


5-29-2018

Doping Appeals at the Court of Arbitration for Sport: Lessons from *Essendon*

David Mahoney
Boston College Law School

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/bclr>

 Part of the [Dispute Resolution and Arbitration Commons](#), [Entertainment, Arts, and Sports Law Commons](#), and the [Food and Drug Law Commons](#)

Recommended Citation

David Mahoney, *Doping Appeals at the Court of Arbitration for Sport: Lessons from Essendon*, 59 B.C. L. Rev. 1807 (2018), <https://lawdigitalcommons.bc.edu/bclr/vol59/iss5/7>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact abraham.bauer@bc.edu.

DOPING APPEALS AT THE COURT OF ARBITRATION FOR SPORT: LESSONS FROM *ESSENDON*

Abstract: In recent years, there has been an increase in the growth of the sports industry globally. With it has come the growth of global sports arbitration. The Court of Arbitration for Sport (“CAS”), created in part because of the increase in sport-related arbitration, is designed to promote efficiency and uniformity in the resolution of disputes. Despite the noteworthy objectives of the CAS, recent developments, such as the supplement scandal surrounding the Essendon Football Club of the Australian Football League, highlight the pressure that endures between individual athletes and sport governing bodies. This pressure is especially clear in instances where athletes are found guilty of doping under the World Anti-Doping Agency (“WADA”) code, and the finding is appealed to the CAS. This Note, although recognizing the benefits of the CAS and the WADA code, argues that in light of recent events, individual athlete’s goals should be given a greater weight in doping appeals at the CAS. This Note also assesses whether specific amendments to the CAS code could achieve this change, and how effective such amendments would be.

INTRODUCTION

Traditionally, sport has brought cultures together, acting as a diplomatic tool to mitigate the effects of inter-state conflicts and transcend religious, linguistic, and social differences.¹ Recent events, however, have hampered the efficacy of sport as a means to bring societies together to promote peace, and have highlighted the need for strict oversight of sport governing bodies.² These

¹ See, e.g., *Adopting Resolution, General Assembly Reaffirms Role of Sport in Promoting Sustainable Development, Reconciliation in Strife-Torn Areas*, UNITED NATIONS (Oct. 26, 2015), <http://www.un.org/press/en/2015/ga11712.doc.htm> [<https://perma.cc/H873-F9G3>] (highlighting the U.N.’s commitment to using sport as a developmental tool in “areas of conflict”); *Bureau of Educational and Cultural Affairs*, U.S. DEP’T ST., <https://eca.state.gov/programs-initiatives/sports-diplomacy> [<https://perma.cc/887F-QASD>] (describing efforts to use “sports diplomacy” to bridge “sociocultural differences” and “bring people together”); *Spotlight on Landmark Vatican Conference on Faith and Sport*, VATICAN RADIO (Oct. 4, 2016, 2:53 P.M.), https://web.archive.org/web/20161110224005/http://en.radiovaticana.va/news/2016/10/04/spotlight_on_landmark_vatican_conference_on_faith_and_sport_/1262782 (describing a Vatican conference encouraging the use of sport to promote compassion and respect). The Olympic Charter aims to use sport to serve “the harmonious development of humankind” and recognizes that sport is a “human right.” INT’L OLYMPIC COMM., OLYMPIC CHARTER 13 (2015), https://stillmed.olympic.org/Documents/olympic_charter_en.pdf [<https://perma.cc/4BZZ-KSBG>].

² See Adam Hofstetter, *Can Sports Bring World Peace?*, THE ATLANTIC (Jan. 2010), <http://www.theatlantic.com/magazine/archive/2010/01/can-sports-bring-world-peace/307872/> [<https://perma.cc/4BZZ-KSBG>].

changes in the world of sport over the past twenty years have created other new challenges.³ Specifically, as sport transforms into a worldwide industry, individual athletes are often disadvantaged.⁴ For example, top Olympic officials enjoy the fruits of lucrative media and sponsorship agreements from the Olympic Games at the expense of Olympic athletes, who may only receive a fraction of this money.⁵ Moreover, the issues faced by modern athletes raise the broader question of how to better promote both the rights of individual athletes as well as the rights of sporting organizations.⁶

One reform involves an alteration to the balance of power between individual athletes and sport governing bodies, especially in international sport arbitration.⁷ In particular, the Court of Arbitration for Sport (“CAS”)—regarded as the highest court for international sport disputes—could play an important role in such reform.⁸ Reform of the CAS could have a particularly beneficial effect on athletes accused of doping violations under the World Anti-

perma.cc/JQ63-KGW5] (describing the deadly attack on the Togo national soccer team during the 2010 Africa Cup of Nations Tournament); *see also* Bruce Bean, *An Interim Essay on FIFA’s World Cup of Corruption: The Desperate Need for International Corporate Governance Standards at FIFA*, 22 ILSA J. INT’L & COMP. L. 367, 385 (2016) (advocating for greater corporate governance over FIFA in the wake of its 2015 corruption scandal); Leon Siciliano & Sophie Jamieson, *FIFA: A Timeline of Corruption—In 90 Seconds*, THE TELEGRAPH (Mar. 22, 2016, 11:04 A.M.), <http://www.telegraph.co.uk/football/2016/03/22/fifa-a-timeline-of-corruption-in-90-seconds/> [https://perma.cc/L3VS-5TPR] (summarizing major events in the 2015 FIFA corruption scandal).

³ *See* George Wright, *Sport and Globalization: The Meaning of Globalization*, OLYMPIC REV. (Olympic Studies Centre), 1999, at 17–19, <http://library.la84.org/OlympicInformationCenter/OlympicReview/1999/OREXXVI29/OREXXVI29q.pdf> [https://perma.cc/84SK-FK9D] (discussing the link between globalization and sport). One change witnessed in the sports world is the increased “implementation by the owners and managers of sport of globalized strategies designed to generate enormous profits.” *Id.* at 17. One challenge is addressing the difference in pay between IOC members and U.S. Olympic athletes. Will Hobson, *Olympic Executives Cash in on a ‘Movement’ That Keeps Athletes Poor*, WASH. POST (July 30, 2016), https://www.washingtonpost.com/sports/olympics/olympic-executives-cash-in-on-a-movement-that-keeps-athletes-poor/2016/07/30/ed18c206-5346-11e6-88eb-7dda4e2f2aec_story.html?utm_term=.8b6a4f224f0b [https://perma.cc/GA5W-4C5Z].

⁴ *See* Hobson, *supra* note 3 (discussing the financial challenges of many Olympic athletes).

⁵ *Id.*

⁶ *See generally, e.g., id.* (discussing balance of power between individual Olympic athletes and the organizations that compose the Olympic Movement).

⁷ *See* Antoine Duval, *The Rules of the Game: Three Pillars for a Reform of the Court of Arbitration for Sport: Independence, Transparency and Access to Justice*, PLAY THE GAME (Dec. 4, 2015), http://playthegame.org/news/comments/2015/019_three-pillars-for-a-reform-of-the-court-of-arbitration-for-sport-independence-transparency-and-access-to-justice/ [https://perma.cc/KKB7-LHRG] (proposing reforms to be made at the CAS).

⁸ *See id.*; Ron Katz, *The Supreme Court of Sport Needs to Be Reformed*, FORBES (Sept. 2, 2016, 12:36 AM), <http://www.forbes.com/sites/rkatz/2016/09/02/the-supreme-court-of-sport-needs-to-be-reformed/#6ff0ba937d7f> [https://web.archive.org/web/20161123001648/https://www.forbes.com/sites/rkatz/2016/09/02/the-supreme-court-of-sport-needs-to-be-reformed/] (advocating for CAS reform). CAS is an independent tribunal designed to resolve sports related legal disputes through arbitration. *Frequently Asked Questions*, CT. ARB. FOR SPORT, <http://www.tas-cas.org/en/general-information/frequently-asked-questions.html> [https://perma.cc/DE3G-F4MF]. The CAS is headquartered in Lausanne, Switzerland, and has regional offices in New York, USA and Sydney, Australia. *Id.*

Doping Agency (“WADA”) code.⁹ Moreover, improving the independence of the CAS could also improve its functioning and its image.¹⁰ The recent supplement scandal at the Essendon Football Club (“Essendon”) in the Australian Football League (“AFL”), resulting in the suspension of thirty-four of the club’s players, exemplifies the need for reform.¹¹

Part I of this note summarizes the structural, procedural, and jurisdictional aspects of the CAS, provides an overview of WADA, and summarizes the interaction between the two bodies.¹² Additionally, Part I stresses the historical and current need for global sport governing bodies.¹³ Part II engages in a discussion of the past issues faced by the CAS as well as WADA, the reforms made by CAS and WADA, and concludes with a synopsis of recent appeals at the CAS, which involve WADA and doping violations.¹⁴ Part III of this note affirms the advantages and importance of the CAS and WADA, but argues that the balance of power between athletes should be adjusted to better represent athletes’ interests in doping appeals at the CAS.¹⁵ In particular, Part III of this note explores whether a more customized approach between athletes and sports organizations would be effective, and also considers whether specific amendments to the CAS Code could alleviate some of the tensions discussed in Part II.¹⁶

I. AN OVERVIEW OF THE COURT OF ARBITRATION FOR SPORT AND THE WORLD ANTI-DOPING AGENCY

This part provides a historical overview of both the CAS and the WADA, as well as examines the interplay between these two bodies.¹⁷ Specifically, Section A examines the history, structure, and jurisdiction of the CAS.¹⁸ Section B turns to the history of WADA.¹⁹ Finally, Section C discusses the interaction between the CAS and WADA.²⁰

⁹ See Maureen A. Weston, *Doping Control, Mandatory Arbitration, and Process Dangers for Accused Athletes in International Sports*, 10 PEPP. DISP. RESOL. L.J. 5, 47–48 (2009) (discussing the need for “[m]eaningful [h]earing [r]ights” in doping proceedings at the CAS).

¹⁰ Rachele Downie, *Improving the Performance of Sport’s Ultimate Umpire: Reforming the Court of Arbitration for Sport*, 12 MELB. J. INT’L L. 315, 335 (2011).

¹¹ See Katz, *supra* note 8 (proposing reforms to the CAS); Roy Masters, *Essendon CAS Verdict: Inside the Court of Arbitration for Sport’s Decision*, THE AGE (Jan. 12, 2016), <http://www.theage.com.au/afl/afl-news/essendon-cas-verdict-inside-the-court-of-arbitration-for-sports-decision-2016-0111-gm3tb5.html> [<https://perma.cc/72ZN-VA9P>] (discussing CAS verdict).

¹² See *infra* notes 21–81 and accompanying text.

¹³ See *infra* notes 21–81 and accompanying text.

¹⁴ See *infra* notes 82–174 and accompanying text.

¹⁵ See *infra* notes 175–232 and accompanying text.

¹⁶ See *infra* notes 175–232 and accompanying text.

¹⁷ See *infra* notes 21–81 and accompanying text.

¹⁸ See *infra* notes 21–48 and accompanying text.

¹⁹ See *infra* notes 49–71 and accompanying text.

²⁰ See *infra* notes 72–81 and accompanying text.

A. The History, Structure, and Jurisdiction of the Court of Arbitration for Sport

During the 1980s, it became apparent that there was a need for a single, global sport arbitration body.²¹ This need was due to the increase in sport-related arbitration, the lack of a tribunal specialized in sport disputes, the lack of a sufficiently cost-effective manner of resolving such disputes, and the lack of binding, uniform decisions.²² To address these deficiencies, Judge Kéba Mbaye, then-member of both the International Olympic Committee (“IOC”) and the International Court of Justice (“ICJ”), formed a committee to formulate the founding statutes of the CAS.²³ As a result of this effort, the IOC ratified the statutes, and the CAS was established in 1984.²⁴

Today, the sport industry continues to grow.²⁵ In addition to the increased economic value of the sport industry, sport arbitrations at the CAS have also increased.²⁶ For example, in 2003, the CAS heard one hundred cases in one year for the first time.²⁷ As of 2016, the CAS hears over 350 cases per year.²⁸

The CAS maintains a list of roughly three hundred arbitrators of 87 different nationalities.²⁹ The CAS hears a wide range of sport-related disputes and

²¹ See Downie, *supra* note 10, at 316–17 (noting the disadvantage of resolving sport disputes in “piecemeal fashion,” and summarizing the creation of the CAS); *History of the CAS*, CT. ARB. FOR SPORT, <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> [<https://perma.cc/7B6M-LGKH>] (same).

²² Downie, *supra* note 10, at 316–17; *History of the CAS*, *supra* note 21.

²³ Downie, *supra* note 10, at 316–17; *History of the CAS*, *supra* note 21. “The IOC is a not-for-profit independent international organisation” designed to “build[] a better world through sport.” *The International Olympic Committee*, INT’L OLYMPIC COMMITTEE, <https://www.olympic.org/the-ioc> [<https://perma.cc/NEZ3-B38N>]. The revenue generated by the IOC is used to fund “athletes and sports organisations at all levels around the world.” *Id.*

²⁴ *History of the CAS*, *supra* note 21.

²⁵ See Darren Heitner, *Sports Industry to Reach \$73.5 Billion by 2019*, FORBES (Oct. 19, 2015, 7:15 AM), <http://www.forbes.com/sites/darrenheitner/2015/10/19/sports-industry-to-reach-73-5-billion-by-2019/#575927061585> [<https://web.archive.org/web/20180220162404/http://www.forbes.com/sites/darrenheitner/2015/10/19/sports-industry-to-reach-73-5-billion-by-2019/>] (explaining that a significant force behind such growth is the greater revenue from “media rights deals”).

