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Cover Page Footnote

Professor Victor Essien, Bryan Lipski, Andrew Glickman

The Olympic Binding Arbitration Clause and the Court of Arbitration for Sport: An Analysis of Due Process Concerns

Jason Gubi*

INTRODUCTION

International sports law is guided both by national policies and those of international non-governmental organizations, such as the Olympic movement.¹ When disputes arise, there is a need to find an equitable resolution. Because litigation can be time-consuming and often unsatisfying due to conflicting national laws, there has been a growing reliance on alternative methods of dispute resolution within the field of international sports.²

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* J.D. Candidate, Fordham University School of Law, May 2008. B.A. Political Science, The College of New Jersey. First and foremost, I would like to thank my brother for being as close in spirit as he is far in distance—a better brother can scarcely be found. I am grateful for the support and guidance of my parents throughout the years. I am blessed to have supportive family and friends that have given more to me than I could ever possibly hope to return. What is best in me, I owe to them. I would also like to thank Professor Victor Essien for his advice and guidance in researching this Note. Special thanks to Bryan Lipsky and Andrew Glickman from the Fordham Sports Law Forum for their assistance throughout the editing process. Responsibility for any mistakes or misjudgments rests solely with the author.

¹ James A.R. Nafziger, *International Sports Law: A Replay of Characteristics and Trends*, 86 AM. J. INT'L L. 489, 490–91 [hereinafter Nafziger, *Characteristics and Trends*].

² See generally *id.*

Similarly, alternative methods of dispute resolution such as mediation and arbitration have become increasingly important forms of dispute resolution for sports-related issues in the United States.³ The Ted Stevens Olympic and Amateur Sports Act of 1978, which requires America's national governing bodies of various sports to submit disputes within the scope of the act to the American Arbitration Association ("AAA") for review, has acted as a catalyst promoting movement in this direction.⁴ In passing the Act, Congress must have believed that procedural safeguards would still protect the due process rights of litigants. Otherwise, the Act itself could arguably be said to be in violation of the due process protections embodied in the Fifth and Fourteenth Amendments.⁵ Thus, there is not a hotly contested constitutional issue involved when arbitration occurs in the United States between United States bodies since American arbitration bodies must still provide due process protections.⁶

However, in order to compete in the Olympics, the International Olympic Committee ("IOC") since 1996 has required all potential competitors to sign a waiver form agreeing to litigate all claims in front of the Court of Arbitration for Sport ("CAS"), and forego lawsuits.⁷ The CAS was created by the IOC in 1983, but was criticized for not being independent of the IOC; the IOC chose members of the CAS, which was financially and legally an arm of the IOC.⁸ In response to these criticisms by the Swiss Supreme Court, the IOC founded the International Council of Arbitration for Sport ("ICAS") in 1994 to administer the CAS.⁹

³ Anthony T. Polvino, *Arbitration as Preventative Medicine for Olympic Ailments: The International Olympic Committee's Court of Arbitration for Sport and the Future for the Settlement of International Sporting Disputes*, 8 EMORY INT'L L. REV. 347, 349.

⁴ James A.R. Nafziger, *Arbitration of Rights and Obligations in the International Sports Arena*, 35 VAL. U. L. REV. 357, 358-59 [hereinafter Nafziger, *Arbitration of Rights and Obligations*].

⁵ See U.S. CONST. amends. V, XIV, § 1; see also Urvasi Naidoo & Neil Sarin, *Dispute Resolution at Games Time*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 489, 495-96 (2002).

⁶ See Naidoo & Sarin, *supra* note 5, at 506.

⁷ Nancy K. Raber, *Dispute Resolution in Olympic Sport: The Court of Arbitration for Sport*, 8 SETON HALL J. SPORT L. 75, 77 (1998).

⁸ See Naidoo & Sarin, *supra* note 5, at 502.

⁹ *Id.*

The ICAS's role is to protect the arbitration process and financial independence of the CAS by overseeing all administrative and financial aspects of the court.¹⁰ The ICAS is incorporated as a non-profit, non-governmental organization in Switzerland, and is thus governed by Swiss law.¹¹ Swiss law also, therefore, governs the CAS.

The due process rights of American competitors in the highly contentious field of Olympic sport are thus only as secure as the Swiss judicial system ensures. This paper will discuss problems with this requirement stemming from due process protections provided in the Fifth and Fourteenth amendments. Part II of this paper will set a backdrop for this discussion by summarizing the international Olympic structure, relevant United States arbitration law, and the structure of the CAS. Part III will discuss the Olympic binding arbitration clause, including the due process issues raised by both the Olympic binding arbitration clause and the CAS. Finally, Part IV will make suggestions that could ensure that these due process concerns are addressed.

I. OLYMPIC DISPUTE RESOLUTION STRUCTURE:

Americans live and work abroad. Foreigners live and work in the United States. Nothing about this equation is new, nor is it new in the case of sports. The modern incarnation of the Olympic Games is based on the ancient Olympics, which pitted competitors from differing city-states and across the Roman Empire against one another.¹² It was an international sports competition. Today, however, sports are a much more important economic activity.¹³ American Olympians are often full-time, paid athletes.¹⁴ Besides the nominal salary of Olympic athletes, the endorsement opportunities available to successful Olympians further raises the

¹⁰ *See id.*

¹¹ *See id.*

¹² *See Raber, supra* note 7, at 79.

¹³ *Cf. James A.R. Nafziger, The Future of International Sports Law*, 42 WILLAMETTE L. REV. 861, 871–72 (2006) (noting that corporate influence in international sports competitions has expanded) [hereinafter Nafziger, *Future of International Sports Law*].

¹⁴ Melissa R. Bitting, *Mandatory, Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for "Job Security"?*, 25 FLA. ST. U. L. REV. 655, 665–67 (1998).

monetary stakes involved.¹⁵ This increased monetary aspect has, in turn, increased the likelihood for conflict among potential competitors for the right to compete.

The International Olympic Movement governs the Olympics.¹⁶ However, since the Olympic Movement is a collective network of non-governmental entities, its rulings are not binding on states as a matter of international law.¹⁷ Rather, a desire to have a state's athletes be eligible to compete in the Olympics has largely driven conformity with the guidelines of the International Olympic Movement. This conformity can, in some instances, be said to have created customary international law, which is binding on states regardless of their participation in the Olympic Games.¹⁸ This paper will discuss whether the Court of Arbitration for Sport has adequate due process protections to conform to American notions of justice. Part II will discuss United States arbitration law related to international sports matters and the CAS after summarizing the structure of the International Olympic Movement.

