to wield its self-contained authority over medal disputes in several high profile cases. The 2004 Athens Olympic Games involved three such disputes:

- The first case involved South Korean gymnast Yang Tae-Young and American Paul Hamm. 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 Hamm.¹⁸⁴ Yang argued that the final score should be adjusted to reflect this unfair, though unintentional error, and as such, CAS should declare Yang the gold medal winner. Hamm countered that Yang should have protested the scoring error at the time of competition, and that it was too late to change the results.
- The second case 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 requested that CAS declare Shewfelt, not Dragulescu, the true bronze medalist.¹⁸⁵
- The third case involved Brazilian runner Vanderlei Cordeiro de Lima, who led the Olympic marathon only three miles from the finish when he was grabbed by a deranged spectator. De Lima was able to break free and continue the race but finished third. The Brazilian Olympic Committee and de Lima asked that CAS declare de Lima the gold medal winner in order to remedy the damages he suffered in the marathon race.¹⁸⁶

¹⁸⁴ *Supra* note 123 at 200.

¹⁸⁵ *Ibid.* at 202.

¹⁸⁶ *Ibid.* at 203-04.

Speech Act Analysis and Other Kinds of CAS Disputes

Of course, the CAS arbitrates more than just the disposition of Olympic medals. The CAS also handles a myriad of lower-profile matters, like commercial disputes and appeals from doping suspensions. Admittedly, in these non-medal disputes, the CAS looks much more like a traditional tribunal, in the sense that it requires an extensive alliance of extra-linguistic institutions in order to make the CAS' speech acts effective. For example, suppose the CAS declares that Nike owes the IAAF \$10 million in endorsement fees. The court, by itself, cannot transfer \$10 million from Nike to the IAAF. Instead, it requires either 1) that Nike will voluntarily carry out the CAS' order, or failing that, 2) countries where Nike has assets will use their police power to force Nike to comply. In the doping context, if the CAS declares that Sam cannot be punished for doping, the court relies on Olympic bodies to rescind their bans, pursuant to the CAS' decision.

The CAS and the New York Convention

The *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "*New York Convention*") is a powerful tool that the CAS uses to expand its alliance of supporting extra-linguistic institutions. In the 137 nations that have signed the *New York Convention*, the domestic courts are bound to both respect and enforce the decisions of an arbitral body like the CAS.¹⁸⁷

Essentially, the *New York Convention* harnesses the enforcement power of individual states and puts it at the disposal of the CAS. Specifically:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.¹⁸⁸

¹⁸⁷ According to the World Intellectual Property Organization, there are 137 signatories to the *New York Convention* as of 30 January 2006. See "Parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards," online: WIPO <<http://arbiter.wipo.int/arbitration/ny-convention/parties.html>>.

¹⁸⁸ See *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 U.N.T.S. 38, art. III, (each signatory state

This is a qualified grant of power. Under certain circumstances, domestic courts still can review and refuse to enforce CAS judgments. However, the Convention does not make it easy for parties to challenge an arbitral judgment. The unsatisfied party can do so in the country where the arbitration was held (the primary enforcement jurisdiction), or in a country where the award might be enforced (the secondary enforcement jurisdiction).¹⁸⁹ A successful challenge to an arbitral decision in the primary jurisdiction annuls the award in all 137 countries that signed the Convention. A successful challenge in any secondary jurisdiction only annuls the decision in that particular country.¹⁹⁰

Whichever jurisdiction a party chooses, the *New York Convention* severely limits the grounds to challenge an arbitral judgment. Article V of the Convention lists seven such grounds:¹⁹¹

- 1) The original agreement to submit to arbitration was not valid;
- 2) The party against whom the award is invoked was not given proper opportunity to present a defense;
- 3) The arbitrators exceeded their jurisdiction in hearing the case and making the award;
- 4) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;
- 5) The award is not yet binding on the parties or has been set aside or suspended in the country in which the award was made;
- 6) The subject matter of the matter in dispute is not capable of settlement under the law of the country where recognition and enforcement is sought;
- 7) The enforcement of the award would be contrary to the public policy of the country where recognition and enforcement is sought. This is the so-called “public policy” defense.¹⁹²

However, domestic courts have generally been reluctant to overturn a foreign arbitral award on any of these grounds. American courts, for example, have consistently upheld foreign arbitral awards executed

must recognize arbitral awards as binding and enforceable, as long as the award meets certain procedural requirements).

¹⁸⁹ *Ibid.*, art. V. See also *supra* note 79 at 77.

¹⁹⁰ See W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Durham: Duke University Press, 1992) at 113-14.

¹⁹¹ *Supra* note 188, art. V(1)(a-e).