²⁶ Antoine Duval & Giandonato Marino, *Quantifying the Court of Arbitration for Sport*, ASSER INT’L SPORTS BLOG (May 23, 2014), <http://www.asser.nl/SportsLaw/Blog/post/quantifying-the-court-of-arbitration-for-sport-by-antoine-duval-and-gianni-marino> [<https://perma.cc/FEX7-L2UN>] (discussing the increasing frequency of sports arbitration at the CAS).

²⁷ *Id.*

²⁸ *Id.* In general, CAS arbitration takes between six and twelve months to complete. *Frequently Asked Questions*, *supra* note 8. As for the appellate arbitration procedure, “[i]n the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.” *Code: Procedural Rules*, CT. ARB. FOR SPORT R49, <http://www.tas-cas.org/en/arbitration/code-procedural-rules.html#c251> [<https://perma.cc/57MZ-9LCW>]. Once the arbitration panel has been formed to hear the appeal, “the operative part of the award shall be communicated to the parties within three months after the transfer of the file to the Panel.” *Id.* at R59.

²⁹ *Frequently Asked Questions*, *supra* note 8.

is mainly comprised of two divisions: the Ordinary Arbitration Division and the Appeals Arbitration Division.³⁰ The Ordinary Arbitration Division hears disputes of a purely contractual nature, while the Appeals Arbitration Division deals with the resolution of disputes over decisions taken by a sport organization.³¹ Parties to CAS arbitration proceedings include individual athletes, media companies, clubs, and sports federations.³²

A panel of three arbitrators, who are chosen from the CAS list, hear arbitrations.³³ The selection procedure varies depending on which CAS division the dispute is submitted to.³⁴ For a dispute before the Ordinary Arbitration Division, each party selects its own arbitrator from the CAS list, while both parties together select the third arbitrator, who acts as president of the panel.³⁵ For a dispute before the Appeals Arbitration Division, the process is similar in that each party selects its own arbitrator from the CAS list.³⁶ The Appeals process differs in the selection of the third arbitrator who acts as president of the panel; the President of the Appeals Arbitration Division selects the third arbitrator rather than the parties.³⁷

In each dispute before the CAS, the three-arbitrator panel first determines whether it has jurisdiction.³⁸ In general, the CAS has jurisdiction to hear a dispute only if the parties already have an arbitration agreement in place that expressly states that in the event of arbitration, the CAS will hear the dispute.³⁹ A party may object to jurisdiction as a preliminary matter, in which case the court

³⁰ *Id.* Roughly 90% of cases heard by the CAS are heard by the Appeals Arbitration Division. Louise Reilly, *Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes*, 2012 J. DISP. RESOL. 1, 65. In addition, approximately 30% of CAS cases are doping-related. *Id.* at 70. In addition to the Ordinary Arbitration Division and the Appeals Arbitration Division, the CAS also contains an Ad Hoc Division and a Mediation Division. *Id.* at 65. The Ad Hoc Division is available to hear appeals during “major sports events” such as the Olympic Games, while the Mediation Division is available to parties in advance of entering into “an ordinary arbitration procedure.” *Id.*

³¹ *Frequently Asked Questions*, *supra* note 8. For example, the Ordinary Arbitration Division would hear challenges over “sponsorship contracts; licensing; and broadcasting and media rights[]” while the Appeals Arbitration Division would hear challenges such as “transfer and compensation disputes related to football and disciplinary sanctions for anti-doping rule violations[] . . .” Reilly, *supra* note 30, at 64–65.

³² *Frequently Asked Questions*, *supra* note 8.

³³ *Id.*

³⁴ *See id.* (describing the ordinary selection procedure and the appeals selection procedure).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* The President of the Appeals Arbitration Division is appointed by the International Council of Arbitration for Sport (“ICAS”), a twenty-member body tasked with the “administration and financing of the CAS” as well as facilitating “the settlement of sports-related disputes through arbitration.” *Code: Statutes of ICAS and CAS*, CT. ARB. FOR SPORT, <http://www.tas-cas.org/en/icas/code-statutes-of-icas-and-cas.html> [<https://perma.cc/384E-FCH5>].

³⁸ *Code: Procedural Rules*, *supra* note 28, at R39.

³⁹ *History of the CAS*, *supra* note 21.

must allow the opposing party to file a written submission on the issue of jurisdiction.⁴⁰ Finally, the governing CAS Code makes clear that this decision is to be made regardless of whether another action concerning the same subject matter between the parties is pending in another tribunal.⁴¹

The CAS is shaped by statutes and procedural rules.⁴² Procedural Rule 27, entitled “Application of the Rules,” sets out two main instances in which parties may bring disputes to the CAS.⁴³ First, parties may bring a dispute to the CAS if they had a previous arbitration agreement in place providing for recourse to the CAS.⁴⁴ Second, a dispute may be brought to the CAS in the form of an appeal against a decision by a sports association if the statutes of the association provide for appeals to the CAS.⁴⁵ For instance, the statutes of the Fédération Internationale de Football Association (FIFA) state that all disputes are to be resolved by the CAS and prohibit the seeking of relief in a domestic court of law, and that appeals against a FIFA decision may be made exclusively to the CAS only if internal remedies were exhausted.⁴⁶ Finally, Pro-

⁴⁰ *Id.* The panel, however, makes the final decision regarding jurisdiction. *Id.* Furthermore, the CAS has jurisdiction solely over disputes related to sport. *Code: Procedural Rules, supra* note 28, at R27; *History of the CAS, supra* note 21. As a practical matter, however, the CAS has never found it lacked jurisdiction over a dispute on the grounds that the subject matter was insufficiently related to sport. *History of the CAS, supra* note 21.

⁴¹ *Code: Procedural Rules, supra* note 28, at R39. R39 provides, inter alia, that “[t]he panel shall rule on its own jurisdiction, irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of proceedings.” *Id.*

⁴² *Code: Statutes of ICAS and CAS, supra* note 37. Although the statutes and procedural rules control the CAS and the ICAS, the procedural rules are only applicable to the CAS. *See Code: Procedural Rules, supra* note 28, at R27.

⁴³ *Code: Procedural Rules, supra* note 28, at R27.

⁴⁴ *Id.*

⁴⁵ *Id.* at R47. R47 specifically provides:

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

An appeal may be filed with [the] CAS against an award rendered by [the] CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned.

Id.

⁴⁶ FIFA, FIFA STATUTES 54–55 (Apr. 2016), http://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifastatutswen_neutral.pdf [<https://perma.cc/8CNX-BSMN>]. The statute specifically provides in relevant part that the CAS has the power to “resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents.” *Id.* at 54. The statutes further state that “[r]ecourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations.” *Id.* at 55. Moreover, the statutes add that “[r]ecourse may only be made to [the] CAS after all other internal channels have been exhausted” and grant FIFA and WADA rights to appeal. *Id.* at 54–55.

cedural Rule 57 provides that the CAS panel has complete power to conduct a review of the facts and the law and may exclude evidence in specific instances.⁴⁷ The ability to hear appeals and the broad scope of review it has when doing so means that the CAS plays an important role in sports-related dispute resolution.⁴⁸

B. The History of the World Anti-Doping Agency

Like the CAS, the WADA has come to play an important role in international sport.⁴⁹ WADA is an international, independent agency designed to combat doping in sport.⁵⁰ Established in 1999 pursuant to the Lausanne Declaration on Doping in Sport, WADA is based in Montréal, Canada and is supported by four regional offices throughout the world.⁵¹ A Foundation Board and an Executive Committee are the main bodies that govern WADA.⁵² Originally, the Olympic Movement funded WADA exclusively, but since 2002, funding has been split equally among the Olympic Movement and national governments.⁵³ WADA promotes the advancement of uniform, worldwide anti-

⁴⁷ *Code: Procedural Rules*, *supra* note 28, at R57.

⁴⁸ *History of the CAS*, *supra* note 21.

⁴⁹ See *Code Signatories*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/code-signatories#GovernmentFundedOrganizations> [<https://perma.cc/E9PG-8MK8>] (listing the signatories to the WADA Code).

⁵⁰ *Who We Are*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/who-we-are> [<https://perma.cc/J77P-QND8>]. In general, doping refers to the practice of using prohibited substances or methods to gain a competitive advantage. *What Is Doping?*, UNESCO, <http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/youth-space/what-is-doping/> [<https://perma.cc/RC4Y-KS6F>].

⁵¹ *Regional Offices*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/regional-offices> [<https://perma.cc/7YDD-U9BZ>]; *Who We Are*, *supra* note 50. The IOC organized the World Conference on Doping in February of 1999, which produced the Lausanne Declaration. *Who We Are*, *supra* note 50. The Conference and the Declaration, which ultimately established WADA, was prompted by the “Festina affair”—the expulsion from the Tour de France of an entire cycling team after the coach admitted to providing illegal drugs to the team members. Samuel Abt, *Top Team Expelled by Tour de France over Drug Charges*, N.Y. TIMES (July 18, 1998), <http://www.nytimes.com/1998/07/18/sports/top-team-expelled-by-tour-de-france-over-drug-charges.html> [<https://perma.cc/TF8J-6FTT>]; *The Festina Affair*, THE GUARDIAN (July 9, 2008, 6:07 P.M.), <https://www.theguardian.com/sport/gallery/2008/jul/09/tourdefrance.cycling> [<https://perma.cc/VY8C-KR3F>]. See *generally Governance*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/governance> [<https://perma.cc/EWE4-3BHY>] (describing the structure of WADA, which includes a “Foundation Board,” an “Executive Board,” and numerous committees).

⁵² *Governance*, *supra* note 51. WADA is also partially governed by several other committees, such as the Education Committee, the Compliance Review Committee, and the Athlete Committee. *Id.*

⁵³ *Funding*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/funding> [<https://perma.cc/VRS4-W3VS>]. The Olympic Movement is “the concerted, organised, universal and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympism.” OLYMPIC CHARTER, *supra* note 1, at 13. The Olympic Movement is chiefly composed of the IOC, the IFs, and the National Olympic Committees (“NOCs”). *Id.* at 17.

doping standards through the provisions contained in the World Anti-Doping Code (“WADA Code”), which entered into force in 2004.⁵⁴

The WADA Code is the principal document containing WADA’s rules and policies.⁵⁵ There are over six hundred sports organizations throughout the world that are signatories to the WADA Code, including the IOC and National Anti-Doping Organizations (“NADOs”).⁵⁶ By signing and accepting the WADA Code, the signatory agrees to bind itself to the principles articulated in the Code, and further agrees to implement and enforce the provisions of the Code.⁵⁷ WADA acts as a watchdog, monitoring the signatories to ensure they are effectively carrying out and enforcing the Code.⁵⁸ Particularly significant is Article 13.2.1 of the WADA Code, which provides that a decision involving an “International Event” or “International-Level Athletes” can only be appealed to the CAS.⁵⁹

Although the WADA Code is not itself binding authority on any member organization, WADA requires member organizations to adopt their own anti-doping rules consistent with the WADA Code.⁶⁰ For example, the WADA Code mandates that the IOC adopt anti-doping rules consistent with the WADA Code, and that International Sports Federations (“IFs”), in order to be recognized by the IOC, must also comply with the WADA Code.⁶¹ In addition, the WADA Code requires that, as a prerequisite to participation in the Olympics, any athlete or other personnel such as trainers and coaches consent to adhere to anti-doping rules consistent with the WADA Code.⁶²

⁵⁴ *The Code*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/what-we-do/the-code> [<https://perma.cc/HPJ8-JBUE>]; WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE 11 (2015), <https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf> [<https://perma.cc/Y5CE-BLYB>] [hereinafter WADA CODE]. The Code’s main purposes are to “protect the fundamental right [of athletes] to participate in doping-free sport,” encourage “health, fairness and equality” among athletes, and secure “harmonized, coordinated and effective” anti-doping efforts. WADA CODE, *supra*, at 11.

⁵⁵ WADA CODE, *supra* note 54, at 11.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 82. Article 13.2.1 provides that “[i]n cases arising from participation in an *International Event* or in cases involving *International-Level Athletes*, the decision may be appealed exclusively to CAS.” *Id.* Appendix 1 of the WADA Code defines an “International Event” as “[a]n Event or Competition where the International Olympic Committee, the International Paralympic Committee, an International Federation, a *Major Event Organization*, or another international sports organization is the ruling body for the *Event* or appoints the technical officials for the *Event*.” *Id.* at 135. Appendix 1 goes on to define an “International-Level Athlete” as one who “compet[e]s in sport at the international level, as defined by each International Federation, consistent with the International Standard for Testing and Investigations.” *Id.* at 136.

⁶⁰ Reilly, *supra* note 30, at 70; WADA CODE, *supra* note 54, at 102 (Articles 20.1.1–2).

⁶¹ Reilly, *supra* note 30, at 70; WADA CODE, *supra* note 54, at 102 (Articles 20.1.1–2).

⁶² WADA CODE, *supra* note 54, at 102 (Article 20.1.6).