A. *International Olympic Structure*

International sports law, like other types of international law is governed primarily by provisions of international conventions, international custom, and to a lesser extent, the general principles of law recognized by civilized nations, case law, and the teachings of the most qualified international sports law theorists.¹⁹ The Olympic Movement, governed by the IOC, is "the dominant institution in the framework of international sports law" because it serves as a catalyst for the development of international sports law as its rules and practices develop into customary international law.²⁰

¹⁵ See Nafziger, *Future of International Sports Law*, *supra* note 13, at 866–67.

¹⁶ See Nafziger, *Characteristics and Trends*, *supra* note 1, at 490–91.

¹⁷ See *id.* at 491–93.

¹⁸ See generally CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 486–91 (2d ed. 2006).

¹⁹ See Polvino, *supra* note 3, at 349; see also Statute of the International Court of Justice, at art. 38.

²⁰ See Polvino, *supra* note 3, at 350.

The Olympic Movement is composed of the IOC, International Sports Federations (“ISF’s”), National Olympic Committees (“NOC’s”), organizing committees for particular Olympic Games, and the Olympic Congress.²¹ Along with local and national governments, these institutions govern international sports competitions.²² Unfortunately, the rules and regulations of these institutions do not always correlate with one another. Even when the rules and regulations do correlate, the way a particular case would be interpreted by these differing bodies may not coincide. Thus, an athlete may be found to have complied with regulations by one body, but still be banned from competition by another.²³ In this subsection, I will discuss these overlapping levels of regulation, beginning with the IOC.

1. IOC Structure

The IOC has been referred to as the “point person” of the Olympic Movement, and is responsible for the development and regulation of high-performance sports competitions.²⁴ The Committee acts as a coordinating body, delegating the conduction of international competitions and world championships to ISFs and NOCs.²⁵

Perhaps the IOC’s most important function is the role it plays in setting international sports law. The IOC, as indicated by its founding documents, is a non-governmental organization and thus has no power to create international law.²⁶ The main way that the Olympic Movement develops international law is by states following the practices set forth by the IOC.²⁷ In general, states

²¹ See *id.* at 350–51.

²² *Id.*

²³ James A.R. Nafziger, *American Law in a Time of Global Interdependence: U.S. Nation Reports to the XVth International Congress of Comparative Law: Section II Dispute Resolution in the Arena of International Sports Competition*, 50 AM. J. COMP. L. 161, 162 (2002) [hereinafter Nafziger, *Global Interdependence*].

²⁴ Susan Haslip, *International Sports Law Perspective: A Consideration of the Need for a National Dispute Resolution System for National Sport Organizations in Canada*, 11 MARQ. SPORTS L.J. 245, 257 (2001)

²⁵ *Id.*

²⁶ See Polvino, *supra* note 3, at 351.

²⁷ See *id.*

have voluntarily followed the rules, decisions, and practices of the IOC and the Olympic Charter, often incorporating them into their respective national sports law policies.²⁸

The IOC provides a basic framework that ISFs have to follow in order for a particular sport to be conducted in the Olympics.²⁹ While a particular ISF may be the official federation for more than one Olympic sport, the IOC only recognizes one ISF for a particular sport.³⁰ This Federation, in turn, coordinates with the NOCs of nations across the world.³¹ Every nation participating in the Olympics has a national sports federation (NSF) or governing body³² for the sports it competes in, which ensures that a given sport is being run according to the standards set by its respective ISF.³³

2. Role of the ISFs

There are a total of thirty-five ISFs.³⁴ These ISFs serve three primary functions. First, the IOC delegates the authority to run international competitions to the various ISFs.³⁵ The second main function of the ISFs is in spreading the ideals, practices, and rules of the IOC. In order for an athlete to compete in an Olympic Games, he must both be selected by his nation's NOC and also be in conformance with the rules of the ISF for which he is competing.³⁶ The statutes, practices, and activities of the ISFs must, in turn, conform to the Olympic Charter.³⁷ Third, in addition to these general rules all ISFs export to the respective NOCs and National Governing Bodies ('NGB's), each ISF determines the

²⁸ See *id.* at 351–52.

²⁹ See Raber, *supra* note 7, at 82.

³⁰ Cf. International Olympic Committee, http://www.olympic.org/uk/organization/if/index_uk.asp (last visited Feb. 1, 2008) (noting that international federations are recognized by the IOC as administering one or more sports at world level).

³¹ See Raber, *supra* note 7, at 82.

³² Hereinafter, national sports associations responsible for administering competitions to determine who will represent a particular state in an international competition will be referred to by their alternate name, National Governing Bodies.

³³ See Raber, *supra* note 7, at 82.

³⁴ See Naidoo & Sarin, *supra* note 5, at 489.

³⁵ See Haslip, *supra* note 24, at 257.

³⁶ See Naidoo & Sarin, *supra* note 5, at 492.

³⁷ *Id.*

rules by which that sport is to be judged, thereby bringing about conformity in how sports are conducted throughout the world.³⁸

3. Authority and Role of NOCs and NGBs

NOCs are responsible for determining who will represent a particular nation in an international sports competition. Typically, NOCs delegate to their respective NGBs the authority to hold competitions in order to determine who will represent the nation in international competitions.³⁹ NGBs incorporate the rules for a particular sport as determined by ISFs thereby helping the spread of ISF rules to the local level.⁴⁰ In this way, conformity with international practice is achieved and the ideals of the IOC are spread as NGBs conform to the dictates of ISFs, who themselves are embodying the principles and practices of the IOC.⁴¹ The United States Olympic Committee (“USOC”) is America’s NOC.⁴²

The USOC is responsible for supporting American athletes in general, and specifically, American Olympic athletes.⁴³ Though operating under various names, the USOC, has represented the United States in all Olympic matters since its founding in 1894.⁴⁴ It selects and enters American competitors for participation in the Summer and Winter Olympic Games, the Pan American Games, and the Paralympic Games.⁴⁵

The Amateur Sports Act creates the authority for the USOC to act.⁴⁶ Section 220503 addresses the purposes of the USOC.⁴⁷ Some of these purposes are:

³⁸ See Mary K. Fitzgerald, *The Court of Arbitration for Sport: Doping and Due Process During the Olympics*, 7 SPORTS LAW. J. 213, 215 (2000).

³⁹ See Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C.A. § 220523 (1998) [hereinafter Amateur Sports Act] (delegating the authority to hold competitions in order to determine who will represent the United States in international competitions to National Governing Bodies).

⁴⁰ See Fitzgerald, *supra* note 38, at 215.

⁴¹ See Naidoo & Sarin, *supra* note 5, at 492.

⁴² See United States Olympic Committee Charter § 1.4 (2006) [hereinafter USOC Charter], available at http://www.usoc.org/USOC_Bylaws_as_of_6232006.pdf.

