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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. These 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. These


changes in the world of sport over the past twenty years have created other new challenges. Specifically, as sport transforms into a worldwide industry, individual athletes are often disadvantaged. 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. 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.

One reform involves an alteration to the balance of power between individual athletes and sport governing bodies, especially in international sport arbitration. 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. Reform of the CAS could have a particularly beneficial effect on athletes accused of doping violations under the World Anti-
Doping Agency ("WADA") code.\textsuperscript{9} Moreover, improving the independence of the CAS could also improve its functioning and its image.\textsuperscript{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.\textsuperscript{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.\textsuperscript{12} Additionally, Part I stresses the historical and current need for global sport governing bodies.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{17} Specifically, Section A examines the history, structure, and jurisdiction of the CAS.\textsuperscript{18} Section B turns to the history of WADA.\textsuperscript{19} Finally, Section C discusses the interaction between the CAS and WADA.\textsuperscript{20}

\textsuperscript{10} Rachelle 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).
\textsuperscript{12} See infra notes 21–81 and accompanying text.
\textsuperscript{13} See infra notes 21–81 and accompanying text.
\textsuperscript{14} See infra notes 82–174 and accompanying text.
\textsuperscript{15} See infra notes 175–232 and accompanying text.
\textsuperscript{16} See infra notes 175–232 and accompanying text.
\textsuperscript{17} See infra notes 21–81 and accompanying text.
\textsuperscript{18} See infra notes 21–48 and accompanying text.
\textsuperscript{19} See infra notes 49–71 and accompanying text.
\textsuperscript{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

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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 “[b]uild[] 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.


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.tascas.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.  

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. Parties to CAS arbitration proceedings include individual athletes, media companies, clubs, and sports federations.

A panel of three arbitrators, who are chosen from the CAS list, hear arbitrations. The selection procedure varies depending on which CAS division the dispute is submitted to. 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. For a dispute before the Appeals Arbitration Division, the process is similar in that each party selects its own arbitrator from the CAS list. 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.

In each dispute before the CAS, the three-arbitrator panel first determines whether it has jurisdiction. 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. A party may object to jurisdiction as a preliminary matter, in which case the court
must allow the opposing party to file a written submission on the issue of jurisdiction. 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.

The CAS is shaped by statutes and procedural rules. Procedural Rule 27, entitled “Application of the Rules,” sets out two main instances in which parties may bring disputes to the CAS. First, parties may bring a dispute to the CAS if they had a previous arbitration agreement in place providing for recourse to the CAS. 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. 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. Finally, Pro-

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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 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.

44 FIFA, FIFA STATUTES 54–55 (Apr. 2016), http://resources.fifit.com/mm/document/affederation/generic/02/78/29/07/fifastatutsweben_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.
Procedural 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. 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.

B. The History of the World Anti-Doping Agency

Like the CAS, the WADA has come to play an important role in international sport. WADA is an international, independent agency designed to combat doping in sport. 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. A Foundation Board and an Executive Committee are the main bodies that govern WADA. Originally, the Olympic Movement funded WADA exclusively, but since 2002, funding has been split equally among the Olympic Movement and national governments. WADA promotes the advancement of uniform, worldwide anti-

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48 History of the CAS, supra note 21.
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

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 “compete[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

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


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. In some cases, WADA may appeal decisions to the CAS. CAS and WADA are both influential forces in the lives of athletes competing internationally. 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.

Furthermore, athletes participating in international competitions are indirectly bound to agree to the Code. Under WADA rules, athletes are required to submit to CAS jurisdiction regarding any arbitration. In addition, a third party unrelated to the dispute, such as WADA, can appeal to the CAS. This, however, can result in inconsistent and potentially problematic results. 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. Because of these issues, both WADA and the CAS can impact athletes in a significant manner.
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. Section A provides a background of the early concerns directed at the CAS. Section B then summarizes a CAS decision, *Gundel v. Fédération Equestre Internationale*, which ultimately motivated reform at the CAS. Section C highlights a more recent CAS decision involving German speed-skater Claudia Pechstein. 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.

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. 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.

The arbitrator selection process exemplifies the influence the IOC possessed over the CAS. 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. Thus, the sixty arbitrators were all, either directly or indirectly, chosen by an Olympic organization. Perhaps more importantly, individual athletes did not have any immediate input in the procedure.

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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 See generally *History of the CAS*, supra note 21.
88 *Downie, supra* note 10, at 320–21.
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. In fact, one commentator characterized the CAS as the “little sibling of the IOC.” 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.