In addition to overseeing global anti-doping enforcement and compliance, WADA is involved in many other tasks, such as increasing awareness of the dangers of doping through educational outreach and supporting scientific research designed to increase detection of banned substances.⁶³ There are a number of signatories to the Code, including Olympic Member Sport Federations, National Olympic Committees, government-funded organizations, and other independent sporting organizations.⁶⁴

Regarding investigations, WADA acts as an overseer of IFs as well as NADOs to ensure their compliance with the Code.⁶⁵ WADA makes clear that it is not involved in the punishment of athletes in instances where analysis of a lab sample shows the presence of a banned substance.⁶⁶ Instead of meting out punishments for doping violations, WADA acts as an appellate body.⁶⁷ WADA can exercise this appellate jurisdiction only after the NADO or IF has completed its investigation and decided on the proper punishment.⁶⁸ An example of WADA's appellate ability is contained in the FIFA statutes, which states that WADA has the right to appeal to the CAS any doping decision passed by FIFA or its affiliates.⁶⁹ Then, WADA may assess whether the relevant adjudication of the particular doping violation was in compliance with the Code; if WADA determines that the adjudication may not have been in compliance, it may appeal the decision to the CAS.⁷⁰ The CAS decision regarding a WADA appeal is considered final and cannot be appealed further, except if required by law relating to the nullification or implementation of an award.⁷¹

⁶³ *Education & Prevention*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/education-prevention> [<https://perma.cc/Q6E5-N4W7>]; *Research*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/research> [<https://perma.cc/4SQA-SCTM>].

⁶⁴ See *Code Signatories*, *supra* note 49 (listing the signatories to the WADA Code).

⁶⁵ *WADA's Role in Results Management*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/questions-answers/wadas-role-in-results-management> [<https://perma.cc/QMY9-AL8S>].

⁶⁶ *Id.* WADA calls such instances "adverse analytical findings." *Id.* In such instances, WADA only receives a "certificate of analysis" reporting the lab finding; it does not receive the name of any individual athlete. *Id.*

⁶⁷ *Id.* The NADOs or IFs are responsible for punishment. *Id.*

⁶⁸ *Id.*

⁶⁹ FIFA STATUTES, *supra* note 46, at 55. The full text of the relevant provision provides that "[t]he World Anti-Doping Agency (WADA) is entitled to appeal to CAS against any internally final and binding doping-related decision passed in particular by the FIFA, the confederations, member associations or leagues in accordance with the provisions set out in the FIFA Anti-Doping Regulations." *Id.*

⁷⁰ WADA CODE, *supra* note 54, at 81–83. The Code provides that cases involving international athletes or participation in an international sporting event "may be appealed exclusively to CAS." *Id.* at 82. As to which parties may appeal in such instances, Article 13.2.3 specifically names the parties, which include the individual athlete, the athlete's national anti-doping organization, and WADA, as parties to whom appeal is available. *Id.* at 83–84.

⁷¹ *Id.* at 82 (see Comment to Article 13.2.1). For example, the Swiss Private International Law Act permits CAS awards to be appealed to the Federal Supreme Court of Switzerland. LUCIEN W. VALLONI & ALWIN KELLER, FRORIEP, NOTES ON THE SWISS FEDERAL COURT'S PRACTICE REGARDING THE AD-

C. *The Interaction Between the CAS and WADA*

As discussed, WADA creates and supports the WADA Code, in an effort to combat doping in sport, as well as supervises IFs and NADOs.⁷² In some cases, WADA may appeal decisions to the CAS.⁷³ CAS and WADA are both influential forces in the lives of athletes competing internationally.⁷⁴ For example, athletes typically waive their right to relief from domestic courts, instead agreeing to arbitration clauses that mandate disputes be submitted to the CAS.⁷⁵

Furthermore, athletes participating in international competitions are indirectly bound to agree to the Code.⁷⁶ Under WADA rules, athletes are required to submit to CAS jurisdiction regarding any arbitration.⁷⁷ In addition, a third party unrelated to the dispute, such as WADA, can appeal to the CAS.⁷⁸ This, however, can result in inconsistent and potentially problematic results.⁷⁹ These problems are compounded when one considers that the individual athlete must shoulder the unpredictability and costs that necessarily accompany a second proceeding at the CAS.⁸⁰ Because of these issues, both WADA and the CAS can impact athletes in a significant manner.⁸¹

MISSIBILITY OF SPORTS LAW-RELATED MATTERS 1 (Feb. 2014), <http://documents.lexology.com/27b73a8a-9af9-4539-a0ce-d648e47e38e5.pdf> [<https://perma.cc/R2SC-3ZX7>]. Appeals to the Swiss Supreme Court, however, are “allowed on a very limited number of grounds.” *Frequently Asked Questions*, *supra* note 8.

⁷² *The Code*, *supra* note 54; *WADA’s Role in Results Management*, *supra* note 65.

⁷³ *WADA’s Role in Results Management*, *supra* note 65.

⁷⁴ See Weston, *supra* note 9, at 5–6 (noting that athletes competing internationally “agree to mandatory arbitration” at the CAS and that athletes are required to follow the anti-doping rules of the WADA Code).

⁷⁵ *Id.*

⁷⁶ See Reilly, *supra* note 30, at 70 (explaining that IFs are required “to adopt anti-doping rules which are in compliance with the WADA Code” and also binding on their athletes).

⁷⁷ Melissa Hewitt, Note, *An Unbalanced Act: A Criticism of How the Court of Arbitration for Sport Issues Unjustly Harsh Sanctions by Attempting to Regulate Doping in Sport*, 22 IND. J. GLOBAL LEGAL STUD. 769, 769 (2015).

⁷⁸ Maureen A. Weston, *Simply a Dress Rehearsal? U.S. Olympic Sports Arbitration and De Novo Review at the Court of Arbitration for Sport*, 38 GA. J. INT’L & COMP. L. 97, 101 (2009).

⁷⁹ See *id.* at 102–03 (noting that such a process can result in further penalties and additional costs). Weston notes the disciplinary proceedings of Tyler Hamilton, in which the U.S. Anti-Doping Agency imposed a penalty of eight years. *Id.* at 101. WADA, not involved in the disciplinary proceeding, however, elected to appeal the decision to CAS, asking CAS for a lifetime ban from the sport. *Id.*

⁸⁰ *Id.* at 102. For example, cyclist Floyd Landis spent over \$2 million related to a public arbitration and appeal to the CAS, in an effort to defend doping charges against him. Weston, *supra* note 9, at 9–10.

⁸¹ See Weston, *supra* note 78, at 102–03 (discussing consequences of “anti-doping” agencies, such as WADA, appealing to the CAS).

II. ISSUES FACED BY THE COURT OF ARBITRATION FOR SPORT AND THE NEED FOR REFORM

This part discusses historical challenges and contemporary issues regarding the CAS, as demonstrated by three doping-related cases.⁸² Section A provides a background of the early concerns directed at the CAS.⁸³ Section B then summarizes a CAS decision, *Gundel v. Fédération Equestre Internationale*, which ultimately motivated reform at the CAS.⁸⁴ Section C highlights a more recent CAS decision involving German speed-skater Claudia Pechstein.⁸⁵ Finally, Section D discusses the recent supplement scandal involving Essendon of the AFL, in order to illustrate issues that still exist in the context of doping appeals to the CAS.⁸⁶

A. Historical Issues Faced by the CAS

Since its establishment, the CAS has had to endure allegations that it was not an independent and impartial tribunal.⁸⁷ For instance, in its early days, the CAS and the IOC were closely connected, as the IOC exerted substantial financial control and played a significant role in the governance and composition of the CAS.⁸⁸

The arbitrator selection process exemplifies the influence the IOC possessed over the CAS.⁸⁹ The composition of the arbitrator selection pool was done in the following manner: the IOC nominated fifteen persons, the President of the IOC nominated fifteen persons, the National Olympic Committees nominated fifteen persons, and the International Federation for Olympic sports nominated the final fifteen.⁹⁰ Thus, the sixty arbitrators were all, either directly or indirectly, chosen by an Olympic organization.⁹¹ Perhaps more importantly, individual athletes did not have any immediate input in the procedure.⁹²

⁸² See *infra* notes 87–174 and accompanying text.

⁸³ See *infra* notes 87–95 and accompanying text.

⁸⁴ See *infra* notes 96–119 and accompanying text.

⁸⁵ See *infra* notes 120–136 and accompanying text.

⁸⁶ See *infra* notes 137–174 and accompanying text.

⁸⁷ Downie, *supra* note 10, at 320–21. See generally *History of the CAS*, *supra* note 21.

⁸⁸ See Downie, *supra* note 10, at 321 (noting that in its early years, the CAS was “financially and administratively dependent on the IOC” and that the IOC was tasked with appointing the CAS arbitrators); *History of the CAS*, *supra* note 21 (noting that the IOC shouldered the entire operating costs of the CAS and that the CAS founding statute could only be amended with the consent of the IOC).

⁸⁹ Daniel H. Yi, *Turning Metals into Metal: Evaluating the Court of Arbitration for Sport as an International Tribunal*, 6 ASPER. REV. INT’L BUS. & TRADE L. 289, 296–97 (2006).

⁹⁰ *Id.* at 296–97.

⁹¹ *Id.* The CAS initially contained sixty arbitrators, although this figure was subsequently increased. *Id.* at 296, 299.

⁹² *Id.* at 297.

Examples such as the arbitrator selection process cast doubt upon both the impartiality of the CAS arbitrators and the independence of the CAS.⁹³ In fact, one commentator characterized the CAS as the “little sibling of the IOC.”⁹⁴ These concerns over independence and impartiality plagued the integrity of the CAS and eventually were the catalyst for a series of major reforms to the institution.⁹⁵

B. Gundel v. Fédération Equestre Internationale: *A Turning Point at the CAS*

1. Facts and Procedural History

The need to reform the CAS to better ensure independence and impartiality was highlighted in the 1993 CAS decision of *Gundel v. Fédération Equestre Internationale*.⁹⁶ The case involved a German equestrian rider, Elmar Gundel, accused of doping his horse in order to gain a competitive edge at a leading international competition.⁹⁷ After Gundel’s horse tested positive for a banned substance, the International Equestrian Federation (“FEI”) fined Gundel and suspended him from competition for a period of three months.⁹⁸ Disappointed with the FEI’s decision, Gundel appealed the penalty to the CAS, which ultimately reduced his suspension to only one month.⁹⁹ Despite this partial victory at the CAS, Gundel elected to appeal the CAS decision to the Swiss Supreme Court (“SFT”).¹⁰⁰ Gundel’s theory on appeal to the SFT was that the CAS

⁹³ See *History of the CAS*, *supra* note 21.

⁹⁴ Downie, *supra* note 10, at 321 (quoting and citing Gabrielle Kaufmann-Kohler, *Sports Marketing: Tax and Finance* (paper presented at the IOC Museum, Lausanne, Switzerland, 1994)).

⁹⁵ See *id.* at 321–22 (discussing the *Gundel* decision and the reforms that followed).

⁹⁶ *Id.* at 320–21; *History of the CAS*, *supra* note 21. See *G. v. Fédération Equestre Internationale*, in *DIGEST OF CAS AWARDS 1986–1998*, at 561 (Kluwer Law Int’l, Matthew Reeb ed., 1998) (providing discussion of background, legal grounds for appeal, and analysis).

⁹⁷ Downie, *supra* note 10, at 321; Yi, *supra* note 89, at 297; *History of the CAS*, *supra* note 21. The competition, an “international jumping event,” took place in Aachen, Germany. *G. v. Fédération Equestre Internationale*, *supra* note 96, at 562.

⁹⁸ Downie, *supra* note 10, at 321; Yi, *supra* note 89, at 297–98. The International Equestrian Federation is “the world governing body of equestrian sport” whose goal is to “ensure that [e]vents . . . are conducted in a fair, consistent and structured way across the globe.” *My FEI Guide*, FEI, <http://inside.fei.org/myfeiguide> [<https://perma.cc/XYM8-Q4H4>].

⁹⁹ Downie *supra* note 10, at 321; Yi, *supra* note 89, at 297–98; *History of the CAS*, *supra* note 21. The CAS’s decision to reduce the suspension from three months to one month was not based upon an unreliable or faulty drug test of the horse—the CAS noted that it was “irrefutable” that banned substances were inside the horse. Downie, *supra* note 10, at 321. Rather, the CAS based its decision to reduce the suspension on the fact that the “mere presence” of the illegal drugs did not establish that Gundel intended to cheat. *Id.*

¹⁰⁰ Downie, *supra* note 10, at 321; Yi, *supra* note 89, at 297–98; *History of the CAS*, *supra* note 21. As noted *supra* note 71, decisions of the CAS may be appealed to the Swiss Supreme Court, in accordance with “Article 190 of the Swiss Private International Law Act.” VALLONI & KELLER, *supra* note 71, at 1.

award was unenforceable because it was not an independent and impartial award under Swiss law.¹⁰¹ Despite Gundel's efforts, the SFT upheld the CAS award, noting that the CAS was an independent arbitral tribunal.¹⁰²

Notwithstanding the SFT's approval of the CAS and the award handed to Gundel, the SFT did focus attention on the relationship between the CAS and the IOC.¹⁰³ In particular, the Swiss court found it troubling that the IOC was nearly entirely responsible for financing the CAS, that the IOC possessed the ability to change the CAS founding statute, and that the IOC wielded substantial influence in the appointment of the CAS arbitrators.¹⁰⁴ In light of these factors, the Swiss court, in dicta, expressed that it would be best if the CAS became more independent, both financially and structurally, from the IOC.¹⁰⁵

2. Post-Gundel Reforms at the CAS

In the wake of *Gundel*, “[t]he 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)” implemented reforms in an attempt to make the CAS more independent and impartial as a tribunal.¹⁰⁶ The chief reforms established a new organization to act as a buffer between the CAS and the IOC, enlarged the arbitrator selection pool, and diversified the funding of the CAS.¹⁰⁷

¹⁰¹ Downie, *supra* note 10, at 321; Yi, *supra* note 89, at 297–98; *History of the CAS*, *supra* note 21. Gundel argued that “the CAS was essentially controlled by Olympic institutions.” Yi, *supra* note 89, at 297. Article 190 of PILA sets out the grounds upon which an “award may . . . be annulled.” *Federal Statute on Private International Law*, SWISS CHAMBERS’ ARB. INSTITUTION, https://www.swissarbitration.org/files/34/Swiss%20International%20Arbitration%20Law/IPRG_english.pdf [<https://perma.cc/397J-47BR>] (see Article 190(2)). Such grounds include “if the arbitral tribunal was not properly constituted” and “if the award is incompatible with public policy.” *Id.* (see Articles 190(2)(a) and 190(2)(e)).