⁴³ *Id.* § 2.1.

⁴⁴ Christopher T. Murray, *Representant Les Etats-Unis D’Amerique: Reforming the USOC Charter*, 7 VAND. J. ENT. L. & PRAC. 233, 235 (2005).

⁴⁵ See USOC Charter § 1.4.

⁴⁶ See Murray, *supra* note 44, at 233.

- to establish national goals for amateur athletic activities and encourage the[ir] attainment . . . ;
- to coordinate and develop amateur athletic activity in the United States, directly related to international amateur athletic competition, to foster productive working relationships among sports-related organizations;
- to promote and support amateur athletic activities involving the United States and foreign nations;
- to assist organizations and persons concerned with sports in the development of amateur athletic programs for amateur athletes;⁴⁸

Thus, the USOC has been empowered by Congress to act as the body primarily responsible for American involvement in international amateur athletic activities, as well as to coordinate America's domestic efforts in the field of amateur athletic activity.

Section 220505 of the code describes the powers created by the Amateur Sports Act to be held by the USOC.⁴⁹ Part (c)(4) of the section creates the power for the USOC to recognize NGBs.⁵⁰ Sections 220521 through § 220528 deal with NGBs.⁵¹

Section 220521 of the Amateur Sports Act provides for the general recognition authority by the USOC of NGBs.⁵² Section 220522 provides eligibility requirements for NGBs to receive and retain such recognition by the USOC.⁵³ Since American NGBs receive their authority from the USOC, they must conform to regulations set forth by the USOC. However, in order to be an official representative of a nation with an ISF, NGBs must also conform to the dictates of that ISF. There is thus a dual level of regulation to which NGBs must conform in order for the athletes

⁴⁷ See Amateur Sports Act, 36 U.S.C.A. § 220523 (1998).

⁴⁸ *Id.*

⁴⁹ *Id.* § 220505.

⁵⁰ *Id.* § 220505(c)(4).

⁵¹ *Id.* §§ 220521–28.

⁵² *Id.* § 220521.

⁵³ *Id.* § 220522.

served by a particular NGB to be eligible to compete in international competition.

Section 220523 establishes the power that NGBs receive upon recognition as a NGB by the USOC.⁵⁴ NGBs represent the United States in ISFs; select teams for international competitions other than the Olympics, Paralympic Games, and the Pan-American Games and make recommendations to the USOC as to who should represent the United States for these competitions; and coordinate and conduct amateur athletic activities in the United States.⁵⁵ For an amateur athletic association to hold a competition, it must receive a sanction to do so by its NGB.⁵⁶ The title ‘national governing body’ is thus apt because NGBs coordinate all amateur athletic activity for a particular sport in the country.

Through this overlapping structure of authority, amateur athletes across the globe from the remotest villages to the largest cities are subject to the same rules and regulations for a particular sport as well as the ideals of the IOC. Because international athletic competition has become such a large business enterprise, there has been an increasing level of disputes in recent years.⁵⁷ When disputes arise in the United States in consideration of amateur athletic competition, there is a strong preference in the law for such conflicts to be resolved outside of the courts.⁵⁸ As Judge Posner once said, “there can be few less suitable bodies than the federal courts for determining the eligibility, or procedures for determining the eligibility, of athletes to participate in the Olympic Games.”⁵⁹ I will next discuss United States arbitration law that is particularly related to amateur athletic competition because arbitration is an alternative to litigation.

⁵⁴ *Id.* § 220523.

⁵⁵ *Id.*

⁵⁶ *Id.* § 220525.

⁵⁷ *Cf.* Nafziger, *Future of International Sports Law*, *supra* note 13, at 872 (noting that “corporate intervention in the sports arena generates conflicts”).

⁵⁸ *See* Nafziger, *Arbitration of Rights and Obligations*, *supra* note 4, at 358–59.

⁵⁹ *Michels v. U.S. Olympic Comm.*, 741 F.2d 155, 159 (Ill. 1984).

B. *United States Arbitration Law*

Litigation can be expensive and time-consuming. In the context of determining who will represent a nation in an international sports competition, the time that a lawsuit can take will often conflict with the need for a quick resolution of the dispute in order for a NOC to submit a list of competitors for a particular event.⁶⁰ Binding arbitration presents an opportunity to more quickly resolve such disputes.⁶¹ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Federal Arbitration Act, and the Ted Stevens Olympic and Amateur Sports Act are important aspects of United States arbitration law as it relates to international sports competition.

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards is an international convention requiring signatory states to enforce the arbitration judgments of other states.⁶² A member state is bound under the Convention to recognize arbitration rulings from other states regardless of whether the state in which the arbitration hearing occurred adheres to the Convention.⁶³ A few exceptions to this enforcement requirement exist. Under Article V of the Convention, an arbitration ruling does not have to be enforced if doing so would be against the public policy of a given state.⁶⁴ Rulings also do not have to be enforced if the arbitration panel acted against its own stated rules or there is reason to believe one of the arbitrators may have been biased based on his actions or his failure to disclose a potential conflict of interest.⁶⁵ Finally, courts do not have to

⁶⁰ See Bitting, *supra* note 14, at 660.

⁶¹ See *id.* at 662–64.

⁶² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

⁶³ See *id.* art. I.

⁶⁴ See *id.* art. V(2)(b); see also Naidoo & Sarin, *supra* note 5, at 494.

⁶⁵ See New York Convention, *supra* note 62, art. V(1)(a) & (d); see also Naidoo & Sarin, *supra* note 5, at 494.

enforce foreign arbitration rulings when the court system where the arbitration was held has vacated the judgment.⁶⁶

In order to be a member of a United States NGB, and thereby eligible to be selected to represent the United States in international competition, one must agree to arbitration as per the provisions of the Amateur Sports Act.⁶⁷ Once selected to compete, all Olympic athletes must sign a form agreeing to submit all disputes to the CAS.⁶⁸ Since the court is incorporated in Switzerland, the CAS applies Swiss law by default.⁶⁹ Because the CAS is a foreign arbitration body, the New York Convention makes rulings of the CAS binding on American courts unless one of the previously stated exceptions to enforcement can be invoked. Therefore, one who is challenging an IOC determination concerning his eligibility to compete in the Olympic Games is bound by CAS determinations without a right of appeal because the New York Convention compels enforcement of CAS rulings by United States courts. The United States Arbitration Act of 1925, commonly known as the Federal Arbitration Act, works in conjunction with the New York Convention to see that foreign arbitration awards are enforced in United States jurisdictions.⁷⁰

2. Federal Arbitration Act

The United States Arbitration Act of 1925 (“FAA”) provides for the specific enforcement of arbitration agreements.⁷¹ Section 2 of the FAA limits the scope of the New York Convention as applied in the United States by stating that an arbitration agreement is valid “save upon such grounds as exist at law or in equity for the revocation of any contract.”⁷² Since American contract law is a creature of state law, grounds for revocation of any contractual

⁶⁶ See New York Convention, *supra* note 62, art. V(1)(e); *see also* Naidoo & Sarin, *supra* note 5, at 494.