¹⁹² See *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 at 516 (2d Cir. 1975).

under the *New York Convention* in commercial disputes.¹⁹³ In Olympic disputes, courts have been even more unlikely to intercede. In *Slaney v. IAAF*, for example, U.S. middle-distance runner Mary Decker Slaney challenged the decision of an IAAF arbitral panel that suspended her for doping in federal district court.¹⁹⁴ She claimed that:

- 1) the IAAF denied her a meaningful opportunity to present her case,¹⁹⁵ and
- 2) the standard for excessive testosterone levels was scientifically invalid, discriminatory towards female athletes, and violated the most basic notions of morality and justice. As such, the arbitral award against her violated the public policy of the United States.¹⁹⁶

The Seventh Circuit summarily rejected all of Slaney's arguments, and concluded that the court was obliged to recognize her doping suspension under the terms of the *New York Convention*.¹⁹⁷

As the *Slaney* case illustrates, the *New York Convention* theoretically allows the CAS to speak with authority in a wide array of commercial and disciplinary matters. Its ability to, say, order Nike to pay the IOC 10 million dollars is empowered to the extent that an American court could force Nike to do so. Its ability to ban an athlete from competition has force insofar as domestic courts can compel event organizers to bar that athlete.

The Convention ultimately allows the CAS to harness the police power of individual states, and thereby compel individual parties to carry out the dictates of the court. As such, even with statements that require a rather broad network of extra-linguistic institutions in order to have

¹⁹³ See e.g. *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 165 F.3d 310 (2d Cir. 1998) (The court upheld a foreign arbitral award despite claims by one party that the underlying contract at issue was forged by the other party); *La Societe Nationale Pour La Recherche, La Production, Le Transport, La Transformation et la Commercialisation Des Hydrocarbures v. Shaheen Natural Res., Co., Inc.*, 585 F.Supp. 57 (S.D.N.Y. 1983) (court rejected a party's attempt to defeat a foreign arbitral award on antitrust-based policy grounds.); *Fotochrome, Inc. v. Copal Co.*, *supra* note 192 at 516 (noting that the public policy defense is exceedingly narrow).

¹⁹⁴ Specifically, a UCLA laboratory found elevated levels of testosterone in Slaney's urine sample. *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580 at 586 (7th Cir. 2001).

¹⁹⁵ *Ibid.* at 593. If true, this would have potentially rendered the arbitral award unenforceable under Article V(1)(b) of the *New York Convention*.

¹⁹⁶ *Ibid.* If true, this would have potentially rendered her suspension invalid under Article V(1)(e) of the *New York Convention*.

¹⁹⁷ *Ibid.* at 601.

force, the CAS can feel fairly confident that its speech acts will have their intended effect.

The Outer Limits of the CAS's Ability to Perform Effective Speech Acts

The discussion to this point has painted a rather rosy picture of the CAS as an effective international tribunal. The CAS successfully offers enticements for all parties to participate. The CAS is able to speak with great authority on a rather broad array of sports-related issues.

However, after twenty-two years of existence, there are signs that the CAS is beginning to reach the outer limits of its authority, and is now in danger of eroding its legitimacy through failed speech acts. In particular, two recent cases, those of U.S. sprinter Jerome Young and German cyclist Danilo Hondo, are disturbing signs about the future of the CAS. The *Young* case illustrates how CAS' legitimacy is vulnerable to assault from *within* the Olympic Movement. The *Hondo* case shows how CAS also faces assault from *outside* the Movement.

The Young Case: CAS speech acts are threatened from within

The case of American sprinter Jerome Young is, perhaps, an ominous harbinger of things to come, an example of what can happen when Olympic institutions choose to ignore the words of the CAS.

Jerome Young was a naturalized American¹⁹⁸ who also happened to be one of the best 400 meter runners in the world. As a high school athlete, Young was practically legendary. He was the 1994 Connecticut high school champion at 400 meters, the 1995 national high school champion in both the 200 meters and 400 meters, and the 1995 Pan Am Games gold medalist in the 4 X 400m relay. Worldwide success seemed assured in 1997 when — only two years removed from high school — Young was already running on the U.S. team at the World Championships. In 1998, Young was ascendant; he won his first U.S. national championship.

However, Jerome Young's meteoric rise hit a snag on 26 June 1999. After winning his second national title in Eugene, Oregon, Young was asked to submit a urine sample for a standard drug testing (the "Eugene Sample"). The test came back positive for nandrolone, a notorious anabolic steroid. Usually, a positive test like this would spell doom for an athlete; under the penalty regime of the IAAF and U.S. Association for

¹⁹⁸ Jerome Young was born in Clarendon, Jamaica but spent his teen years in Hartford, Connecticut. See Jerome Young Biography, online: USA Track & Field, Inc. <http://www.usatf.org/athletes/bios/oldBios/2001/Young_Jerome.asp>.

Track and Field (“USATF”), first-time offenders like Young were subject to a two-year ban from competition. For an athlete in the prime of his life, two years might as well have been an eternity.

As momentous as this may have seemed to Young, not even he would have guessed that this single positive drug test would lead to a nightmarish, four-year legal battle between the United States and the rest of the Olympic Movement, one that would nearly destroy USATF and also threaten the very legitimacy of the Court of Arbitration for Sport.