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. 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. 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. Disappointed with the FEI’s decision, Gundel appealed the penalty to the CAS, which ultimately reduced his suspension to only one month. Despite this partial victory at the CAS, Gundel elected to appeal the CAS decision to the Swiss Supreme Court (“SFT”). Gundel’s theory on appeal to the SFT was that the CAS

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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).
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

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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.


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

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\(^{108}\) 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.


\(^{115}\) 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. In particular, such cases have brought to light the need for a fair balance of power between athletes and sport organizations at the CAS.

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. Claudia Pechstein began her international speed-skating career in 1988 and since then, had competed in five Olympic Games. 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. 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.

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


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

Pechstein challenged the ISU decision at the CAS, arguing that the blood testing procedure employed by the ISU was flawed. 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. Despite Pechstein’s arguments, the CAS affirmed the ISU finding her guilty of blood doping and upheld the two-year competition ban.

In December 2009, Pechstein appealed the CAS decision to the SFT. In her appeal, Pechstein requested the court set aside the CAS award, which affirmed her two-year ban. 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. The SFT flatly rejected her appeal, however, pointing out that Pechstein had failed to raise the issue of independence at the CAS proceeding.

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. Significantly, the

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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, “[the 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.


130 See Charlish, supra note 123, at 82.

131 Id. at 84–85.

Munich Appeal Court found the arbitration clause between Pechstein and the ISU to be invalid as a violation of German competition law. In addition, the Munich appellate court stated that the CAS decision was invalid and that it would not recognize the decision. The court reasoned that the arbitration agreement between the ISU and Pechsetein 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.
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.  

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. The standard of review employed by the CAS Appeals Division is partly to blame for such varied results. 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. 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. The recent case involving Essendon of the AFL has illustrated the conflicting results of the CAS and the domestic disciplinary body.
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-
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.
154 Chalkley-Rhoden, supra note 141.
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/S2FACVRY] (reasoning that the CAS decision was correct).

158 See Baker, supra note 141.
159 Id.
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. 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. 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. 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. The use of two competing approaches in the same case has left some wondering what the appropriate standard in anti-doping proceedings should be. That completely opposite conclusions were reached on largely the same evidence drew significant skepticism.

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. In particular, the opposite results of the AFL Anti-Doping Tribunal and the CAS in Essendon highlight the need for reform.

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-
zations, especially in doping appeals at the CAS. 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. To minimize this tension, changes should be made at the CAS, specifically in dealing with doping appeals. 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. Driven by the concerns and rationale underlying this framework, specific amendments to the CAS Code are recommended to protect individual athletes’ rights. Section A argues for the usage of a more deferential standard of review in doping appeals at the CAS. Section B argues that a more regionalized and tailored anti-doping enforcement method should be embraced. Finally, Section C suggests specific changes to the CAS Code to accomplish these objectives.

A. De Novo Review at the CAS in WADA Appeals

The power and authority entrusted in the CAS does have certain advantages. 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. 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

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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).
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

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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.
193 Weston, supra note 78, at 113–14.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{199}

\textbf{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.\textsuperscript{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.\textsuperscript{201}

\textsuperscript{195} See Weston, \textit{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, \textit{supra} note 168.

\textsuperscript{196} See \textit{OPTIONAL APPELLATE ARBITRATION RULES}, \textit{supra} note 179, at A-10 (providing grounds for appeal).

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

\textsuperscript{198} See Sébastien Besson et al., \textit{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).

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

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

\textsuperscript{201} See id. (acknowledging the shortcomings of WADA’s “one-size-fits-all” template); see also Hewitt, \textit{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


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,] the 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.”).

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.\footnote{See Hagen, \textit{supra} note 202.} Underscoring the negotiated deal was the influence of the MLBPA, which advocated for the players’ preferences in order to bring about collaborative change.\footnote{See id.} 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.\footnote{See Kevin Mahoney, \textit{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, \textit{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).}

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{216} Moreover, adopting a

\textsuperscript{211} See Ryan, supra note 119.

\textsuperscript{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).

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

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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. A model provision can be found in the American Arbitration Association’s (“AAA”) Optional Appellate Arbitration Rules. 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.” 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.

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. Nonetheless, an additional provision such as the AAA provision described above could act as a check on the CAS’s jurisdictional rules. 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. Athletes, however, could suffer under such an amendment, if the ruling was unfavorable toward them. Nonetheless, athletes could alleviate this problem by engaging in discussions with the league or...
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 reasonably 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-

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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”).


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”).


230 See Code: Procedural Rules, supra note 28, at R57 (noting when evidence may be “excluded” 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.
negotiations with their governing sport organizations. Overall, such negotiations could lead to more effective and sensible doping enforcement policies.

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.

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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).