⁶⁷ See Amateur Sports Act, 36 U.S.C. § 220522 (2006).

⁶⁸ See Naidoo & Sarin, *supra* note 5, at 493; *see also* Fitzgerald, *supra* note 38, at 238.

⁶⁹ See Fitzgerald, *supra* note 38, at 237.

⁷⁰ See United States Arbitration Act of 1925, 9 U.S.C. §§ 2–3 (1925) [hereinafter FAA]; *see also* New York Convention, *supra* note 62, arts. I, III.

⁷¹ See generally FAA, 9 U.S.C. §§ 1–16; *see also*, Richard Bales & Jason F. Darnall, *Arbitral Discovery of Non-Parties*, 2001 J. DISP. RESOL. 321, 321 (2001).

⁷² See FAA, 9 U.S.C. § 2.

provision stem from state law sources.⁷³ This provision is similar to the aforementioned provision limiting the scope of the New York Convention that states are not bound to recognize arbitration decisions that are adverse to the public policy of that state.

The objective of the New York Convention should not therefore be viewed as achieving full recognition of every foreign arbitration decision, but rather, as both prohibiting states from taking affirmative steps to prevent foreign recognition and also promoting a more stable system for arbitration in the international context. In addition to the New York Convention and the FAA, the Amateur Sports Act also has a substantial effect on the way sports disputes are resolved.

3. Ted Stevens Olympic and Amateur Sports Act

The Amateur Sports Act was updated in 1998 for a number of reasons, including the desire to protect the USOC against lawsuits for situations in which an athlete's right to participate in the Olympic Games is at stake.⁷⁴ The Amateur Sports Act establishes the authority for the USOC to act as America's representative for international amateur sports competitions.⁷⁵ It also sets up the hierarchical system whereby NGBs coordinate amateur athletic activity for particular sports and act as the liaison with ISFs.⁷⁶ In addition to these primary functions, the Amateur Sports Act also compels the use of arbitration to resolve disputes between NGBs and the USOC, as well as between amateur athletes and their respective NGBs.⁷⁷

Section 220503 of the Amateur Sports Act lists providing "swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports organizations" and protecting "the opportunity of any amateur

⁷³ See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 1.6 (5th ed. 2003). For discussion on whether the Olympic binding arbitration may be voided by American courts because it violates common law contractual doctrines, see Naidoo and Sarin, *supra* note 5, at 503–05.

⁷⁴ See Murray, *supra* note 46, at 233.

⁷⁵ See generally Amateur Sports Act, 36 U.S.C. §§ 220503, 220505 (2006).

⁷⁶ See generally *id.* §§ 220505, 220521–28.

⁷⁷ See generally *id.* §§ 220522, 220527, 220529.

athlete . . . to participate in amateur athletic competition” as two of the purposes of the USOC.⁷⁸ However, this mandate of § 220503 seems to be contradicted by the prohibition of lawsuits provided in § 220509 of the Act.

Subsection (a) of § 220509 of the Amateur Sports Act prevents a prospective athlete hoping to represent the United States in international competition from bringing a lawsuit within twenty-one days of the beginning of such competition.⁷⁹ In order for subsection (a) to be invoked, the USOC must certify to a court where a lawsuit is brought that it cannot provide for the resolution of such dispute prior to the beginning of such competition.⁸⁰ Unfortunately for the athlete who feels his opportunity to compete has been unfairly restricted, this is exactly the situation in which such a prospective competitor would need injunctive protection from a court. The USOC’s desire for timely resolution of conflicts, so as to not interfere with the selection of competitors for international competitions, is directly in conflict with prospective competitors’ desire to uphold their rights when they feel their exclusion is unjust. While binding arbitration may yield swift resolution of disputes, it may not be the best way to protect the opportunity of amateur athletes to compete for reasons that will be discussed in Part III of this paper.

Section 220529 states that one who is aggrieved under § 220527 has the right to arbitration under the AAA.⁸¹ Section 220527 deals with a member’s complaint against his or her respective NGB.⁸² If a member of a NGB believes his NGB has violated a provision of §§ 220522, 220524, or 220525 of the Amateur Sports Act, once NGB appeal mechanisms are exhausted, he or she is entitled to a hearing before the USOC.⁸³ An unfavorable decision in this hearing can then be appealed to the AAA as per § 220529.⁸⁴

⁷⁸ *Id.* § 220503.

⁷⁹ *Id.* § 220509.

⁸⁰ *Id.*

⁸¹ *See id.* §§ 220527, 220529.

⁸² *See id.* § 220527.

⁸³ *Id.*

⁸⁴ *See id.* § 220529.

Under § 220522, in addition to other requirements, an amateur sports organization can only be recognized as a NGB if it agrees to binding arbitration for all disputes concerning the right of its members to compete in international competition.⁸⁵ The NGB must not unfairly restrict membership and must also provide “an equal opportunity to . . . participate in amateur athletic competition, without discrimination . . . and with fair notice and opportunity for a hearing . . . before declaring the individual ineligible to participate.”⁸⁶

Section 220524 addresses the duties of NGBs.⁸⁷ Violation of the obligation to inform amateurs of applicable rules and rule changes in a timely manner, for example, is grounds for challenging NGB recommendations regarding who should compete in a particular international competition.⁸⁸ Section 220525 deals with NGBs holding international competitions in the United States; more importantly, it deals with the sponsoring of athlete trips to participate in international competitions outside of the United States.⁸⁹ Failure of a NGB to act in a timely manner in deciding whether or not to grant the sanction for an athlete to compete can have grave repercussions for an Olympic hopeful. As such, an athlete can challenge his NGB’s decision of whether to grant the sanction, or its failure to act in a timely manner in so deciding, before the USOC.⁹⁰

The Amateur Sports Act deals with the rights and obligations of the USOC and NGBs, and creates a right to arbitration while in some situations prohibiting lawsuits.⁹¹ This act can not, however, be viewed in isolation. In combination with the New York Convention and the FAA, the Amateur Sports Act both makes decisions of the AAA binding and also prevents an aggrieved party from bringing a lawsuit in the context of disputes arising immediately before the onset of international competition.

⁸⁵ *See id.* § 220522.

⁸⁶ *Id.*

⁸⁷ *See id.* § 220524.

⁸⁸ *Id.*

⁸⁹ *See id.* § 220525.