How did the *Jerome Young* case go from isolated incident to international debacle? The first domino fell when Jerome Young insisted on his innocence, and pursuant to USATF regulations, appealed his positive drug test to a three-member USATF arbitration board.¹⁹⁹ Young pointed out that six days after he produced the damning Eugene Sample, he had given another urine sample at a meet in Raleigh, North Carolina (the “Raleigh Sample”).²⁰⁰ This second sample was free of any banned substances, including nandrolone. In essence, Young argued that it was impossible for him use nandrolone in Eugene, and then have no sign of the steroid in his urine six days later, in Raleigh.²⁰¹ On 10 July 2000, the USATF Doping Appeals Board accepted Young’s argument, and exonerated the sprinter.

If this were an American criminal case, the matter would end here, and Jerome Young would walk away a free man.²⁰² However, unlike an American criminal justice matter, Jerome Young’s case only became murkier and more complicated at this point.

The case became messy due to a glaring conflict of regulations. In the IAAF’s opinion, whenever a domestic track and field organization (like the USATF) knew of a positive drug test, they were supposed to forward those results to the IAAF, regardless of whether a domestic body (such as the USATF Doping Appeals Board) acquitted the accused athlete.²⁰³ The

¹⁹⁹ Young was originally found guilty by the USATF Doping Hearing Panel on 11 March 2000. Young then appealed this decision to the USATF Doping Appeals Board, a three-member panel of independent arbitrators. See *International Association of Athletics Federations v. Young* (28 June 2004), CAS 2004/A/628 at 8.

²⁰⁰ *Ibid.* at 8.

²⁰¹ There is some reason to doubt the veracity of Young’s argument. To support this claim, Jerome Young submitted the testimony of an expert with “no pharmacological training or experience who relied upon ‘. . . basic pharmacokinetic equations relating to blood concentrations, which were clearly irrelevant to this issue . . .’” *Ibid.* at 20.

²⁰² For a discussion of double jeopardy and doping, see *supra* note 51 at 550 (“an IF would violate the prohibition against double jeopardy if it recharged and retried an athlete after an NGB has cleared the athlete”).

²⁰³ A central issue of the subsequent CAS arbitration would be whether IAAF rules in place at the time actually required the forwarding of a positive drug test,

IAAF could then overturn the acquittal, reinstate the charges, and go on to suspend that athlete.²⁰⁴ For example, British sprinter Mark Richardson — like Jerome Young — tested positive for nandrolone in 1999 and was subsequently exonerated by the British track federation. However, when British officials sent the positive drug test to the IAAF, it reversed the acquittal and banned Richardson for two years.²⁰⁵ In the same year, German runner Dieter Baumann's case reached a nearly identical outcome.²⁰⁶

However, under its regulations in effect at the time, USATF was required to keep the name of an athlete who tested positive confidential until the USATF Doping Appeals Board upheld the positive test result.²⁰⁷ In essence, USATF — unlike its British, German, and other counterparts — gave an accused athlete the right to confidentiality until that athlete was formally found guilty. USATF believed that it was required to do so as a matter of U.S. federal law; the *Olympic and Amateur Sports Act* of 1998 calls for numerous due process and procedural safeguards for Olympic athletes accused of doping.²⁰⁸ Hence, when Jerome Young was

regardless of domestic adjudicatory outcome. A strong case was made, though ultimately rejected by CAS, that the IAAF's rules required no such disclosure. Specifically, USATF argued that under IAAF rules, a drug test is only "positive" once it has been deemed to be such by a review board. See Arbitration CAS 2002/O/401, *International Association of Athletic Federation v. USA Track & Field* (10 January 2003), reprinted in *Digest of CAS Awards III 2001-2003*, ed. by Matthieu Reeb (The Hague: Kluwer Law International, 2004) 36 at 52.

²⁰⁴ An analogous practice continues to this day. The domestic testing organization (in the United States, this is the U.S. Anti-Doping Agency) may exonerate an athlete. However, the international testing organization (today, the World Anti-Doping Agency) still can reinstate the charges against the athlete. See *e.g. World Anti-Doping Agency v. Lund* (10 February 2006), CAS OG 06/001(CAS, Ad hoc Division – XX Olympic Winter Games in Turin).

²⁰⁵ See Alan Abrahamson, "Pound Wants U.S. to Forfeit Medals" *Los Angeles Times* (28 August 2003) D1.

²⁰⁶ *Ibid.*

²⁰⁷ USATF Regulation 10(G), which was in force from December 1998 to December 1999 stated,

Confidentiality and publication of drug test results: The names of athletes who have tested negative or who have provided valid excuses for failure to appear for testing shall be made available to the public. The names of athletes testing positive shall not be made publicly available until an athlete has been deemed ineligible by a DHB (Doping Hearing Board), or when the findings of the DHB have been reaffirmed by the DAB (Doping Appeals Board), when appropriate. Any other information will be made available only with prior consent of the athlete...

See Arbitration CAS 2002/O/401, *supra* note 203 at 52.