¹⁰² Downie, *supra* note 10, at 321; *History of the CAS*, *supra* note 21.

¹⁰³ Downie, *supra* note 10, at 321; Yi, *supra* note 89, at 297–98; *History of the CAS*, *supra* note 21.

¹⁰⁴ Yi, *supra* note 89, at 297–98; *History of the CAS*, *supra* note 21.

¹⁰⁵ Downie, *supra* note 10, at 321; Yi, *supra* note 89, at 298; *History of the CAS*, *supra* note 21.

¹⁰⁶ Yi, *supra* note 89, at 298 n.61; see Downie, *supra* note 10, at 321–22 (describing reforms); *History of the CAS*, *supra* note 21 (same). In addition to the major reforms described above, the CAS periodically amends its Code of Sports-Related Arbitration. See generally, e.g., Antonio Rigozzi et al., *The 2011, 2012, and 2013 Revisions to the Code of Sports-related Arbitration*, JUSLETTER, June 3, 2013, <http://lk-k.com/wp-content/uploads/RIGOZZI-HASLER-QUINN-The-2011-2012-2013-Revisions-of-the-CAS-Code-Jusletter-3-June-2013-Annex.pdf> [<https://perma.cc/739Q-RVKA>] (describing recent changes in the CAS Code). For an example of the periodic revisions made to the Code of Sports-Related Arbitration, see *Amendments to the Code of Sports-Related Arbitration*, CT. ARB. FOR SPORT (Jan. 1, 2017), http://www.tas-cas.org/fileadmin/user_upload/Amendments_Code_2017_tracked_changes.pdf [<https://perma.cc/9L4Y-6NKH>].

¹⁰⁷ Yi, *supra* note 89, at 298–99; see also Downie, *supra* note 10, at 321–22 (describing CAS reforms); *History of the CAS*, *supra* note 21 (same).

The first reform called for the creation of the International Council of Arbitration for Sport (“ICAS”), which replaced the IOC in its role as the governing and financing body of the CAS.¹⁰⁸ Responsibilities of ICAS, which was established in an effort to make the CAS more independent on the IOC, include overseeing the “administration and financing of the CAS,” as well as “appoint[ing] the CAS arbitrators.”¹⁰⁹ The second reform expanded the number of arbitrators available for parties to select—from sixty to a minimum of 150.¹¹⁰ The goal was to provide parties with greater diversity in their selections and ease the burden imposed by the CAS’s heavy caseload.¹¹¹ Finally, the CAS would no longer receive nearly all of its funding from the IOC.¹¹² Instead, in addition to receiving some funding from the IOC, the CAS would receive funding from other sources, such as private organizations and National Olympic Committees.¹¹³

Nevertheless, despite the aforementioned reform efforts, criticism surrounding the CAS did not disappear entirely.¹¹⁴ For example, the independence of the CAS was once again attacked in a 2003 case involving two Russian Olympic skiers who were disqualified by the CAS from the Winter Olympic Games in Salt Lake City.¹¹⁵ The two skiers appealed the CAS ruling to the SFT, which had to decide whether the CAS, in light of the previous reforms made, was sufficiently independent.¹¹⁶ The Swiss court ultimately upheld the CAS ruling, and unlike in *Gundel*, the court found the CAS and the IOC “sufficiently independent” of each other and the CAS a cornerstone of the sports world.¹¹⁷ Notwithstanding the Swiss court’s observance that the IOC and CAS were separate bodies, two recent cases have attracted further criticism of the

¹⁰⁸ Downie, *supra* note 10, at 321–22; Yi, *supra* note 89, at 298; *History of the CAS*, *supra* note 21. ICAS is a governing body of twenty “experienced jurists,” each “appointed for one or several renewable [term] period(s) of four years.” *Code: Statutes of ICAS and CAS*, *supra* note 37.

¹⁰⁹ *History of the CAS*, *supra* note 21.

¹¹⁰ Yi, *supra* note 89, at 299.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See *History of the CAS*, *supra* note 21; see also *Essendon 34: Further Consideration of the CAS Decision*, SNEDDEN HALL & GALLOP (Feb. 4, 2016), <https://www.shglawyers.com.au/news/legal-news/article/?id=essendon-34-further-consideration-of-the-cas-decision> [<https://perma.cc/HJA4-ZGD5>]; Mathias Wittinghofer & Sylvia Schenk, *A Never Ending Story: Claudia Pechstein’s Challenge to the CAS*, WOLTERS KLUWER: KLUWER ARB. BLOG (June 14, 2016), <http://kluwerarbitrationblog.com/2016/06/14/a-never-ending-story-claudia-pechsteins-challenge-to-the-cas/> [<https://perma.cc/AE8B-DMEA>] (describing German speed-skater Claudia Pechstein’s challenge to the CAS in the German courts).

¹¹⁵ *History of the CAS*, *supra* note 21; see *Lazutina Loses Olympic Medals*, BBC (June 29, 2003), http://news.bbc.co.uk/sport2/hi/other_sports/3015952.stm (noting that the two Russian skiers’ “two-year bans for doping offences” were affirmed by the Swiss Federal Tribunal).

¹¹⁶ See *History of the CAS*, *supra* note 21.

¹¹⁷ *Id.*

CAS.¹¹⁸ In particular, such cases have brought to light the need for a fair balance of power between athletes and sport organizations at the CAS.¹¹⁹

C. Pechstein v. International Skating Union: *Another Challenge to CAS Independence and Impartiality*

The CAS ruling against German speed-skater Claudia Pechstein, and her subsequent appeal, highlighted issues that had troubled the CAS in *Gundel*.¹²⁰ Claudia Pechstein began her international speed-skating career in 1988 and since then, had competed in five Olympic Games.¹²¹ During her career, Pechstein captured many world, European and national titles, in addition to earning five gold medals and two bronze medals at the Olympics.¹²² Pechstein's legal battle chiefly emphasized the potential structural bias as well as the imbalanced arbitrator selection rules athletes must face in arbitration proceedings before the CAS.¹²³

Pechstein's legal battle began in 2009, when the International Skating Union ("ISU") charged Pechstein with blood doping and banned her from com-

¹¹⁸ See generally *Essendon CAS Verdict: Timeline of Events in the Supplements Saga*, THE AGE (Jan. 12, 2016), <http://www.theage.com.au/afl/essendon-cas-verdict-timeline-of-events-in-the-supplements-saga-20160107-gm0z20.html> [<https://perma.cc/JX9Z-6BLM>] (providing an overview of the events of the Essendon "supplements saga"); Wittinghofer & Schenk, *supra* note 114 (summarizing speed-skater Claudia Pechstein's legal journey).

¹¹⁹ See *The Essendon 34: A New Perspective*, SNEDDEN HALL & GALLOP (Jan. 15, 2016), <https://www.shglawyers.com.au/news/legal-news/article/?id=the-essendon-34-a-new-perspective> [<https://perma.cc/NZH7-XEE3>] (noting issues relating to "the compatibility between the forced nature of the CAS arbitration on the one hand and the rights of the players to a fair decision on the other"); Rosanna Ryan, *What's Wrong with WADA and the Court of Arbitration for Sport?*, ABC: RN BREAKFAST (Jan. 11, 2016), <http://www.abc.net.au/radionational/programs/breakfast/whats-wrong-with-wada-and-the-court-of-arbitration-for-sport/7081534> [<https://perma.cc/CDB8-MJN2>] (discussing the imbalance of power between athletes and sports organizations); Matt Slater, *Claudia Pechstein Puts Sport's Supreme Court on Trial*, BBC: SPORT (Feb. 19, 2015), <http://www.bbc.com/sport/31447368> [<https://perma.cc/D3SX-ABX2>] (noting the need for the "independence and transparency" in relation to sports "arbitration agreements").

¹²⁰ See Rebecca R. Ruiz, *Sports Arbitration Court Ruling Against German Speedskater Claudia Pechstein Is Upheld*, N.Y. TIMES (June 7, 2016), <https://www.nytimes.com/2016/06/08/sports/sports-arbitration-court-ruling-against-german-speedskater-claudia-pechstein-is-upheld.html> [<https://perma.cc/GR2K-XDZ7>] (noting issues raised in Claudia Pechstein's case); *G. v. Fédération Equestre Internationale*, *supra* note 96, at 561 (questioning the independence of the CAS); Wittinghofer & Schenk, *supra* note 114 (same).

¹²¹ Pechstein v. Int'l Skating Union, CAS 2009/A/1912, ¶ 1 (Court of Arbitration for Sport, Nov. 25, 2009), <https://www.isu.org/claudia-pechstein-case/2198-arbitral-award-cas/file> [<https://perma.cc/NLH2-U5GX>]. Pechstein had competed in five Olympic Games at the time of the CAS ruling. *Id.*

¹²² *Id.* In total, Pechstein has won over sixty medals while competing internationally since 1992. Wittinghofer & Schenk, *supra* note 114.

¹²³ See Peter Charlish, *The Biological Passport: Closing the Net on Doping*, 22 MARQ. SPORTS L. REV. 61, 82 (2011) (noting that Pechstein's appeal to the SFT related to the "independence" of the CAS); Amanda Coletta, *Speedskater Is Poised to Upend Rule of Sports' Highest Court*, N.Y. TIMES (Feb. 11, 2016), <https://www.nytimes.com/2016/02/12/sports/skater-challenges-supremacy-of-court-of-arbitration-for-sport.html> [<https://perma.cc/9WKF-YKDX>] (discussing arbitrator selection bias).

peting for two years.¹²⁴ Pechstein challenged the ISU decision at the CAS, arguing that the blood testing procedure employed by the ISU was flawed.¹²⁵ In addition, Pechstein pointed to the fact that she had never been the subject of a positive blood doping test at any point in her skating career.¹²⁶ Despite Pechstein's arguments, the CAS affirmed the ISU finding her guilty of blood doping and upheld the two-year competition ban.¹²⁷

In December 2009, Pechstein appealed the CAS decision to the SFT.¹²⁸ In her appeal, Pechstein requested the court set aside the CAS award, which affirmed her two-year ban.¹²⁹ Pechstein disputed the independence of the CAS, alleging that the IOC felt pressure to appear effective in its doping enforcement efforts, and that this pressure may have influenced the CAS decision.¹³⁰ The SFT flatly rejected her appeal, however, pointing out that Pechstein had failed to raise the issue of independence at the CAS proceeding.¹³¹

Although the SFT is the ultimate appellate tribunal for parties disputing CAS awards, Pechstein was nevertheless determined to continue her legal saga, choosing to take her case to the Munich Appeal Court.¹³² Significantly, the

¹²⁴ See Charlish, *supra* note 123, at 72 (noting that after the ISU charged Pechstein with blood doping, "the ISU Disciplinary Committee subsequently imposed a two-year ban on [her]"). See generally *Pechstein* (issuing the CAS arbitration award). "The International Skating Union [ISU] . . . is an association formed under the laws of Switzerland and having its seat in Lausanne, [Switzerland]." *Id.* ¶ 3. In addition, "[t]he ISU is recognized by the [IOC] as the international federation governing the sports of figure skating and speed skating worldwide." *Id.* Moreover, the ISU is a signatory to the WADA Code and thus its anti-doping program "fully follows the World Anti-Doping Agency (WADA) Code." *Clean Sport*, INT'L SKATING UNION, <https://www.isu.org/anti-doping> [<https://perma.cc/K2ZC-46GN>]; *Code Signatories*, *supra* note 49. The ISU accused Pechstein of violating Article 2.2 of the ISU Anti-Doping Rules, which is consistent with WADA's Anti-Doping Code. *Pechstein*, CAS 2009/A/1912 ¶ 12; Charlish, *supra* note 123, at 72.

¹²⁵ See Charlish, *supra* note 123, at 72–73 (setting out Pechstein's arguments against the ISU decision). The metrics employed by the ISU to assess the blood test results include, but are not limited to, "hemoglobin, hematocrit and percentage of reticulocytes." *Pechstein*, CAS 2009/A/1912 ¶ 7. The ISU found that Pechstein's percentage of reticulocytes, which are "immature red blood cells that are released from the bone marrow," were "abnormal," as the percentages were "well above" the normal range, and then decreased dramatically. *Id.* ¶¶ 7, 8, 10. In addition to questioning the validity of the blood testing, Pechstein asserted that a "chronic blood disorder and/or genetic abnormality" could explain her increased levels of reticulocytes. *Id.* ¶ 52.

¹²⁶ *Pechstein*, CAS 2009/A/1912 ¶ 46; Charlish, *supra* note 123, at 72.

¹²⁷ *Pechstein*, CAS 2009/A/1912 ¶¶ 212–215; Charlish, *supra* note 123, at 81.