⁹⁰ *See id.*

⁹¹ *See generally id.* §§ 220509, 220522, 220524–25, 220527–29.

In order to be recognized as a NGB, an organization must agree to binding arbitration when one of its members is challenging a decision as to who the USOC is recognizing as the United States representative in an international competition.⁹² After the IOC created the requirement that all competitors agree to binding arbitration before the CAS, the IOC persuaded all thirty-five ISFs to agree to the IOC supported dispute resolution process, effectively preventing any dissent by competitors from materializing.⁹³ The USOC is legislatively required to ensure that the United States will be in compliance with the requirements of bodies such as the IOC.⁹⁴ Since the IOC requires athletes to agree to binding arbitration, a failure by the USOC to promote such acceptance may not be in keeping with its congressional mandate. Thus, it could be argued that the Amateur Sports Act prohibition against lawsuits in the period immediately preceding international competition is merely a response to the Olympic requirement that athletes consent to binding arbitration when challenging a decision regarding their right to compete.

Analysis of the Olympic binding arbitration clause is thus necessary. Two main questions presented by the Olympic binding arbitration clause are whether American courts would strike the provision for offending common law contract principles and whether it violates constitutional due process protections. Contractually, the provision may be attacked for (1) being a contract of adhesion, or (2) one that was fostered by parties in unequal bargaining position, because of the concepts of (3) unconscionability and (4) duress, (5) the capacity of the parties, or (6) for being an unlawful restraint of trade.⁹⁵ While analysis of the provision in the context of international athletic competition can illuminate whether American courts would uphold the provision, analysis of the structure of the CAS is needed to determine whether it violates American due process protections.

⁹² See *id.* § 220522.

⁹³ See Naidoo & Sarin, *supra* note 5, at 495.

⁹⁴ See Amateur Sports Act, 36 U.S.C. § 220503 (2006).

⁹⁵ See Naidoo & Sarin, *supra* note 5, at 503–05; see also Bitting, *supra* note 14, at 667–70.

C. *The Court of Arbitration for Sport*

CAS Secretary General Matthieu Reeb has pointed to two main objectives leading to the creation of the court. First, at the beginning of the 1980s, an increase in the number of international sports-related disputes combined with the absence of an independent authority with expertise and authority to handle such matters led to the conclusion that some sort of authority with the ability to set binding rulings was necessary.⁹⁶ A second main objective of the IOC in creating the CAS was to settle disputes quickly and inexpensively.⁹⁷

The IOC held these goals (a) because litigation can be both costly and lengthy and (b) because it believed the efficient resolution of disputes by a recognized binding authority to be essential in order to further the objectives of the Olympic Games.⁹⁸ However, without a mechanism for potential competitors to have a meaningful venue to seek a redress of their grievances, spectator faith in the fairness of the Games would likely wane. Thus the court is charged with efficiently and fairly settling disputes both so that competitors feel their rights are not being trampled, and also so that a fair and accurate result is achieved.

1. History and Structure of the CAS

The history of the CAS can be divided into two periods: the first dates from the inception of the court in 1983 until amendments to its structure were made in 1994. Prior to these changes made through the Agreement concerning the constitution of the International Council of Arbitration for Sport ('Paris Agreement'), the court was a body of the IOC.⁹⁹ The CAS was composed of sixty members, with fifteen members apiece appointed by the IOC, the ISFs, the NOCs, and the IOC President, with the budget supplied by the IOC.¹⁰⁰ The IOC, at the proposal

⁹⁶ See Matthieu Reeb, *The Court of Arbitration for Sport*, <http://www.tas-cas.org/en/histoire/histoireA.htm> (last visited Feb. 1, 2008).

⁹⁷ See *id.*

⁹⁸ See Bitting, *supra* note 14, at 663–64.

⁹⁹ See Reeb, *supra* note 96.

¹⁰⁰ See *id.*

of the IOC Executive Board, had the sole authority to amend the statute governing CAS proceedings.¹⁰¹ Beginning in 1991, the CAS published a guide to arbitration that included model arbitration clauses. One such clause was for use by sports federations.¹⁰² This clause led to the development of the CAS as a body for parties to appeal the decisions made by the sports federations to which they belonged.¹⁰³

The International Equestrian Federation (“FEI”) was the first sports federation to adopt the aforementioned arbitration clause.¹⁰⁴ Elmar Gundel, one of its members, filed an appeal with the CAS, challenging a decision by the FEI.¹⁰⁵ Unsatisfied with the result before the CAS, Gundel subsequently filed an appeal with the Swiss Federal Tribunal challenging the court’s impartiality and independence.¹⁰⁶ Though the Swiss Federal Tribunal found that the CAS was a true court of arbitration for purposes of the case before it, its ruling indicated concern that the CAS may not be sufficiently independent, and thus possibly not impartial, if the IOC was one of the parties.¹⁰⁷

As a result of these concerns, the structure of the CAS was modified to make it independent of the IOC.¹⁰⁸ In order to achieve this end, the ICAS was created with the purpose of running and funding the CAS.¹⁰⁹ The number of CAS arbitrators was also expanded with the power to appoint them given to the ICAS.¹¹⁰ Rather than have a set number of arbitrators selected by the IOC, ISFs, NOCs, and the IOC President, all arbitrators are appointed by the ICAS upon proposal by the IOC, ISFs, NOCs, and at its own behest.¹¹¹ One of the more important reforms was changing the process whereby the CAS hears arbitration proceedings.

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *See id.*

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

¹⁰⁹ *See id.*

¹¹⁰ *See id.*

¹¹¹ *See id.*

Before the Paris Agreement, the CAS did not draw a distinction between arbitration cases brought in the first instance between parties and those brought on appeal. Now there is a clear distinction between the two main procedures of the CAS.¹¹² This distinction makes the court more likely to be used since potential parties to a hearing now better understand the services provided. In general, cases brought in the first instance deal with commercial issues and those brought in the Appeals division pertain to disciplinary matters.¹¹³ In addition, the Paris Agreement also provided for the court to issue advisory positions, to conduct mediation prior to arbitration proceeding, and for the creation of an ad hoc division of the CAS that is operative during international competitions to resolve disputes in a timely manner.¹¹⁴

The first ad hoc division was set up for the 1996 Olympic Games in Atlanta.¹¹⁵ Since that time, ad hoc divisions have also been created for subsequent Olympic Games, the European Football Union Championships and the Commonwealth Games.¹¹⁶ A simpler procedure is used for the ad hoc division so that arbitration proceedings can be brought and heard within twenty-four hours.¹¹⁷

2. Process Whereby Arbitration Hearings Are Brought Before the CAS

Any aggrieved party can submit a dispute to the CAS if there is an arbitration agreement between the parties indicating that either or both of the parties has recourse to the court and the dispute is related to sports.¹¹⁸ Specifically, the Statutes of the Bodies Working for the Settlement of Sports-related Disputes (“Statutes”) provides that the Statutes’ “procedural rules apply whenever the

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See *id.*; see also Court of Arbitration for Sports, *Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-related Disputes* § 6 [hereinafter *Code of Sports-related Arbitration*], available at <http://www.tas-cas.org/en/code/frmco.htm> (last visited Feb. 1, 2008).