²⁰⁸ The CEO of USATF notes that "USATF's concern for athletes' rights is mandated by federal law." See Craig Masback, Letter to the Editor, *American*

exonerated by USATF's Appeals Board, USATF felt that it could not disclose his name to the public or the IAAF.

For a year after Young was exonerated, life went on. Pursuant to its regulations, USATF kept the overturned drug test locked away, IAAF remained in the dark, and Young continued to compete in track meets around the world. However, the next domino fell on the eve of the 2000 Sydney Olympic Games, where Jerome Young was scheduled to run as a member of the U.S. team. In August of 2000, the laboratory that had performed Young's failed drug test tipped the IAAF off about the positive result.²⁰⁹ The lab had no names to give the IAAF, however, as the test was only labeled with an ID number.²¹⁰ As IAAF pondered about what to do with this troubling information, the Sydney Games went on, and Jerome Young won a gold medal as a member of the U.S. 4 X 400m relay team.²¹¹

In September of 2000, the IAAF asked USATF to name names, and identify the athlete who had tested positive. USATF pointed to its confidentiality regulations, and refused to disclose the names. Over the next year and a half, the organizations engaged in an awkward stalemate.²¹² At one point, the IAAF even threatened to suspend USATF as a member organization.²¹³ Finally, the IAAF and USATF agreed to take their dispute to CAS.

Lawyer (January 2002) at 14. Masback's position had some merit; the *Olympic and Amateur Sports Act* of 1998 does require national governing bodies (like USATF) to provide "fair notice and opportunity for a hearing to any amateur athlete, coach, trainer, manager, administrator, or official before declaring the individual ineligible to participate." 36 U.S.C. §220522(a)(8).

²⁰⁹ *International Amateur Athletic Federation v. Young*, *supra* note 199 at 8-9.

²¹⁰ *Ibid.* at 9.

²¹¹ Young only ran in the preliminary heats of the 4 X 400m relay for the U.S.; however, the IOC awards relay medals to all runners who ran in any round of the relay event, not just the final.

²¹² The acrimony between the Olympic Movement and USATF was highlighted when the Presidents of the IOC and the World Anti-Doping Agency openly condemned USATF's refusal to name names. They intimated that USATF was "covering up drug-test positives and, perhaps, cheating on behalf of its star athletes." Amy Shipley, "Court Rules in Favor of U.S. Track: Refusal to Identify Athletes in Drug Testing Case Upheld" *The Washington Post* (11 January 2003) D01.

²¹³ "Only the threat of suspension by the IAAF . . . prompted USATF to eventually agree to submit its position for determination by the Swiss-based Court of Arbitration for Sport." See Richard W. Pound & Craig A. Masback, "Crack in the Code; A new global anti-doping initiative may be a turning point in fight against performance-enhancing drugs in international sport, but a major rift is likely if U.S., viewed suspiciously by much of world, isn't on board" *Los Angeles Times* (9 March 2003) part 4 at 1.

The CAS Rules on the Jerome Young Case

After reviewing documents and hearing testimony, the CAS issued a rather stunning victory for USATF on 10 January 2003. The CAS affirmed that the USATF was bound, as a member organization, to follow IAAF regulations.²¹⁴ However, the CAS noted that before the dispute arose, USATF had repeatedly asked IAAF how USATF should resolve the conflicts in their respective regulations. These queries “were met with deafening silence on the part of the IAAF.”²¹⁵ By such inaction, “IAAF caused USATF to continue with its confidentiality policy with the athletes.”²¹⁶ The CAS declared that it would therefore be unfair to reopen cases at this point, noting that:

Stripped of all vestiges of reasoning and rhetoric, and but for the heat and light of the hearing room, the bare truth is that, at its core, the case clearly concerns the lives, livelihoods and reputations of thirteen athletes [including Jerome Young] who no doubt have every reason to wonder why questions which they thought were resolved should now be reopened. In the opinion of the Panel, they should not be.²¹⁷

In the interests of fairness and finality, the CAS had declared that USATF did not have to disclose the names of the athletes to the IAAF.²¹⁸

Aftermath of the CAS’s Ruling

In the immediate aftermath of the CAS’s surprising decision, Olympic officials were apoplectic. Dick Pound, the Chairman of the World Anti-Doping Agency (and former Vice-President of the IOC) went so far as to publicly question the very legitimacy of the CAS. “All this proves is if you are big and have bad breath and are a scofflaw, you can get away with it,” Pound growled.²¹⁹ WADA’s chief also criticized the CAS’s decision as “inflicting serious damage to the fight against doping in sport.”²²⁰

²¹⁴ *Supra* note 203 at 54.

²¹⁵ *Ibid.* at 62.

²¹⁶ *Ibid.* at 63.

²¹⁷ *Ibid.* at 64.

²¹⁸ *Ibid.* at 67 (“ . . . the unique facts and circumstances of this case constitute a valid and compelling reason why USATF should not be required to disclose the information . . . of the relevant IAAF Rules.”).