¹²⁸ Nathalie Voser & Philipp Meier, *Swiss Federal Tribunal's Reasoning in the "Pechstein" Case Confirms Its Strict Approach to Petitions to Set Aside Arbitral Awards*, THOMSON REUTERS: PRACTICAL LAW (June 2, 2010), <http://uk.practicallaw.com/5-502-4343#> [<https://perma.cc/4QET-P95E>].

¹²⁹ *Id.* In addition to the appeal described above, Pechstein unsuccessfully challenged the ruling a second time at the SFT. Andrew Smith, *The Pechstein Judgment: CAS's Reaction & Potential Ramifications*, LAW IN SPORT (Apr. 17, 2015), <http://www.lawinsport.com/articles/item/the-pechstein-judgment-cas-s-reaction-potential-ramifications> [<https://perma.cc/E2SN-RXA9>].

¹³⁰ See Charlish, *supra* note 123, at 82.

¹³¹ *Id.* at 84–85.

¹³² Karolos Grohmann, *German Skater Pechstein Earns Key Court Win over ISU*, REUTERS (Jan. 15, 2015, 5:28 AM), <http://www.reuters.com/article/us-doping-skating-pechstein-idUSKBN0K0>

Munich Appeal Court found the arbitration clause between Pechstein and the ISU to be invalid as a violation of German competition law.¹³³ In addition, the Munich appellate court stated that the CAS decision was invalid and that it would not recognize the decision.¹³⁴ The court reasoned that the arbitration agreement between the ISU and Pechstein was contrary to German law and thus against public policy, and so, pursuant to the New York Convention, the court decided not to recognize the award.¹³⁵

0X220150115 [<https://perma.cc/N5QF-Z9AB>]. At the Munich appellate court, Pechstein sought 4.4 million euros from the ISU for lost wages as a result of the suspension. Coletta, *supra* note 123. Pechstein was able to reach the Munich appellate court after first disputing the CAS award in the Regional Court of Munich. Wittinghofer & Schenk, *supra* note 114. The Munich appellate court, or the Higher Regional Court, “hear[s] appeals against judgements of the regional courts.” *Ordinary Courts—Germany*, EUR. E-JUST. PORTAL, https://e-justice.europa.eu/content_ordinary_courts-18-de-maximize-MS-en.do?member=1 [<https://perma.cc/7YBR-6XJH>] (last updated Sept. 9, 2016). In general, an “award” refers to “[a] final judgment or decision, esp. one by an arbitrator or by a jury assessing damages.” *Award*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹³³ Smith, *supra* note 129. It should be noted that in February 2014, the *Landgericht München I* (Munich District Court), like the Munich appellate court, found that the arbitration agreement between Pechstein and the ISU was not valid. *Id.* Nevertheless, the Munich District Court believed itself to be bound by the CAS decision, finding that the issues were barred by *res judicata*. Wittinghofer & Schenk, *supra* note 114. The Munich appellate court did not find a “dominant sport organization” conditioning athlete participation in international sport events on the signing of an arbitration agreement to be *per se* invalid. *Id.* The court, however, did find that the agreement between Pechstein and the ISU was invalid. *Id.* In finding the agreement invalid, the court noted that “[t]he ISU is a monopolist on the market for the access to Speed-Skating World Championships and therefore in a dominant position” and that “the fact that ISU required . . . Pechstein to sign an arbitration agreement in favour of [the] CAS is an abuse of dominant position.” *Oberlandesgericht München [OLG of Munich]* Jan. 15, 2015, Az. U 1110/14 Kart, ¶¶ 76, 93 (Ger.), translated in Antoine Duval, *Translation of the Pechstein Ruling of the OLG München*, <https://goo.gl/9uR7H2> [<https://perma.cc/KE8G-8HKB>] [hereinafter *Translation of the Pechstein Ruling*].

¹³⁴ Grohman, *supra* note 132. The Munich court commented in detail on the composition of the ICAS, the selection of CAS arbitrators, and the imbalance of power between athletes and sport associations. *See generally Translation of the Pechstein Ruling*, *supra* note 133 (translating the ruling of the Munich appellate court). For example, the court was of the opinion that the “provisions regulating the selection of the potential CAS arbitrators favour the sports associations in disputes against athletes . . . embedding a structural imbalance that is threatening the neutrality of [the] CAS” and that “[t]here is no rational justification for such an imbalance in favour of the sports associations.” *Translation of the Pechstein Ruling*, *supra* note 133, ¶¶ 104, 109.

¹³⁵ Danielle Sharkey et al., *Skating on Thin Ice: The Independence of CAS Challenged*, DLA PIPER: MEDIA, SPORT & ENT. ONLINE (Mar. 4, 2015), <http://blogs.dlapiper.com/mediaandsport/2015/03/skating-on-thin-ice-the-independence-of-cas-is-challenged-2/> [<https://perma.cc/RQR6-W2GE>]. The New York Convention (officially The Convention on the Recognition and Enforcement of Foreign Arbitral Awards), allows for the “recognition and enforcement of foreign arbitral awards,” which requires that contracting States “recognize . . . [arbitral] awards as binding and to enforce them.” *In Brief*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/in+brief> [<https://perma.cc/AL7J-WEG9>]. In Pechstein’s case, the Munich appellate court concluded that the CAS award “[could not] be recognized due to § 1061 Abs. 1 Satz 1 ZPO in relation with [Art. V(2)(b)] of the New York Convention.” *Translation of the Pechstein Ruling*, *supra* note 133, ¶ 131. Article V(2)(b) provides: “2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: . . . (b) The recognition or enforcement of the award would be contrary to the public policy of that country.” *See* U.N. Convention

Although the Bundesgerichtshof (German Federal Court of Justice), the top civil court in the nation, would later rule against Pechstein and affirm the legitimacy of the CAS as an independent arbitral body, Pechstein's legal journey through the courts brought to light the inadequacies that persisted at the CAS.¹³⁶

D. The Essendon Supplement Scandal: Highlighting the Potential Inconsistency Between First-Instance Tribunals and the CAS

1. Facts and Procedural History

In addition to the charges of institutional bias and lack of independence exposed in the *Pechstein* legal saga, appeals adjudicated by the CAS can lead to inconsistencies between the CAS and the relevant domestic authority.¹³⁷ The standard of review employed by the CAS Appeals Division is partly to blame for such varied results.¹³⁸ This *de novo* standard of review allows the CAS Appeals Division to re-examine the factual record as if doing so in the first instance.¹³⁹ This ability, coupled with the fact that the awards by the CAS Appeals Division are considered “final and binding,” can have adverse effects on athletes.¹⁴⁰ The recent case involving Essendon of the AFL has illustrated the conflicting results of the CAS and the domestic disciplinary body.¹⁴¹ The con-

on the Recognition and Enforcement of Foreign Arbitral Awards (June 7, 1958), <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> [<https://perma.cc/ADV9-RCZ8>] (see Article V(2)).

¹³⁶ See Wittinghofer & Schenk, *supra* note 114.

¹³⁷ See Coletta, *supra* note 123; Ryan, *supra* note 119.

¹³⁸ See Weston, *supra* note 78, at 113.

¹³⁹ See *id.* *De novo* judicial review refers to “[a] court’s review of a lower court’s or an administrative body’s factual or legal findings.” See *Judicial Review*, BLACK’S LAW DICTIONARY (10th ed. 2014). For example, in *Pechstein*, the CAS characterized this *de novo* review as imposing the duty on the arbitration panel to “make [an] independent determination as to whether the parties’ contentions are inherently correct rather than to assess the correctness of the Appealed Decision.” *Pechstein*, CAS 2009/A/1912 ¶ 77. The panel in *Pechstein* also made clear that such *de novo* review would require the panel “not [to be] confined to deciding whether the body that issued the appealed ruling was correct or not.” *Id.*; see also *World Anti-Doping Agency v. Bellchambers.*, CAS 2015/A/4059, ¶ 114 (Ct. Arb. Sport, Jan. 11, 2016), http://www.tas-cas.org/fileadmin/user_upload/Arbitral_Award_WADA_ESSENDON.pdf [<https://perma.cc/J9SX-U9RQ>] (rejecting Essendon players’ contention that appeal should be not *de novo*). *De novo* review may be contrasted with abuse of discretion, which is the typical appellate review standard. See Weston, *supra* note 78, at 111 n.70.

¹⁴⁰ See Weston, *supra* note 78, at 113–14.

¹⁴¹ See, e.g., Grant Baker, *Essendon Chairman Lindsay Tanner Says It’s ‘Unlikely’ Banned Bombers Will Be Back on the Park This Season*, HERALD SUN (Feb. 10, 2016), <http://www.heraldsun.com.au/sport/afl/more-news/essendon-chairman-lindsay-tanner-says-its-unlikely-banned-bombers-will-be-back-on-the-park-this-season/news-story/06dc142ed1dff5ef00acb3316012baa1> [<https://perma.cc/NNX9-2B5W?type=image>]; Stephanie Chalkley-Rhoden, *Essendon ASADA Investigation: Players Not Guilty of Using Banned Peptide, AFL Anti-Doping Tribunal Finds*, ABC NEWS (Mar. 31, 2015), <http://www.abc.net.au/news/2015-03-31/essendon-supplements-afl-anti-doping-tribunal-decision/6361006> [<https://perma.cc/U4JE-5UE8>]. Australian football is a contact sport that is

troversy resulted in the twelve-month suspension of thirty-four Essendon players.¹⁴²

The heart of the dispute centered on Essendon's supplement program.¹⁴³ The program, designed and managed by the club's sport scientist, consisted of administering subcutaneous injections and pills to the players to stimulate soft tissue recovery time, thereby giving the players a physical advantage over their competition.¹⁴⁴ During the course of the supplement program, the club's sport scientist, as well as the club's head coach and performance coach, held a meeting with the players, after which the players signed forms consenting to the injections of certain drugs.¹⁴⁵ Moreover, the consent forms stated that the injected substances were compliant with WADA.¹⁴⁶ Although some players, as well as the team doctor, expressed their concerns about the program, the supplements continued to be given out to the players.¹⁴⁷

On February 5, 2013, Essendon decided to report itself to the AFL and to the Australian Sports Anti-Doping Authority ("ASADA"), exposing the performance enhancing sports supplement program that Essendon was administering to its athletes.¹⁴⁸ In August 2013, the AFL brought charges against Essen-

similar to rugby but is described as "uniquely Australian." *Introduction to Australian Football*, U.S. AUSTL. FOOTBALL LEAGUE, <https://us afl.com/intro#what> [<https://perma.cc/JAA5-4JV3>].

¹⁴² *Essendon Supplement Saga: Players Banned for 12 Months After WADA Appeal Upheld by Court of Arbitration for Sport*, ABC NEWS (Jan. 12, 2016), <http://www.abc.net.au/news/2016-01-12/cas-upholds-wada-appeal-essendon-anti-doping-verdict/7081874> [<https://perma.cc/RN3R-P9F4>]. The suspension was two years; however, WADA gave "credit . . . for any individual period of ineligibility already served." Media Release, Ct. Arb. Sport, WADA Appeal Against 34 Current and Former Players of Essendon Football Club Upheld; Violation of Anti-Doping Rules Established; Players Suspended (Jan. 11, 2016), http://www.tas-cas.org/fileadmin/user_upload/Media_Release_4059.pdf [<https://perma.cc/MQ7G-Z6R8>].

¹⁴³ See Carly Crawford, *Essendon Drugs Saga: How Stephen Dank Ran the Controversial Supplement Program*, HERALD SUN (Mar. 27, 2015), <http://www.heraldsun.com.au/sport/afl/teams/essendon/essendon-drugs-saga-how-stephen-dank-ran-the-controversial-supplement-program/news-story/ea77b17dfe9d7f67d8d0cac79f4f9aa5> [<https://perma.cc/7JER-V3A6?type=image>].

¹⁴⁴ See *id.*; see also *Bellchambers*, CAS 2015/A/4059 ¶ 25 (mentioning the team doctor's unease over "players being given subcutaneous injections").

¹⁴⁵ *Bellchambers*, CAS 2015/A/4059 ¶ 27; Crawford, *supra* note 143. The "patient information/informed consent" forms "were signed by the players "either at the meeting or shortly thereafter." *Bellchambers*, CAS 2015/A/4059 ¶ 27.

¹⁴⁶ *Bellchambers*, CAS 2015/A/4059 ¶ 27.

¹⁴⁷ *Id.* ¶¶ 24, 25. For example, Essendon's team doctor expressed his unease about the program to the head coach and the performance coach, writing that "we are playing at the edge and this will read extremely bad in the press for our club and for the benefits and also for side effects that are not known in the long term. I have trouble with all these drugs." *Id.* ¶ 25.