¹¹⁵ See Reeb, *supra* note 96.

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *id.*

parties have agreed to refer a sports-related dispute to the CAS.”¹¹⁹ “Such disputes may arise out of an arbitration clause inserted in a contract or regulations,” or of a subsequent arbitration agreement, in the case of ordinary arbitration proceedings.¹²⁰

For arbitration proceedings in appeal of matters decided by other sports organizations, disputes may “involve an appeal against a decision rendered by a federation, association or sports-related body where the . . . regulations of such bodies, or a specific agreement” between the “parties provides for an appeal to the CAS.”¹²¹ All of these “disputes may involve matters of principle relating to sport or matters of pecuniary or other interests brought into play in the practice or the development of sport and . . . any [other] activity related or connected to sport.”¹²² The court generally views its jurisdiction broadly. Indeed, it has never declined to exercise jurisdiction when a party has sought arbitration before it.¹²³

3. Appeal of CAS Rulings

A party to an arbitration proceeding who wants to appeal a CAS ruling can only do so when the instrument providing for arbitration does not contain a provision precluding such an appeal.¹²⁴ Also, such a party must be domiciled in Switzerland.¹²⁵ If the ruling is not going to be carried out in Switzerland or by a Swiss entity, the aforementioned provisions from the New York Convention can lead a national court where that party is a citizen (or if a corporation, is incorporated) to not enforce the ruling.¹²⁶ However, if the ruling were to be carried out in Switzerland or by an institution incorporated in Switzerland, such as the IOC, this would leave all non-Swiss parties in a worse position vis-a-vis Swiss parties to arbitration hearings before the CAS.

¹¹⁹ See *Code of Sports-related Arbitration*, *supra* note 114, § 27.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ See Reeb, *supra* note 96.

¹²⁴ *Code of Sports-related Arbitration*, *supra* note 114, §§ 46, 59.

¹²⁵ *Id.*

¹²⁶ See *supra* notes 64–66 and accompanying text (addressing when a party to the Convention does not have to enforce foreign arbitration decisions).

II. THE OLYMPIC BINDING ARBITRATION CLAUSE

The Olympic binding arbitration clause introduced for the 1996 Summer Olympics in Atlanta must be signed by all competitors in order for the IOC to confirm their ability to compete.¹²⁷ Moreover, the IOC has attained the acquiescence of all the ISFs it recognizes in embracing binding arbitration before the CAS by its members.¹²⁸

A. *Positive Attributes of the Olympic Binding Arbitration Clause*

The Olympic binding arbitration clause presents an efficient mechanism for resolving disputes during the Olympic Games. The ad hoc division set up at the respective Olympic Games has not charged athletes appealing decisions concerning their ability to compete.¹²⁹ Moreover, most such cases have yielded a decision within twenty-four hours.¹³⁰ Thus the speed and cost of appealing a ruling to the CAS were not hindrances for competitors seeking to challenge adverse rulings. Additional positive attributes of the CAS are that it is likely to be more neutral than arbitration by ISFs and NGBs; the panel is composed of experts in sports law; CAS proceedings can be flexible; and the court's judgments are more easily enforceable than those of national court systems.¹³¹ Also, domestic courts may not have the jurisdiction to hear a case when the other party is based in another country.¹³²

Some attributes of the CAS have both positive and negative aspects in comparison with traditional litigation. While confidentiality is generally viewed as a positive aspect of arbitration, such confidentiality also yields more uncertainty for parties, as they may not be aware of how the CAS has ruled in similar cases previously. Athletes may thus distrust CAS proceedings for this reason if they fear that the CAS is unpredictable and inconsistent.¹³³

¹²⁷ See Raber, *supra* note 7, at 77.

¹²⁸ See Naidoo & Sarin, *supra* note 5, at 495.

¹²⁹ See Reeb, *supra* note 96.

¹³⁰ *Id.*

¹³¹ See Naidoo & Sarin, *supra* note 5, at 515.

¹³² *See id.*

¹³³ See Raber, *supra* note 7, at 95.

Just as some attributes of the CAS have both positive and negative aspects in comparison with litigation, so too is the court in some ways superior to litigation and in some ways inferior to litigation in consideration of the same issue. Having experts on the panel may bring efficiency gains as the need for expert witnesses may be decreased and may also lead to a more accurate result.¹³⁴ However, the more limited discovery procedures of the CAS, as compared with litigation in United States courts cuts against the possibility of reaching the most accurate and equitable result possible.¹³⁵

The CAS acts as a replacement to litigation. When the parties agree that the efficiency benefits provided by binding arbitration overrides any potential negative aspects of arbitration, these negative qualities, including those related to due process protections, are of less concern. Thus when the parties involved are commercial entities, who have agreed to bring their dispute to the CAS in the first instance, any due process concerns presented in losing the right to a jury trial dissipate. However, in the case of Olympic athletes, who are required to sign the Olympic binding arbitration clause in order to compete, it is important to analyze the due process deficiencies of the CAS.¹³⁶

B. Negative Attributes of the Olympic Binding Arbitration Clause—Due Process Concerns

In order for a proceeding to protect procedural due process rights, one must be entitled to a hearing and notice of the hearing time, date, and content.¹³⁷ This hearing should be “in front of a neutral decision-maker” and should provide “an opportunity to make an oral presentation, to present favorable evidence and to

¹³⁴ See *id.* at 94.

¹³⁵ See *id.*; see also Naidoo & Sarin, *supra* note 5, at 515–16.

¹³⁶ In the case of prospective Olympic athletes who are required to sign the Olympic binding arbitration clause in order to compete, there are actually two issues. The first is whether the provision should be struck for violating common law contractual doctrines. Assuming *arguendo* that the provision will not be struck, one must then analyze the due process protections provided by the CAS itself since it, in effect, is supplanting the right to a trial.

¹³⁷ See Naidoo & Sarin, *supra* note 5, at 497.

confront and cross-examine adverse witnesses.”¹³⁸ Since the Statutes of the CAS do not provide for the cross-examination of adverse witnesses and fundamental rights of Olympic athletes to engage in their employment are at stake, it could be argued that the CAS fails to provide adequate procedural due process protections.¹³⁹ In Part III.C. I will discuss a current hearing, in which the impartiality of an arbitrator was at issue, thereby threatening the procedural due process rights of the athletes.