²¹⁹ Philip Hersh, “U.S. Track Body Cleared in Drug Case” *Chicago Tribune* (11 January 2003) 6N.

²²⁰ Pound, *supra* note 213.

Though Olympic officials clearly did not like the CAS's verdict, they were at least willing to abide by it.²²¹ That is, until August of 2003, when an enterprising staff reporter for the Los Angeles Times let the world know that Jerome Young was, in fact, the unknown athlete who had tested positive in 1999.²²² Jerome Young's public humiliation upstaged what should have been the proudest moment of his career; just as the devastating article was going to press, Young was busy winning the 400 meters at the World Championships.

International reaction to the naming of Jerome Young was swift and furious. Writers around the world were appalled at the thought that Young, a doper, had just won a world title and had been allowed to win gold in Sydney.²²³ As pressure mounted, Olympic officials scrambled to give the public the pound of flesh being demanded. Dick Pound loudly proclaimed that the International Olympic Committee should launch a "full investigation" and act "decisively" to "preserve the ethical values of Olympic sport and the image of the Olympic Games."²²⁴

There was only one small problem. The CAS had already ruled that for interests of finality, the matter was closed, and that USATF did not have to turn over any of the documents needed to prove Young's guilt.²²⁵

At this point, the IOC and IAAF were faced with a dilemma. On one hand, Jerome Young's presence at track meets around the world was a walking, talking reminder of how steroid use persisted in Olympic sports; by letting him compete, the IOC and IAAF were endangering the "ethical values of Olympic sport." On the other hand, the Olympics' own court, the CAS, had already ruled definitively on the matter. By vigorously prosecuting him now, the IOC and IAAF would countermand the CAS' edict, and undermine the tribunal's credibility as the "supreme court for sport." Faced with this difficult choice, Olympic authorities chose public

²²¹ *Ibid.* (even CAS critic Dick Pound acknowledged that "[t]he CAS panel decided that the athletes – however guilty – were entitled to believe that their cases were completed . . . and could not now be considered by the IAAF."); see also Owen Slot, "Young's gold is tarnished by US drugs scandal" *The Times (London)* (28 August 2003) 42. ("The International Olympic Committee (IOC) confirmed yesterday that the case was in the hands of the USATF and so no action could be taken.")

²²² Alan Abrahamson, "Worldwide Perception Is a Harsh Reality for U.S." *Los Angeles Times* (27 August 2003) 1 (LexisNexis). ("According to documents and statements obtained by The Times, USOC #13 is Jerome Young.")

²²³ See e.g. Tom Knight, "Shame of Olympic Champion" *The Daily Telegraph (London)* (28 August 2003) 1.

²²⁴ *Supra* note 205.

²²⁵ IAAF publicly acknowledged as much; IAAF anti-doping chief Arne Ljungqvist, "[w]e cannot ask USATF to submit any information since this is what CAS decided . . ." "Young Off the Hook For Drug Allegations" *The Record* (25 September 2003) D4.

opinion over the institutional integrity of the CAS. Jerome Young was to be prosecuted using every means available.

IAAF again demanded USATF's confidential files on Young. USATF refused, citing the previous CAS verdict. At this point, perhaps sensing the tenuousness of its legal position, Olympic authorities went so far as to begin a public campaign calling for the USOC to voluntarily return the Olympic gold medals won by Young's 4 X 400 meter team in Sydney. The USOC refused.

Regardless of legal right, Olympic authorities ploughed doggedly on, continuing to exert pressure "with all means" in order get USATF to give up the files.²²⁶ As part of this effort, the International Olympic Committee pressured the USOC to decertify USATF and cut off nearly \$3 million in funding unless USATF released the files.²²⁷ Weary of the constant negative publicity, USOC relented, and in January of 2004, threatened to decertify USATF.²²⁸

For its part, USATF was confronted with an ugly Hobson's choice. On one hand, it could fight the USOC, IAAF, and IOC in domestic court, relying on the CAS judgment coupled with the *New York Convention*.²²⁹ Of course, though USATF would probably win this legal battle, the larger Olympic institutions could then retaliate by decertifying USATF, essentially obliterating that organization.²³⁰

On the other hand, USATF could turn over the confidential files, and expose itself to a multi-million dollar lawsuit by Jerome Young.²³¹ In fact, USATF went so far as to ask the USOC to indemnify USATF if it agreed to give up the confidential files. USOC, understanding the potential liability that USATF might subject itself to, unequivocally refused.²³²

²²⁶ "US Sprinter Young Could Lose Sydney Gold" *China Daily* (27 September 2003).

²²⁷ Elliott Almond, "Track Group to Yield Documents in Doping Case; Details of Sprinter's Appeal to Be Sent to USOC Review" *San Jose Mercury News* (2 February 2004) 3D; see also Stephen Wilson, "Court Appeal Threatens U.S. Track" *Hamilton Spectator* (28 January 2004) SP14.