¹⁴⁸ *Essendon CAS Verdict: Timeline of Events in the Supplements Saga*, THE AGE (Jan. 12, 2016), <http://www.theage.com.au/afl/essendon-cas-verdict-timeline-of-events-in-the-supplements-saga-20160107-gm0z20.html> [<https://perma.cc/8DS6-KXF3>]. ASADA is the "national anti-doping organisation" of Australia. *About*, AUSTL. SPORTS ANTI-DOPING AUTHORITY, <https://www.asada.gov.au/about-asada> [<https://perma.cc/XF8K-U58V>]. The purpose of ASADA is to "protect the health of athletes and the integrity of . . . sport through engagement, deterrence, detection and enforcement." *Id.* Moreover,

don and certain Essendon personnel in connection with the supplement program.¹⁴⁹ The AFL subsequently implemented various penalties against the club and staff, including barring the club from playing in the league championship, a loss of future draft picks, and a two million dollar fine.¹⁵⁰

This self-reporting prompted ASADA to begin its own investigation of the supplement program, which commenced in February 2013.¹⁵¹ In November 2014, ASADA issued “infraction notices” to the players, alleging use of prohibited substances, which violated the AFL Anti-Doping Code.¹⁵² The case against the Essendon players, however, was based on circumstantial evidence; there was no direct evidence that each of the Essendon players injected the prohibited substances.¹⁵³ Later, in March 2015, an AFL Anti-Doping Tribunal found that the thirty-four Essendon athletes were not guilty of using banned substances.¹⁵⁴

Despite Essendon’s victory at the AFL tribunal, the club’s legal issues were far from over.¹⁵⁵ In August 2015, WADA announced that it would appeal the AFL tribunal’s exculpation of the Essendon players to the CAS.¹⁵⁶ WADA’s appeal at the CAS commenced in November 2015, and in January 2016, the CAS ruled that the AFL tribunal’s findings were to be vacated and the players suspended for the 2016 season.¹⁵⁷ Essendon then appealed the CAS verdict to

ASADA works closely with WADA in an attempt to “strengthen anti-doping practices globally”; ASADA’s efforts are in line with the WADA Code. *Id.*

¹⁴⁹ *Essendon CAS Verdict*, *supra* note 148.

¹⁵⁰ *Id.*

¹⁵¹ *Bellchambers*, CAS 2015/A/4059 ¶ 32.

¹⁵² *Id.*; James Kitching, *Not Comfortably Satisfied? The Upcoming Court of Arbitration for Sport Case of the Thirty-Four Current and Former Players of the Essendon Football Club.*, ASSER INT’L SPORTS L. BLOG (Sept. 4, 2015), <http://www.asser.nl/SportsLaw/Blog/post/not-comfortably-satisfied-the-upcoming-court-of-arbitration-for-sport-case-of-the-thirty-four-current-and-former-players-of-the-essendon-football-club-by-james-kitching> [https://perma.cc/DCY4-T5XE]. The AFL Anti-Doping Code is “effectively a mirror of the WADA Code.” *Id.*

¹⁵³ See Dan Trindade & Ruth Thevathasan, *Evidence, the Essendon 34, and the Employee Under Suspicion*, CLAYTON UTZ (Apr. 26, 2016), <https://www.claytonutz.com/knowledge/2016/april/evidence-the-essendon-34-and-the-employee-under-suspicion> [https://perma.cc/M5HE-9QDF] (noting that the CAS was “[p]resented with a raft of circumstantial evidence” and that “the case against the Essendon 34 [was developed] without a smoking syringe”).

¹⁵⁴ Chalkley-Rhoden, *supra* note 141.

¹⁵⁵ See, e.g., *World Anti-Doping Tribunal to Appeal AFL Anti-Doping Tribunal’s Essendon Verdict*, ABC NEWS (Aug. 25, 2015), <http://www.abc.net.au/news/2015-05-12/wada-to-appeal-afl-anti-doping-tribunal27s-essendon-verdict/6461996> [https://perma.cc/MNY8-87X2] (noting WADA’s decision to appeal Essendon’s case to the CAS).

¹⁵⁶ *Id.*

¹⁵⁷ *Essendon CAS Verdict*, *supra* note 148; see *Masters*, *supra* note 11 (describing the CAS decision against Essendon). The CAS decision was met with mixed reactions; although some claimed the CAS decision was best for the future of the sport and would discourage supplement abuse, others believed the Essendon players were “victims” and had committed no wrongdoing. See Shane de Barra, *AFL Players’ Association Unloads on the CAS in Essendon Saga*, SPORTING NEWS (Jan. 11, 2016), <http://www.sportingnews.com/au/afl/news/afl-players-association-unloads-on-the-cas-in-essendon>

the SFT, arguing that the CAS should not have employed a de novo standard in reviewing the AFL tribunal's finding of not guilty.¹⁵⁸ Rather, Essendon argued, the CAS should only have assessed whether the AFL tribunal committed an error of law.¹⁵⁹ The SFT dismissed Essendon's appeal, marking the end of the club's legal fight.¹⁶⁰

2. Aftermath

Essendon's misfortunes at the CAS have generated a new wave of criticism directed at the CAS and the World Anti-Doping Agency.¹⁶¹ One criticism of the CAS and WADA claims that athletes, such as the Essendon football players, are not party to any genuine agreement with the CAS or WADA.¹⁶² Thus, this criticism likens the *Essendon* decision to the *Pechstein* decision.¹⁶³ Moreover, such critics contend that global governing bodies, such as the CAS and WADA, attempt to execute global policies that interfere with the ability of national sport bodies to implement their own specific policies.¹⁶⁴ In short, the "one size fits all" model advanced by WADA and CAS is not the most effective way to forward individual athlete interests.¹⁶⁵ A more focused model—one that is geographically narrower in scope—would be more flexible and responsive to athlete needs.¹⁶⁶

Other criticisms focus on the differing theories employed at the AFL Anti-Doping Tribunal and at the CAS, which led to profoundly different results us-

saga/1n8glaz3e16gh1bw488qw5icr5 [https://perma.cc/Q9V6-XTTB] (noting different reactions to the CAS decision); Craig Fry, *Court of Arbitration Decision on Essendon Doping Was the Right One*, SYDNEY MORNING HERALD (Jan. 13, 2016), <http://www.smh.com.au/comment/court-of-arbitration-decision-on-essendon-doping-was-the-right-one-20160112-gm4ls3.html> [https://perma.cc/S2FA-CVRY] (reasoning that the CAS decision was correct).

¹⁵⁸ See Baker, *supra* note 141.

¹⁵⁹ *Id.*

¹⁶⁰ *Essendon Players Lose Swiss Court Appeal over Supplement Bans; Jobe Watson Could Lose 2012 Brownlow*, ABC NEWS (Oct. 11, 2016), <http://www.abc.net.au/news/2016-10-11/afl-doping-bans-over-essendon-supplements-court-appeal-fails/7923934> [https://perma.cc/R3CE-PZ5G].

¹⁶¹ See, e.g., *A Critique of the Essendon CAS Verdict (Part 1)*, THE ROAR (Jan. 17, 2016), <http://www.theroar.com.au/2016/01/17/a-critique-of-the-essendon-cas-verdict-part-1/> [https://perma.cc/M3FF-CSE7] (contrasting the AFL tribunal and the CAS judgments); Darren Kane, *Essendon CAS Verdict: Why Decision to Reverse AFL Tribunal's Bombers Decision Was Mystifying*, SYDNEY SUNDAY MORNING HERALD (Jan. 15, 2016), <http://www.smh.com.au/sport/essendon-cas-verdict-why-the-decision-to-reverse-afl-tribunals-bombers-decision-was-mystifying-20160115-gm61yh.html> [https://perma.cc/9D62-QFFK] (describing the CAS decision as "unanticipated").

¹⁶² Ryan, *supra* note 119.

¹⁶³ See *id.* (discussing both Claudia Pechstein's and Essendon's respective cases).

¹⁶⁴ See *id.* (noting that sports lawyer Brendan Schwab reasons that such global policies clash with "sport at the national level").

¹⁶⁵ *Id.*

¹⁶⁶ See *id.* (noting the issues with a global anti-doping procedure as well as the benefits of a more athlete-responsive method).

ing largely the same evidence.¹⁶⁷ More precisely, the AFL Anti-Doping Tribunal adopted a “links in the chain” evidentiary approach, while the CAS used a “strands in a cable” approach.¹⁶⁸ The “links in the chain” approach requires the case to be proven sequentially—if one fact in the sequence is not proven, the chain falls apart and the case cannot be proven.¹⁶⁹ In contrast, the “strands in a cable” approach simply looks at the totality of the circumstances, and generally makes it easier to prove the issue in question.¹⁷⁰ The use of two competing approaches in the same case has left some wondering what the appropriate standard in anti-doping proceedings should be.¹⁷¹ That completely opposite conclusions were reached on largely the same evidence drew significant skepticism.¹⁷²

In summary, the Essendon supplement scandal illustrates that, in the context of doping appeals, results at the CAS can clash with the decision of a domestic tribunal.¹⁷³ In particular, the opposite results of the AFL Anti-Doping Tribunal and the CAS in *Essendon* highlight the need for reform.¹⁷⁴

III. POTENTIAL RESPONSES TO THE ISSUES CONTAINED IN *ESSENDON*

Although the CAS and WADA have worthy goals, and are designed to foster efficiency, tension nevertheless exists between athletes and sport organi-

¹⁶⁷ *A Critique of the Essendon CAS Verdict (Part I)*, *supra* note 161; Kane, *supra* note 161.

¹⁶⁸ Natalie Hickey, *ASADA Said ‘Links in a Chain’; WADA Said ‘Strands in a Cable’: Which Was Right?*, SOC. LITIGATOR (Jan. 14, 2016), <https://sociallitigator.com/2016/01/14/asada-said-links-in-a-chain-wada-said-strands-in-a-cable-which-was-right/> [<https://perma.cc/6DL2-YADA>]; Gareth Towan, *The Essendon Decision: How a Different Decision Emerged from the Same Evidence*, BRISBANE TIMES (Jan. 13, 2016), <http://www.brisbanetimes.com.au/comment/the-essendon-decision-how-could-a-different-decision-emerge-from-the-same-evidence-20160113-gm4q4w.html> [<https://perma.cc/WSH2-DWYZ>].

¹⁶⁹ See *Bellchambers*, CAS 2015/A/4059 ¶ 109 (discussing “links in a chain” approach); Hickey, *supra* note 168 (same); Towan, *supra* note 168 (same). The AFL Anti-Doping Tribunal found that the links in the chain included: that the illegal substance (TB4) was obtained from China, that the illegal substance was then possessed by the club’s sports scientist, and that the sports scientist then injected the illegal substance to each accused player. Hickey, *supra* note 168. Because the AFL Anti-Doping Tribunal was not persuaded that each link was proven, ASADA lost the case. *Id.*

¹⁷⁰ See Hickey, *supra* note 168; Towan, *supra* note 168 (discussing the “strands in a cable” method and noting that it “is easier to apply”).

¹⁷¹ See *A Critique of the Essendon CAS Verdict (Part I)*, *supra* note 161 (asking what the proper “burden of proof” should be).

¹⁷² See *id.* (questioning the evidentiary method employed at the CAS); see also Courtney Walsh, *Essendon Doping Scandal: Reaction to CAS Verdict*, THE AUSTRALIAN (Jan. 12, 2016, 12:18 PM), <http://www.theaustralian.com.au/sport/afl/essendon-doping-scandal-reaction-to-cas-verdict/news-story/30ec9fe4cecc6551990029a66369cd1f> [<https://perma.cc/X2GG-7NG3>] (noting the mixed reactions to the CAS verdict).

¹⁷³ See *Essendon CAS Verdict*, *supra* note 148 (providing a “timeline of events in the [Essendon] supplements saga”).

¹⁷⁴ See Kane, *supra* note 161 (discussing the reversal of the AFL anti-doping tribunal’s decision by the CAS); Ryan, *supra* note 162 (noting some of the criticisms of the CAS).

zations, especially in doping appeals at the CAS.¹⁷⁵ More specifically, the *Essendon* and *Pechstein* cases highlight the tension between an individual athlete's right to a fair hearing and the governing sport body's interest in effectively prosecuting any offending athlete.¹⁷⁶ To minimize this tension, changes should be made at the CAS, specifically in dealing with doping appeals.¹⁷⁷ In arriving at this conclusion, the advantages and disadvantages of employing the current *de novo* standard at the CAS are explored, and the motivations for a more regional, or sport-specific anti-doping framework, which would allow for greater athlete input, are assessed.¹⁷⁸ Driven by the concerns and rationale underlying this framework, specific amendments to the CAS Code are recommended to protect individual athletes' rights.¹⁷⁹ Section A argues for the usage of a more deferential standard of review in doping appeals at the CAS.¹⁸⁰ Section B argues that a more regionalized and tailored anti-doping enforcement method should be embraced.¹⁸¹ Finally, Section C suggests specific changes to the CAS Code to accomplish these objectives.¹⁸²

A. De Novo Review at the CAS in WADA Appeals

The power and authority entrusted in the CAS does have certain advantages.¹⁸³ One advantage is that a supra-national body like the CAS can more effectively and efficiently handle international sport disputes compared to a national court, due to the global applicability of the CAS Code.¹⁸⁴ Moreover, the specialization of the CAS is an advantage as it is unlikely that a domestic court would possess the comparable level of expertise in hearing sport

¹⁷⁵ See, e.g., *Who We Are*, *supra* note 50 (noting WADA's "[c]ore [v]alues" and "[v]ision" of "[a] world where all athletes can compete in a doping-free sporting environment"); *History of the CAS*, *supra* note 21 (noting the "specialised authority" of the CAS); see also Ruiz, *supra* note 120 (noting Claudia Pechstein's contention that the CAS is "not truly independent"); Ryan, *supra* note 162 (noting the pressures that exist between athletes and the global organizations of CAS and WADA); Wittinghofer & Schenk, *supra* note 114 (summarizing Pechstein's "challeng[ing] [of] the CAS decision").

¹⁷⁶ See, e.g., Ryan, *supra* note 162 (discussing the *Essendon* and *Pechstein* cases and the issues they raise with respect to WADA and the CAS); Wittinghofer & Schenk, *supra* note 114 (suggesting that the CAS might want to provide "athletes further opportunity to influence the list of arbitrators").

¹⁷⁷ See generally Ryan, *supra* note 162 (arguing for greater athlete input in anti-doping proceedings at the CAS).