An additional issue touching on the neutrality of the CAS is its funding. The CAS receives its funding from the ICAS. It remains unclear, however, how the ICAS is funded.¹⁴⁰ If ICAS funding can be traced to the IOC, the World Anti-Doping Agency (“WADA”), NOCs, or ISFs, the independence and impartiality of the CAS would then be in question.

Substantive due process focuses on whether a rule or regulation “is fair and reasonable and clearly relevant to the accomplishment of its purpose.”¹⁴¹ Courts will review the rules of sports bodies only in a limited number of situations. The courts will review the rules of sports bodies when a rule violates public policy by being fraudulent or unreasonable.¹⁴² They will also review when an organization’s rules or regulations exceed the organization’s authority, or when the organization violates one of its own rules.¹⁴³ Finally, the courts will review when the rules in question are applied unreasonably or arbitrarily, or violate an individual’s constitutional rights.¹⁴⁴

Perhaps the biggest reason for concern with the CAS is the CAS Statute provision affording Swiss persons the right to appeal CAS rulings in the absence of provisions stating that CAS decisions will not be appealed by either of the parties.¹⁴⁵ Since non-Swiss persons do not have this right, and the IOC is

¹³⁸ *Id.*

¹³⁹ See generally *Code of Sports-related Arbitration*, *supra* note 114; see also Bitting, *supra* note 14, at 664.

¹⁴⁰ See Raber, *supra* note 7, at 89.

¹⁴¹ See Naidoo & Sarin, *supra* note 5, at 497.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 498.

¹⁴⁵ See *Code of Sports-related Arbitration*, *supra* note 114, § 46, 59.

incorporated in Switzerland, in any case involving the IOC and a non-Swiss person, there is a very strong argument that the rule violates public policy by being unreasonable.¹⁴⁶ Moreover, if an arbitration hearing violates fundamental notions of fairness, it cannot be said that the proceeding provides substantive due process. Because of the aforementioned CAS Statute, therefore, the CAS arguably does not protect the substantive due process rights of non-Swiss parties for hearings involving either the IOC, or any other Swiss person or corporation.

The main due process concerns presented by the Olympic binding arbitration agreement flow from the nature of the CAS. If the CAS could provide the same procedural safeguards that other courts of law provide, there would be less of a threat to the rights of competitors. As Bitting notes, since the Olympic athlete can be regarded as a professional, his rights should receive the same protections as an employee who is compelled to accept binding arbitration as a condition of employment.¹⁴⁷ Even if the CAS is able to alleviate these due process concerns, common law contractual doctrines still may cause American courts to strike the Olympic arbitration clause from contracts entered into by Olympic competitors.¹⁴⁸ Nonetheless, some recent cases shed light as to competitor concerns about the CAS.

C. Potential Due Process Violations and the Court of Arbitration for Sport

The recent case between the International Association of Athletics Federation (“IAAF”) and Greek sprinters Kostas Kenteris and Katerina Thanou is illustrative of the problems still plaguing the CAS. The IAAF had suspended the sprinters from the Athens Olympics for failure to appear at a drug test. Upon appeal, a Greek

¹⁴⁶ It could also be argued that the CAS’s rulings are subject to review insofar as affording a right to only one party in an arbitration amounts to unreasonable or arbitrary application of the rules.

¹⁴⁷ See Bitting, *supra* note 14, at 666–67.

¹⁴⁸ See Naidoo & Sarin, *supra* note 5, at 503–05 (discussing whether the Olympic binding arbitration clause may be voided by American courts because it violates common law contractual doctrines); see also Bitting, *supra* note 14, at 667–77; see also PERILLO, *supra* note 73, §§ 8.2, 9.2, 9.9, 9.38, 9.40 (discussing common law contractual principles).

Athletics Federation disciplinary panel reversed the suspension.¹⁴⁹ The athletes appealed the selection of arbitrators because one of the three arbitrators, Yves Fortier, worked for a law firm that represented the WADA, thereby presenting a potential conflict of interest.¹⁵⁰ This episode may stand for the notion that the CAS provides adequate avenues for potential conflicts of interest to be remedied, as a new arbitration board is in the process of being established to hear the case. However, it was not at the behest of the CAS that the new board was established.¹⁵¹ Rather, Fortier resigned from the arbitration panel so that the sprinters would feel confident that the hearing was not tainted by a potential conflict of interest.¹⁵²

While it is unclear whether the CAS would have replaced Fortier on its own accord, the court stated that it had confidence in Fortier's independence and impartiality.¹⁵³ It is thus at least questionable whether the CAS would have taken affirmative steps to protect the organization from the hint of a conflict of interest. The incident also illustrates that, though the CAS provides better procedural due process protections than it did prior to the Paris Agreement when the CAS was an arm of the IOC, these protections are still not as strong as they need to be. While the due process protections of the Greek sprinters were protected, in all other cases that Fortier was an arbitrator, parties may not have had sufficient procedural due process protections because the impartiality and independence of arbitration panels that Fortier was a member of is questionable.¹⁵⁴ While the Greek sprinters case¹⁵⁵

¹⁴⁹ *Sprint Duo Drop Drugs Ban Appeals*, BBC SPORT, June 26, 2006,

<http://news.bbc.co.uk/sport1/hi/athletics/5118074.stm> [hereinafter "*Sprint Duo*"].

¹⁵⁰ Martin King, *Recent Decisions and Issues in the Court of Arbitration for Sport*, ARBITRATION WORLD, Summer 2006, at 4, 5.

¹⁵¹ *Id.* at 5–6.

¹⁵² *Id.* at 6.

¹⁵³ *Id.*

¹⁵⁴ *See id.* (noting that Tim Montgomery is appealing the verdict from his hearing before the CAS because of Fortier's failure to disclose his law firm's relationship with the World Anti-Doping Agency creating the possibility that the result achieved may not have been an impartial one).

¹⁵⁵ *Sprint Duo*, *supra* note 149. On the eve of the CAS hearing before a reconstituted arbitration panel in June 2006, the IAAF and the sprinters settled the case, thus avoiding a CAS ruling.

provides an example of procedural due process rights being put in jeopardy, the case of American skeleton team member Zachery Lund provides an example of substantive due process rights potentially not being protected by the CAS.