²²⁸ Alan Abrahamson, "USATF Issued Deadline by USOC" *Los Angeles Times* (30 January 2004) D14. It is worth noting that the USOC's actions were particularly self-preserving. Given that the testing occurred entirely under the USOC's supervision, it (like USATF) had full knowledge about Jerome Young's test. Rather than turn over the documents itself, however, the USOC instead chose to pressure the USATF to do so.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ Presumably, Jerome Young could have sued USATF for consequential damages resulting from the breach of the confidentiality agreement.

²³² Elliott Almond, *supra* note 227.

Ultimately, USATF took the slightly less tragic choice. That is, it did precisely what the CAS declared USATF had the right not to do; on 2 February 2004, USATF handed over Jerome Young's confidential files, and formally confirmed that he was the athlete who tested positive in 1999. The move was lauded by USOC spokesman Darryl Seibel as "a significant step . . . a step in the right direction."²³³ Of course, Seibel did not mention that this case was also a significant step backwards for the authority of the CAS, along with the idea that CAS verdicts are truly binding on *all* parties, be they powerful (like the IOC or IAAF) or subservient (like USATF).

What the Young case means for the CAS

In essence, the Jerome Young case illustrates how the CAS can have its authority undermined from within, by the very Olympic Movement that created the court just decades earlier. The behaviour of the IOC, IAAF, and USOC in the Jerome Young case does not bode well for the future of the CAS. When Olympic officials openly question the legitimacy of the CAS as an institution, and contravene the CAS' decisions through sheer use of power, it is unlikely that the court can maintain its image as an independent, legitimate, and effective arbitral body. Instead, the CAS begins to resemble courts like the ICJ, who frequently have trouble achieving compliance.

And if the CAS follows the advice given to the ICJ, namely that the court build its legitimacy by making decisions it knows will be carried out, we would expect to see the CAS either duck contentious cases like Jerome Young's, or worse, align its decisions with the interests of more powerful Olympic institutions.²³⁴ As the Young case makes very clear, if the CAS refuses to rule in favour of powerful Olympic institutions, these institutions may simply find other extra-legal ways of accomplishing their desired ends.²³⁵

This in mind, Professor Hjalte Rasmussen's warning to the European Court of Human Rights seems equally applicable to the CAS. Namely, all is lost if the CAS becomes no more than "the red-robed puppet of the powerful."²³⁶

²³³ *Ibid.*

²³⁴ See Jonathan I. Charney, "Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance" in Lori F. Damrosch, ed., *The International Court of Justice at a Crossroads* (New York: Transnational Publishers, Inc., 1987) 288.

²³⁵ The aftermath of the Jerome Young case is interesting, and was discussed in further detail earlier in this paper.

²³⁶ Hjalte Rasmussen, "Between Self-Restraint and Activism: A Judicial Policy for the European Court" (1988) 13(1) Eur. L. Rev. 28 at 37.

The Hondo Case: The CAS faces an external assault

German cyclist Danilo Hondo and his inventive lawyer are the latest and perhaps greatest threat to the CAS's authority. For years, Hondo was a relatively obscure cyclist, overshadowed by more celebrated German riders like Jan Ullrich and Erik Zabel. In fact, Hondo spent nearly six years toiling as Zabel and Ullrich's *domestique*.²³⁷ But in 2004, Hondo was signed to lead vaunted Team Gerolsteiner, and made an immediate splash. In addition to eight great stage wins, Hondo took points classification victories in no less than four stage races — including three in Germany. He capped his season with a victory at the GP Beghelli, a highly regarded Italian race.²³⁸

By all indications, Hondo was continuing on his path to greatness at the start of 2005. In March, Hondo placed second at the Milan-Sanremo Classic, a so-called “Monument” of the European pro cycling calendar.²³⁹ And at Spain's Tour of Murcia, Hondo won two stages and finished eighth overall.²⁴⁰

Unfortunately for Hondo, he also tested positive at Murcia for carphedon, a banned stimulant said to increase physical endurance.²⁴¹ As a result, Team Gerolsteiner terminated his contract, and the International Cycling Union (UCI, the international federation that governs the sport of cycling) pushed to ban Hondo for two years.²⁴² On 11 July 2005, CAS formally upheld the UCI's two-year ban against Hondo.²⁴³

Hondo, however, did not accept the CAS's verdict. Instead, Hondo exploited a loophole in Swiss law that allowed him to challenge the CAS judgment in the Swiss equivalent of state court. Under a little-known

²³⁷ In the sport of cycling, a domestique is a rider who works solely for the benefit of the team leader. For example, a domestique will block wind, fetch water, and, in Hondo's case, drag the team leader to the head of the pack for a final sprint. See e.g. Mark Taylor, “Tour de France” *The Roanoke Times* (6 July 2001) C6.

²³⁸ Hedwig Kröner, “From Lead-Out Man to Leader: An Interview with Danilo Hondo” (23 November 2004), online: Cyclingnews <http://www.cyclingnews.com/riders/2004/interviews/?id=danilo_hondo04>.