¹⁷⁸ See *id.*; Weston, *supra* note 78, 113–14 (stating the reasoning behind the use of *de novo* review at the CAS, and noting the downsides to such review).

¹⁷⁹ See AM. ARB. ASS'N, OPTIONAL APPELLATE ARBITRATION RULES, A-10, A-16 (2013), <https://www.adr.org/sites/default/files/AAA%20ICDR%20Optional%20Appellate%20Arbitration%20Rules.pdf> [<https://perma.cc/76Z6-ETBK>]; see also Weston, *supra* note 78, at 113–14.

¹⁸⁰ See *infra* notes 183–199 and accompanying text.

¹⁸¹ See *infra* notes 200–215 and accompanying text.

¹⁸² See *infra* notes 216–232 and accompanying text.

¹⁸³ Hewitt, *supra* note 77, at 777.

¹⁸⁴ See *id.* at 777–78 (reasoning that "domestic courts" would settle such disputes in an inadequate manner and noting the "conflicting laws across jurisdictions").

disputes; indeed, one of the reasons for the establishment of the CAS was the need for a specialized sports tribunal.¹⁸⁵

Some commentators, however, dispute the supposed advantages of the CAS.¹⁸⁶ One supposed advantage of CAS power is that it promotes state sovereignty, due to the fact that states consent to be bound to CAS authority but can revoke consent at any time.¹⁸⁷ Critics dispute this point, however, claiming that CAS authority undermines state sovereignty due to the absence of an oversight body holding the CAS accountable.¹⁸⁸ Moreover, the idea that consent to CAS jurisdiction is voluntary and freely revocable is questionable, as experts point out that failure to consent can have dire consequences.¹⁸⁹

In the context of appeals to the CAS, *de novo* review is viewed favorably in light of the unease over the possibility that a domestic tribunal may act sympathetically or be unduly forgiving when faced with the prospect of punishing an athlete from its own jurisdiction.¹⁹⁰ A *de novo* standard of review gives the CAS significant power over athletes as well as first instance tribunals.¹⁹¹ Furthermore, a *de novo* standard of review can be advantageous, providing an appellate safety net from an unjust decision made by the first instance tribunal.¹⁹²

Despite these advantages, a *de novo* standard in doping appeals at the CAS can prove to be costly, as it may in some instances cause the process and outcome of the lower court decision to be valueless.¹⁹³ For example, following the CAS judgment against Essendon, the club reported it had lost AUD \$9.8 million, most of which was related to the CAS arbitration.¹⁹⁴

¹⁸⁵ *Id.* at 779; *History of the CAS*, *supra* note 21.

¹⁸⁶ *See* Hewitt, *supra* note 77, at 780–82 (describing disadvantages of “delegating” authority to the CAS).

¹⁸⁷ *See id.* at 778–79 (summarizing arguments that delegating authority to the CAS illustrates “a state’s sovereign” power). Some proponents contend that a state’s conditional delegation of authority to the CAS legitimizes its state sovereignty. *See id.* at 778 (citing Oona Hathaway, *International Delegation and State Sovereignty*, 71 *LAW & CONTEMP. PROBS.* 115 (2008)) (reasoning “that delegation requires a state actor’s consent, and this consent is an exercise of state power”).

¹⁸⁸ *See* Hewitt, *supra* note 77, at 782 (stating that states “have . . . put their athletes in the hands of a private society that is an isolated legal system functioning under its own principles”).

¹⁸⁹ *See id.* at 783 (noting that “access to international sports competitions depends on submitting to the jurisdiction of the CAS”).

¹⁹⁰ Weston, *supra* note 78, at 113; *see also* Masters, *supra* note 11 (asserting that WADA and ASADA did not want Essendon players to “receive the benefit of the doubt by a domestic sports tribunal”).

¹⁹¹ *See* Weston, *supra* note 78, at 113.

¹⁹² *See* Despina Mavromati & Matthieu Reeb, *Commentary on the CAS Procedural Rules, Article R57 [Scope of Panel’s Review: Hearing]*, in *THE CODE OF THE COURT OF ARBITRATION FOR SPORT: COMMENTARY, CASES, AND MATERIALS* 510–11 (Kluwer Law Int’l 2015) (commenting on the “healing effect” of *de novo* review).

¹⁹³ Weston, *supra* note 78, at 113–14.

¹⁹⁴ Michael Warner, *Essendon Announce \$9.8 Million Loss from 2016 Season*, *HERALD SUN* (Nov. 15, 2016), <http://www.heraldsun.com.au/sport/afl/teams/essendon/essendon-announces-98->

Thus, these perceived advantages are outweighed by the uncertainty and costs imposed; instead, a more deferential standard of review should be adopted in anti-doping appeals.¹⁹⁵ Such a standard should limit grounds for appeal, making only significant errors of law or fact by the first-instance tribunal subject to review.¹⁹⁶ Thus, by removing the possibility of conducting a full-blown trial at the appellate level, a more deferential standard of review would introduce more significance to the proceedings at the first-instance tribunal.¹⁹⁷ In turn, by according more deference to decisions of first-instance tribunals, such decisions could be of higher quality and the unpredictability inherent in de novo reviews minimized.¹⁹⁸ Moreover, another advantage of a more deferential standard of review at the CAS in doping appeals is that the legal process could be more predictable, thus reducing the time and expense burden imposed on both parties.¹⁹⁹

B. A Customized Approach to Anti-Doping Enforcement, Granting More Bargaining Power to Athletes

In addition to increasing certainty and decreasing costs of anti-doping appeals, a more deferential standard of review would necessarily give more power to the first instance tribunal; by vesting more power in the first instance tribunal, anti-doping oversight is brought closer to the athletes.²⁰⁰ By adopting a more regional approach to anti-doping and taking into account whether the particular sport is team-oriented, WADA can ensure that its core principles are respected, while tailoring an approach capable of addressing the specific issues in a particular region or sport.²⁰¹

million-loss-from-2016-season/news-story/ff9ee4fceda8da888fd3bf263a98fd83 [https://perma.cc/9F22-CXWH].

¹⁹⁵ See Weston, *supra* note 78, at 113–14, 109 n.61 (citing costs associated with cyclist Floyd Landis’s arbitration, which ultimately led to his loss on appeal at the CAS); Towan, *supra* note 168.

¹⁹⁶ See OPTIONAL APPELLATE ARBITRATION RULES, *supra* note 179, at A-10 (providing grounds for appeal).

¹⁹⁷ See Weston, *supra* note 178, at 113–14 (discussing the issue of de novo review at the CAS and its effect on the domestic tribunal).

¹⁹⁸ See Sébastien Besson et al., *International Sports Arbitration*, GLOBAL ARB. REV. (Oct. 16, 2015), <http://globalarbitrationreview.com/chapter/1036935/international-sports-arbitration> [https://perma.cc/4JBQ-TWHK] (discussing the proposed method of creating “a high-quality ‘national CAS’ in every country for the resolution of national level disputes, and a similarly high-quality arbitral body in each sport, to resolve international disputes” and then limiting opportunities to appeal to the CAS).

¹⁹⁹ See Weston, *supra* note 78, at 113–14 (noting the time costs and monetary costs that may accompany de novo review at the CAS).

²⁰⁰ See Ryan, *supra* note 119 (advocating for an anti-doping system, such as Major League Baseball’s, which allows for greater athlete contribution).

²⁰¹ See *id.* (acknowledging the shortcomings of WADA’s “one-size-fits-all” template); see also Hewitt, *supra* note 77, at 772–74 (implying that WADA’s “strict liability framework” results in inequitable results across different sports).

One example of such a varied and tailored solution to a particular doping epidemic is the reform instituted by Major League Baseball (MLB) in the wake of what is known as baseball's "Steroid Era."²⁰² This particular reform, implemented in 2014, was motivated by the MLB's players, who were displeased with the persistent use of performance-enhancing substances within the league.²⁰³ This reform included increased testing, more rigorous penalties, and the ability for a player's penalty to be reduced if the player can prove that he did not use the illegal substance to enhance his performance.²⁰⁴ Because the MLB model does not have an oversight body such as WADA with which to comply, it may act more forgiving in its punishment of its athletes and in defending their reputations.²⁰⁵ Nevertheless, it could also be argued that the current WADA Code, at least in some instances, can have the opposite effect—resulting in disproportionate penalties.²⁰⁶

²⁰² See Paul Hagen, *MLB, MLBPA Agree to Improve Joint Drug Program*, MLB (Mar. 28, 2014), <http://m.mlb.com/news/article/70316506/mlb-mlbpa-agree-to-improve-joint-drug-program/> [<https://perma.cc/6ZUA-UBZS>] (describing changes made to MLB's "Joint Drug Prevention and Treatment Program"); see also Lynn Zinser, *To Baseball's Chagrin, Steroid Era Goes on*, N.Y. TIMES (Aug. 24, 2012), <http://www.nytimes.com/2012/08/24/sports/baseball/to-baseballs-chagrin-steroid-era-continues.html> [<https://web.archive.org/web/20180131022717/http://www.nytimes.com/2012/08/24/sports/baseball/to-baseballs-chagrin-steroid-era-continues.html>] (describing the steroid era as "an inglorious decade or so of cheating by major league baseball players and a lack of action by baseball owners"). It is unclear precisely when the steroid era began, with some suggesting that the steroid era commenced in 1998. See Eldon L. Ham, *The Immaculate Deception: How the Holy Grail of Protectionism Led to the Great Steroid Era*, 19 MARQ. SPORTS L. REV. 209, 222 (2008) (observing that "[n]o one knows the precise date" but that "[i]t may have been caused by the great 1998 home run chase waged by power hitters Mark McGwire and Sammy Sosa").

²⁰³ Hagen, *supra* note 202.

²⁰⁴ *Id.* With respect to the increased testing, the program would "more than double" the amount of random urine tests during the season and would increase the "frequency of offseason collections." *Id.* Among other measures, the program expanded the list of substances subject to penalties and mandated increased blood collections. *Id.* As for penalties in the new agreement, "[a] first-time offender will receive an 80-game suspension, up from the previous 50 games. A second violation will result in a 162-game suspension and a loss of the entire season (183 days) of pay, up from 100 games. A third violation will lead to permanent banishment." *Id.* Although the penalties would increase and the testing would become more frequent, the players would nevertheless benefit from the new agreement, as the changes contemplated the state of mind of the player. See *id.* The language is as follows:

The Arbitration Panel has been given the right to reduce a player's suspension if he proves at a hearing that the use was not intended to improve his performance.

[However,] [t]he panel may not reduce the first-time penalty to fewer than 40 games, the second offense to fewer than 80 games or change the permanent suspension for a third-time violator at all.

Id.

²⁰⁵ See George T. Stiefel III, *Hard Ball, Soft Law in MLB: Who Died and Made WADA the Boss?*, 56 BUFF. L. REV. 1225, 1281–83 (2008) ("Experts have noted that a sports body is often motivated to protect the public image of its athletes and its sport by 'leniently dealing with violators' when it is able to govern itself.")

²⁰⁶ See Brendan Schwab, *Why Australian Sports Must Cut Ties with WADA*, SYDNEY MORNING HERALD (June 15, 2014), <http://www.smh.com.au/sport/why-australian-sports-must-cut-ties-with-wada>

In sum, the league's players, represented by the Major League Baseball Players Association ("MLBPA"), negotiated with the MLB to implement specific changes to the existing drug testing program, which responded to particular shortcomings.²⁰⁷ Underscoring the negotiated deal was the influence of the MLBPA, which advocated for the players' preferences in order to bring about collaborative change.²⁰⁸ Indeed, the MLBPA has demonstrated itself to be one of the strongest labor unions in the United States, and has acted as an effective restraint on the league's own power.²⁰⁹

In the aftermath of the *Essendon* decision, the chief of the AFL Players Association called for the AFL to withdraw from the WADA Code and advocated for a model of self-governance, similar to the MLB.²¹⁰ Consistent with

wada-20140615-zs8k1.html [https://perma.cc/HS6P-74L5] (characterizing some penalties as "excessive"). Another view supports amending the WADA Code instead of quitting it. See Justin Talent, *Niall: AFL Should Lobby WADA to Change Code, Not Break Away from It*, SEN, https://www.sen.com.au/news/2016/11/11/niall-afl-should-lobby-wada-to-change-code-not-break-away-from-it [https://perma.cc/QCJ7-G2CB] (asserting that the AFL should attempt to modify the WADA Code). Some critics assert that the AFL should lobby WADA to amend the Code to better accommodate the realities and complexities of team sports. See *id.* (noting that "'the [WADA] [C]ode was not written for team sports'"). For example, organizational charges could be added to the code, so that as in the case of *Essendon*, the club would shoulder the blame. See *id.* (noting the advantage of including an "organisation-targeted charge").

²⁰⁷ See Hagen, *supra* note 202.

²⁰⁸ See *id.*

²⁰⁹ See Kevin Mahoney, *Learning from the Mistakes of Others: Changing Major League Baseball's Substance Abuse Arbitration Procedure*, 24 OHIO ST. J. ON DISP. RESOL. 613, 623–24 (2009) (stating that the MLBPA is "widely regarded as the most powerful union in professional sports, and probably one of the most well-represented labor unions in the entire country" and "an effective check on the power of league management"). See generally Patrick Kessock, Note, *Out of Service: Does Service Time Manipulation Violate Major League Baseball's Collective Bargaining Agreement?*, 57 B.C. L. REV. 1367, 1375 (2016) (discussing the formation of the MLBPA).