Lund was found to be in violation of the anti-doping rules for using Proscar and Propecia to combat the effects of male pattern baldness.¹⁵⁶ The sole ingredient of these medicines is Finasteride, which has been on the list of banned substances as a masking agent since January 2005.¹⁵⁷ Lund's mistake in the case amounted to a failure to thoroughly search the Federation Internationale de Bobsleigh et Tobogganing ("FIBT") website for a list of banned substances. No party has alleged that Lund's use of Finasteride was with the intent of gaining an advantage over a competitor, nor of concealing the use of performance enhancing substances.¹⁵⁸ One who is trying to conceal the use of performance enhancing substances would not list the use of a masking agent on a Drug Control Form because the use of a masking agent is similarly punishable by WADA.¹⁵⁹ Rather, Lund had used these medicines for years because they help stem the degree of his baldness. Moreover, he has continuously listed his use of the medicines on the Doping Control Form.¹⁶⁰

Lund had participated in competitions in 2005 prior to the November 2005 World Cup, in which he was ultimately found to have committed a doping violation.¹⁶¹ He listed his use of anti-baldness drugs at all competitions.¹⁶² Because of his honesty, the fact that no one believed he was using the drugs to gain a competitive advantage, and the perceived failure of the anti-doping agencies to detect his violation sooner, the usually mandatory two-year prohibition on competing was reduced to one year.¹⁶³ Though the CAS did not impose the ordinarily mandated two-year ban

¹⁵⁶ See *World Anti-Doping Agency v. Lund*, Ct. of Arb. for Sport, CAS arbitration No. CAS 06/001, at 5 (2006).

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

¹⁵⁹ See *generally id.*

¹⁶⁰ See *id.* at 9.

¹⁶¹ Cf. *id.*

¹⁶² Cf. *id.*

¹⁶³ See *id.* at 9–10.

from competition, there may still have been a substantive due process violation in the case.

Should Lund elect to appeal the CAS ruling in a United States court, he may prevail because the totality of the circumstances indicates that the court's application of the rules in question may have been unreasonable or arbitrary. Had Lund's violation been detected earlier in the year, he would have been able to compete in the Turin Olympics. As a result of the system's failure and Lund's honest mistake, he missed his opportunity to compete.

III. IMPROVING THE COURT OF ARBITRATION FOR SPORT

A main difference between the Olympic binding arbitration requirement and the Amateur Sports Act provision that requires binding arbitration is that the Olympic provision pertains to all disputes brought by competitors.¹⁶⁴ The Amateur Sports Act provision, on the other hand, only pertains to disputes arising within twenty-one days of the beginning of an international competition.¹⁶⁵ For this reason, the due process concerns created by the structure and operation of the CAS are greater than those presented by the Amateur Sports Act.

Going forward, the CAS will likely play an ever-increasing role in resolution of sports law disputes. It is thus imperative that the CAS ameliorate the areas in which its due process protections are not sufficient. There are many fairly simple steps the ICAS can take to cure sources of due process concerns with the CAS.¹⁶⁶ Publishing CAS decisions, allowing for greater discovery, including the cross-examination of adverse witnesses, providing athletes with more information regarding rights and resources available to them, and ensuring that the arbitrator lists include people from diverse backgrounds will all help increase athlete confidence in the court.¹⁶⁷ I will now address a few of the issues raised in this paper.

¹⁶⁴ See Bitting, *supra* note 14, at 663.

¹⁶⁵ See Amateur Sports Act, 36 U.S.C. § 220509 (2006).

¹⁶⁶ See Naidoo & Sarin, *supra* note 5, at 515; *see also* Raber, *supra* note 7, at 96–97.

¹⁶⁷ See Naidoo & Sarin, *supra* note 5, at 515; *see also* Raber, *supra* note 7, at 96–97.

For disciplinary matters that arise after the completion of a competition, I do not believe there is a sufficient reason to require that athletes agree to binding arbitration. Binding arbitration during the Olympic Games is mainly defensible because of how quickly a decision can be reached in comparison with lengthy trials, thereby allowing competitions to be held in a timely manner. But if the infraction is detected subsequent to competition, this interest is no longer as paramount, and then the athlete's interest in protecting his due process rights should trump the desire for a swift verdict.

Also, the decision to have binding arbitration before the CAS is one better achieved through mutual consensus. So, when this mutual consensus is not present, the international sports law system should protect athlete rights, since it is their livelihood that is often at stake. On the other hand, when parties negotiate for binding arbitration from positions of equal footing, there is no reason not to prohibit appeal from CAS rulings. Moreover, it is unlikely that national judicial systems will assert jurisdiction in most cases because of the general belief that sports are better left outside of the courtroom.

Indeed, arbitration before the CAS could still be required, but with a provision allowing for a full trial should certain triggering conditions be met. Thus, even if the only thing the IOC requires is that parties consent to arbitration prior to engaging in litigation, this may be sufficient to keep most cases out of national court systems. Leaving the litigation avenue open to prospective Olympic athletes will also make athletes more confident in the fairness of CAS proceedings since they will know that they can appeal if they find the procedural safeguards of the court lacking. If athletes are more confident in the fairness of CAS proceedings, they will probably pursue more matters in the CAS, even when not required to do so.

A second main issue the CAS should address is its source of funding. The court's independence has been questioned because the IOC previously funded the court and it is not currently known how the CAS is funded. While the ICAS was created to ensure the

financial independence of the CAS,¹⁶⁸ if the ICAS is funded by the IOC, this extra layer of bureaucracy could merely be masking a continued IOC role in funding the CAS. Clarifying the court's sources of funding would put practitioners and athletes at ease that the court is sufficiently financially independent. A possible source of funding for the CAS could be from raising the fees it charges. A second potential source could be the NOCs, who in general side with the athletes in disciplinary matters. If the source of the funding is the committees that want their athletes to be able to compete, potential competitors will be less concerned about the financial independence of the CAS.

Next, the flaw in the CAS statutes allowing for appeal of CAS rulings by Swiss citizens or those having a "domicile, habitual residence, or business establishment in Switzerland" when there is not an express provision preventing such a right of appeal should be closed.¹⁶⁹ If the CAS really wishes to attain the esteem of the entire sports and legal community, different rules should not be applied to Swiss citizens or those with substantial connections to Switzerland, as compared with those lacking such a relationship with Switzerland.

Finally, when the neutrality of CAS arbitrators is questionable, the CAS should be willing to reopen such cases or assign new arbitration panels as appropriate. The episode involving the Greek sprinters makes clear that no judicial body is perfect. The CAS could have served its interest in promoting confidence in the impartiality of arbitration boards much better had it requested Mr. Fortier to resign and allowed the reopening of the Montgomery case before a different arbitration panel.

¹⁶⁸ See Naidoo & Sarin, *supra* note 5, at 502; see also Reeb, *supra* note 96.

¹⁶⁹ See *Code of Sports-related Arbitration*, *supra* note 114, §§ 46, 59 (noting that awards "may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland.").