²³⁹ “Hondo suspended after failed test” (1 April 2005), online: CNN <<http://www.cnn.com/2005/SPORT/04/01/cycling.hondo/index.html>>.

²⁴⁰ “Gerolsteiner Sack Hondo After Positive B Sample” *Agence France Presse* (14 April 2005).

²⁴¹ “Hondo dismissed over positive test” (14 April 2005), online: CNN <<http://www.cnn.com/2005/SPORT/04/14/cycling.hondo/index.html>>.

²⁴² “CAS Upholds Hondo's Suspension” *Associated Press* (10 January 2006), online: VeloNews <<http://www.velonews.com/race/int/articles/9365.0.html>>.

²⁴³ See *Hondo v. UCI*, (10 January 2006), online: Court of Arbitration for Sport <<http://www.tas-cas.org/fr/pdf/hondo.pdf>>.

Swiss statute, the decisions of an arbitral tribunal (like the CAS) can be challenged in local courts, if the applicant is a resident of that locality. Because Hondo happened to keep a home in the canton of Vaud, he could file for injunctive relief with Vaud's Court of Appeals. He argued that the anti-doping rules (specifically, strict liability for a positive drug test and an automatic two-year suspension for an athlete's first positive drug test) were contrary to basic Swiss rights.

In a decision that sent shockwaves through the entire Olympic Movement, this local court granted Hondo an injunction, pending a full hearing on the matter.²⁴⁴

There have been several athletes who have challenged CAS rulings in various domestic courts. Invariably, these athletes failed to obtain any relief. That is, until Danilo Hondo. He was the first athlete to ever get a domestic court to actually suspend a CAS ruling.²⁴⁵ Hondo was pleased to be the trailblazer, stating: "The court took our arguments seriously, and I am very happy about it . . . I have been training all along and am in good shape. Now I have to see what happens, so that I can start riding again as soon as possible."²⁴⁶ His attorney noted, "We were rewarded for not giving up the fight."²⁴⁷

Olympic and CAS officials are now scrambling to respond to this potential disaster. Hondo's innovative use of Swiss law makes it is easy to imagine thousands of Olympic athletes now scrambling to purchase a Swiss home, in order to take advantage of this newfound ability to suspend and review CAS judgments in a local court. CAS General Secretary Matthieu Reeb has acknowledged the precarious position the CAS finds itself in. "This is really a concern. We hope that the decision of the local court will not open a door, an invitation, to all athletes to establish their domiciles in Switzerland."²⁴⁸

For its part, the World Anti-Doping Agency has attempted to downplay the importance of the Swiss court's injunction. It points out that Hondo "has not yet submitted his brief on the merits of the case to the Court of Appeal of Canton de Vaud," and that the Swiss court's decision "is not based on the merits of the case (which have yet to be filed by the athlete), and does not pre-judge the final outcome of the appeal." Hence, Olympic officials insist, "it is . . . misleading to claim

²⁴⁴ "CAS, Swiss Court at Odds" *The Toronto Sun* (23 March 2006) S23.

²⁴⁵ *Ibid.*

²⁴⁶ Susan Westemeyer, "Hondo free to race again" (17 March 2006), online: Cyclingnews <<http://www.cyclingnews.com/news.php?id=news/2006/mar06/mar17news2>>.

²⁴⁷ *Ibid.*

²⁴⁸ "Confusion after court suspends ban" (22 March 2006), online: Supercycling <[http://www.supercycling.co.za/default.asp?id=174155&des=article&scat=super cycling/international](http://www.supercycling.co.za/default.asp?id=174155&des=article&scat=super%20cycling/international)>.

that [the Swiss court's] decision constitutes . . . an annulment of the CAS decision . . ."²⁴⁹ For his part, CAS General Secretary Matthieu Reeb does not appear particularly worried about having the CAS's decision ultimately overturned. He stated, "The athlete tested positive for carphedon and he had no explanation at all to say why carphedon was found in his urine . . . So I don't know what the (Vaud court) will say if it thinks there is something wrong."²⁵⁰

However, there is reason to think that the situation is far graver than Olympic and CAS officials let on. Courts in Vaud do not give out injunctions on a whim. Swiss and Vaud civil procedure makes clear that some strong basis must exist in order for a court to grant this temporary relief.

How the Swiss court ultimately resolves this case will certainly have some impact on the authority of the CAS. Regardless of how the local court ultimately decides, however, it has already demonstrated just how fragile a CAS speech act can actually be. One small court sitting in an isolated Swiss canton was able to single-handedly suspend the force of the CAS's words, and reinstate Hondo's ability to compete as a professional cyclist. With a mere injunction, public confidence in the Supreme Court for World Sports has been shaken.

CONCLUSION

The Court of Arbitration for Sport was envisioned as the "supreme court for world sport," a place that could settle athletic disputes from around the world with speed, efficiency, and finality. After twenty-two years, Juan Antonio Samaranch's dream is reaching fruition. In order to find out why the CAS succeeds while so many international tribunals fail, this paper analyzed the CAS along two dimensions: *party preference* and *speech act capability*. Both of these characteristics are crucial to the success of the CAS.