²¹⁰ See Eliza Sewell, *Essendon Guilty Verdict: AFLPA Call for League to Dump WADA Code After Bombers Bans*, HERALD SUN (Jan. 12, 2016), http://www.heraldsun.com.au/sport/afl/teams/essendon/essendon-guilty-verdict-aflpa-call-for-league-to-dump-wada-code-after-bombers-bans/news-story/1c1611d1ab2c94b64b32f8550ae713fd [https://perma.cc/LU24-3FAB?type=image] (citing the AFLPA chief, who asserted that "the best anti-doping codes in world sport are those that are collectively bargained between athletes and sport"). Others argue that as a practical matter, the AFL should not withdraw from the WADA Code as it could result in the AFL losing government funding. See Matt Murnane, *Essendon CAS Verdict: Players Want New Anti-Doping Code, Says AFLPA Boss Paul Marsh*, THE AGE (Jan. 12, 2016), http://www.theage.com.au/afl/essendon-bombers/essendon-cas-verdict-players-want-new-antidoping-code-says-aflpa-boss-paul-marsh-20160112-gm4aun.html [https://perma.cc/5RLG-DPKW] (noting that such funding is used for, among other things, "ground improvements"); see also Glenn Mitchell, *The AFL Must Not Abandon the WADA Code*, THE ROAR (Jan. 14, 2016), http://www.theroar.com.au/2016/01/14/the-afl-must-not-abandon-the-wada-code/ [https://perma.cc/8JMT-Z7KB] (noting that "the AFL is heavily reliant on federal money for the development and upgrading of both competition grounds and club facilities" and that "abandon[ing] WADA could potentially have a massive financial effect on the sport"). Others contend, however, that the loss of government funding would not be a fatal blow to the AFL. See Michael Sexton, *Puzzling Question for Sport over Signing Up to WADA Regime*, THE AUSTRALIAN (Jan. 14, 2016), http://www.theaustralian.com.au/opinion/puzzling-question-for-sport-over-signing-up-to-wada-regime/news-story/562dd632eed0a617f79a132bcf1ec562 [https://perma.cc/TB29-NRBS] (contending that

this response, the head of a labor organization “that represents . . . athletes . . . through players’ associations, including the AFL Players Association” argued that to mitigate future criticisms that may arise from a doping decision similar to *Essendon*, a collective bargaining framework should be implemented, such as that in place in the MLB.²¹¹ Supporting this argument, the concerns that prompted the 2014 MLB reform are analogous to those concerns present in cases at the CAS such as *Essendon*.²¹² Moreover, the manner in which the 2014 MLB reform was developed—by engaging athletes and league management in negotiations in which athletes actively participated—was a significant factor in the success of its enactment.²¹³

The benefit of the 2014 MLB reform—athlete-motivated negotiations with the league resulting in distinct changes to the league’s anti-doping policy—could also be beneficial to other sport leagues, such as the AFL.²¹⁴ If athletes within other sports governing bodies undertake reforms similar to that of the MLB in 2014, the benefits could be preserved and maximized by amending the CAS Code, resulting in a Code that is more responsive to athletes’ interests.²¹⁵

C. Amendments to the CAS Code

Amendments to the CAS Code could ease the concerns articulated in Sections A and B of this Part, as well as protect any benefits produced by greater cooperation between athletes and sport organizations.²¹⁶ Moreover, adopting a

“[i]t is true that many of these sporting bodies [such as the AFL] receive some funding from the federal government but the recent sale of television rights by the AFL suggests that it could survive very well without government grants”).

²¹¹ See Ryan, *supra* note 119.

²¹² See Hagen, *supra* note 202 (noting the athletes’ drive to enact changes to the anti-doping program); Talent, *supra* note 206 (expressing the need to amend the WADA Code in light of the *Essendon* case). Underlying both the 2014 MLB reform and cases such as *Essendon* is the general concern over athlete use of illegal performance enhancing supplements. See Hagen, *supra* note 202 (noting the athletes’ desire for a “clean” sport); Talent, *supra* note 206 (discussing the potential of amending the WADA Code in light of the *Essendon* case).

²¹³ See Hagen, *supra* note 202 (noting the players’ active role in changing the league’s anti-doping rules).

²¹⁴ See *id.* (describing changes made to the MLB’s anti-doping policy); Ryan, *supra* note 162 (noting the advantage of applying such a framework to the AFL).

²¹⁵ See Weston, *supra* note 78, at 128 (suggesting that the “CAS rule” be changed to deal with issues relating to de novo review); Ryan, *supra* note 162 (suggesting that the AFL adopt an anti-doping structure similar to that of the MLB). Brendan Schwab maintains that “[i]f you can solve a problem with expertise on the ground in Australia, in a competition as eminent as the AFL, then why is it necessary to try to adapt to a single global system?” Ryan, *supra* note 162. Schwab is the head of “a Swiss-based labour organization that represents 85,000 athletes and players through players’ associations, including the AFL Players Association.” *Id.*

²¹⁶ See Weston, *supra* note 78, at 128 (concluding that “the CAS rule . . . be amended to address the concerns of . . . de novo [review]” and that “it is more important to provide a standard of true appellate review which examines the underlying record for factual determinations that were clearly

new provision providing for more stringent grounds for appeal could mitigate the effects of allowing parties such as WADA to appeal to the CAS in arbitration clauses.²¹⁷ A model provision can be found in the American Arbitration Association's ("AAA") Optional Appellate Arbitration Rules.²¹⁸ The relevant AAA provision provides that "[a] party may appeal on the grounds that the [arbitral award] is based upon: (1) an error of law that is material and prejudicial; or (2) determinations of fact that are clearly erroneous."²¹⁹ This is more restrictive than the current CAS provision, which permits the CAS to conduct an entirely fresh review of the facts and the law.²²⁰

For a party to file an appeal with the CAS, it would still need to meet the requirements for CAS appellate jurisdiction set forth in the current CAS provision.²²¹ Nonetheless, an additional provision such as the AAA provision described above could act as a check on the CAS's jurisdictional rules.²²² Ultimately, such a provision may prohibit an organization, such as WADA in the *Essendon* case, from appealing a lower decision that was unfavorable to the organization, unless there is a significant error of law or factual determination at the first instance tribunal.²²³ Athletes, however, could suffer under such an amendment, if the ruling was unfavorable toward them.²²⁴ Nonetheless, athletes could alleviate this problem by engaging in discussions with the league or

erroneous or an abuse of discretion, rather than allowing . . . de novo review"); Ryan, *supra* note 162 (calling for greater athlete influence); *supra* notes 183–215 and accompanying text (discussing concerns about the de novo review and athlete bargaining power).

²¹⁷ Compare *Pechstein v. Int'l Skating Union*, CAS 2009/A/1912, ¶ 72 (Ct. Arb. Sport, Nov. 25, 2009), <https://www.isu.org/claudia-pechstein-case/2198-arbitral-award-cas/file> [<https://perma.cc/NLH2-U5GX>] (quoting Article 13.2.1 of the ISU Anti-Doping Rules) ("the decision . . . may be appealed exclusive to [the] CAS"), with OPTIONAL APPELLATE ARBITRATION RULES, *supra* note 179, at A-10 (stating limited grounds for appeal).

²¹⁸ See OPTIONAL APPELLATE ARBITRATION RULES, *supra* note 179, at A-10 (noting the grounds for appeal).

²¹⁹ *Id.*

²²⁰ See *id.*; *Code: Procedural Rules*, *supra* note 28, at R57 (stating that "[t]he [p]anel s full power to review the facts and the law" and "may issue a new decision which replaces the decision challenged").

²²¹ *Code: Procedural Rules*, *supra* note 28, at R47.

²²² See *id.* (describing when "[a]n appeal may be filed with CAS"); OPTIONAL APPELLATE ARBITRATION RULES, *supra* note 179, at A-10 (noting grounds for appeal); see also Hewitt, *supra* note 77, at 783 (noting that "[i]t is almost impossible to remain outside the CAS [authority]").

²²³ See OPTIONAL APPELLATE ARBITRATION RULES, *supra* note 179, at A-10 (noting grounds for appeal); Kane, *supra* note 161 (describing the CAS reversal of the AFL Anti-Doping Tribunal's decision in the *Essendon* case as "unanticipated").

²²⁴ See *Code: Procedural Rules*, *supra* note 28, at R57 (describing the "[s]cope of [CAS arbitral] [p]anel's [r]eview" on appeal); OPTIONAL APPELLATE ARBITRATION RULES, *supra* note 179, at A-10 (noting grounds for appeal); Weston, *supra* note 178, at 113–14 (describing de novo review on appeals at the CAS).

governing sport organization in order to amend the governing rules to better reflect athlete interests.²²⁵

Related to limiting the grounds for appeal, the CAS Code could also be amended to set forth a harder stance than the current CAS Code on the admissibility of new claims or evidence on appeal.²²⁶ Namely, the CAS provision describing the scope of review on appeal could be amended by inserting language from an AAA provision that states the requirements in arranging the appellate record.²²⁷ More precisely, the AAA provision's bar on the introduction of new evidence or issues could replace the current CAS language, which grants the appellate panel the option of—as opposed to the prohibition on—excluding new evidence if it was obtainable or could have been obtainable before the first-instance decision was made.²²⁸

Thus, the AAA provision, which provides in relevant part that “[a] party may not present for the first time on appeal an issue or evidence that was not raised during the [first-instance] arbitration hearing” could replace the relevant portion of the CAS provision, which states that “[t]he panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonable have been discovered by them before the challenged decision was rendered.”²²⁹ This change could, consistent with employing a more deferential standard of review, increase predictability and decrease costs for athletes in appellate proceedings.²³⁰ Finally, disadvantages flowing from more deference to the first-instance arbitration could be remedied by engaging athletes in ne-

²²⁵ See Ryan, *supra* note 119 (calling for a greater athlete role in shaping the AFL anti-doping scheme); cf. Talent, *supra* note 206 (proposing an AFL “lobby” to change the WADA Code to include “team-based” punishments to reflect the nature of “team sports”).

²²⁶ See *Code: Procedural Rules*, *supra* note 28, at R57 (describing when the CAS arbitral “[p]anel has discretion to exclude evidence”); OPTIONAL APPELLATE ARBITRATION RULES, *supra* note 179, at A-16 (describing the “[r]ecord on [a]ppeal”).

²²⁷ See *Code: Procedural Rules*, *supra* note 28, at R57 (setting out the “[s]cope of [the CAS] [p]anel’s [r]eview”); OPTIONAL APPELLATE ARBITRATION RULES, *supra* note 179, at A-16 (describing the “[r]ecord on [a]ppeal”).

²²⁸ See *Code: Procedural Rules*, *supra* note 28, at R57 (describing when the CAS arbitral “[p]anel has discretion to exclude evidence”); OPTIONAL APPELLATE ARBITRATION RULES, *supra* note 179, at A-16 (describing the “[r]ecord on [a]ppeal”).

²²⁹ See *Code: Procedural Rules*, *supra* note 28, at R57 (stating the “[s]cope of [the CAS] [p]anel’s [r]eview”); OPTIONAL APPELLATE ARBITRATION RULES, *supra* note 179, at A-16 (describing the “[r]ecord on [a]ppeal”).

²³⁰ See *Code: Procedural Rules*, *supra* note 28, at R57 (noting when evidence may be “exclude[d]” by “[t]he [CAS] [p]anel”); OPTIONAL APPELLATE ARBITRATION RULES, *supra* note 179, at A-10, A-16 (noting the “[i]ssues [s]ubject to [a]ppeal” and describing the “[r]ecord on [a]ppeal,” respectively); see also Warner, *supra* note 194 (highlighting Essendon’s financial loss in 2016, and noting its connection to the CAS decision); Weston, *supra* note 178, at 113–14 (noting the “expense[s]” that can result because of de novo review at the CAS); *infra* notes 183–199 and accompanying text.

gotiations with their governing sport organizations.²³¹ Overall, such negotiations could lead to more effective and sensible doping enforcement policies.²³²

CONCLUSION

Although the developments of the CAS and the WADA both addressed past issues in sport and encourage uniformity and efficiency, recent developments involving the CAS and WADA have led to the examination of the proper balance between the athletes and sport organizations. Although past allegations of bias and lack of independence of the CAS have led to structural reforms, more reform is necessary so that athletes may feel more confident and better represented in the arbitration process at the CAS. Moreover, in doping appeals at the CAS, the *Essendon* case illustrates the potential for inconsistent outcomes between tribunals. This lack of consistency has led to questioning of the effectiveness of the WADA Code, especially with respect to team sports. This concern—that, in appeals to the CAS, the WADA Code does not adequately meet athlete interests—could be alleviated with an increased dialogue between athletes and their governing bodies. Finally, the benefits from this increased athlete-governing body dialogue could be solidified by specific amendments to the CAS Code, which would provide deference to tailored policies developed in fair negotiations between specific athletes and their governing body.

DAVID MAHONEY

²³¹ See OPTIONAL APPELLATE ARBITRATION RULES, *supra* note 179, at A-10, A-16 (noting the grounds for appeal, and describing the “[r]ecord on [a]ppeal,” respectively); Ryan, *supra* note 162 (suggesting a greater level of athlete participation); Warner, *supra* note 194; *cf.* Talent, *supra* note 206 (proposing that the AFL try to “lobby WADA” to amend WADA Code to better respond to “team sports”).

²³² See Murnane, *supra* note 210 (noting the call for, in the wake of the CAS decision in the *Essendon* case, a conversation “about how the [WADA] code applie[s] to team[] sports”); Ryan, *supra* note 162 (implying that greater athlete involvement could lead to better outcomes).