Party Preference for CAS

As for party preference, if an entrepreneurial court like the CAS is to succeed, there must be some reason why parties prefer it to other means of dispute resolution. Unless the CAS is a "value-adding" institution that is superior to alternatives, we would expect to see the CAS left with a barren docket, as parties in dispute would simply go elsewhere.

²⁴⁹ World Anti-Doping Agency, Press Release, "Clarification about Danilo Hondo case" (28 March 2006), online: WADA <<http://www.wada-ama.org/en/newsarticle.ch2?articleId=3115249>>.

²⁵⁰ *Supra* note 248.

Along the party preference dimension, the CAS rates very highly. Before the CAS, sports disputes were handled in two kinds of forums: domestic courts and internal hearings. For athletes, the CAS is vastly preferable to either of these alternatives. Domestic courts are slow, costly, and are often unable to settle disputes with finality. Internal hearings represent the ultimate “stacked deck”, as the athlete’s accuser also happens to be her judge, jury, and executioner. Olympic institutions also have plenty of reasons to prefer the CAS. Domestic courts are veritable legal minefields, where Olympic institutions face hostile local judges and unfamiliar laws. Internal hearings allow Olympic institutions to retain control over the outcome of a dispute, but also leave these institutions vulnerable to the public criticism that these decisions are sure to provoke.

Compared to these alternatives, the CAS is value-adding for both athletes and Olympic institutions, in that it preserves the best aspects of domestic courts and internal hearings, while avoiding most drawbacks. The CAS is fast, inexpensive, and (theoretically) impartial. At the same time, the CAS also represents “public relations insurance” for Olympic institutions, as they can essentially hoist any blame for controversial decisions onto the court. As such, it is easy to see why parties would be drawn to the CAS to resolve Olympic disputes.

However, the CAS’s universally value-adding status is coming under fire, as some athletes have complained about the court’s appointment process. Under the current CAS appointment system, Olympic institutions retain the ability to essentially ‘pack the court’ with nominees. Frequently, high-ranking members of Olympic institutions go so far as to name themselves to positions in the CAS! If more athletes perceive the CAS as overly biased or inherently unfair, the court may find itself with a barren docket, as Olympic athletes unionize or find other ways to resist CAS jurisdiction.

The CAS and Speech Act Theory

Words and language are the tools of any court. And in many cases, words and language are all a court has to work with. But words alone are not always enough to get parties to actually comply with a judgment. When the ICJ ordered Iran to release American hostages, the court’s words fell on deaf ears in Tehran.²⁵¹ When the U.S. Supreme Court, in *Worcester v. Georgia*, declared that Cherokee Indians in Georgia had a right to peaceably enjoy their land, the President of the United States

²⁵¹ *Supra* note 164 at 145 (observing that “Iran rejected the Court’s Order and Judgment that it release the American hostages in *Diplomatic and Consular Staff...*”).

scoffed.²⁵² Without the ability to compel action, the words of a court, to use Andrew Jackson's phrase, are "still born."²⁵³

The CAS, however, enjoys a unique advantage in this regard, because in its most high-profile cases, all the court needs are words. When the CAS declares, "Geoff is the true gold medal winner," and "Sam is NOT the gold medal winner," it by words alone can bestow the status of "gold medal winner" on Geoff and strip it away from Sam. As the *Young* case illustrated, it hardly matters whether Sam returns his physical gold medal or not, because being 'the gold medalist' has almost nothing to do with possession, and nearly everything to do with status. The CAS enjoys success because in this unique class of controversy, it wields a "quasi-magical" power to transmute a coveted Olympic medal into just a hunk of metal.²⁵⁴

The CAS deals in more than just medal disputes, of course. It also settles commercial and disciplinary matters. In these areas, the court looks much more like a typical international tribunal. It issues a verdict and requires some additional extra-lingual force to compel parties to comply. For the CAS, the *New York Convention*, a multi-national treaty, supplies this force.

The Court of Arbitration for Sport's ability to issue effective speech acts came under fire in two recent cases. The *Young* case illustrates how powerful Olympic institutions can undermine the CAS from within, by ignoring CAS verdicts and instead using extra-legal means to coerce weaker parties. The *Hondo* case drives home just how much the CAS relies on domestic courts to respect the CAS's judgment, as even a small local Swiss court was able to suspend a final verdict from the CAS.

The CAS is a remarkable anomaly among international tribunals, in that it has been wildly successful. At the same time, the court must be wary, as its curious success rests on the razor's edge. Unless the CAS is mindful of the looming threats outlined in this article, Samaranch's dream for the "supreme court for world sport" may yet fail.

²⁵² *Supra* note 172 at 413-14.

²⁵³ *Supra* note 173.

²⁵⁴ *Supra* note 157 at 170.