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# The Beijing Summer Olympic Games: Decisions from the CAS and IOC

Richard H. McLaren & Geoff Cowper-Smith\*

## I. INTRODUCTION

At 8:08:08 pm on the eighth month of the two thousand eighth year<sup>1</sup> the XXIX Olympiad opened in Beijing, People's Republic of China (PRC).<sup>2</sup> No doubt Beijing will be remembered for holding the greatest and most elaborate opening ceremonies ever staged. The 2008 Summer Olympic Games will also be remembered for perhaps the most impressive display of fireworks the world has ever seen,<sup>3</sup> the worst air pollution,<sup>4</sup> a large number

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\* Richard H. McLaren, Professor of Law, University of Western Ontario, London, Canada together with Geoff Cowper-Smith candidate for JD Western Law 2009. Professor McLaren would also like to acknowledge the assistance of several researchers Erika Douglas, Morgan Borins, and Jennifer Del Vecchio, each a candidate for the JD Western Law 2010, and Sharon Kour candidate for the JD Western Law 2009.

1. Because it is associated with prosperity and confidence in Chinese culture, the number eight is considered a lucky. This stems from the fact that the Chinese pronunciation for "eight" is the same as "luck" ("Fa"). VIVIEN SUNG, FIVE-FOLD HAPPINESS: CHINESE CONCEPTS OF LUCK, PROSPERITY, LONGEVITY, HAPPINESS AND WEALTH 214 (2002).

2. Janice Lloyd, *China Opens Olympics with Fireworks, Pageantry*, USA TODAY, Aug. 8, 2008, available at [http://www.usatoday.com/sports/olympics/beijing/2008-08-08-opening-ceremony\\_N.htm](http://www.usatoday.com/sports/olympics/beijing/2008-08-08-opening-ceremony_N.htm).

3. The opening ceremonies astoundingly included approximately 15,000 performers and 33,000 fireworks. See Craig Simons, *Beijing Games Likely To Start With a Bang*, SEATTLE TIMES, Aug. 7, 2008, available at [http://seattletimes.nsource.com/html/olympics/2008096966\\_olyopening070.html](http://seattletimes.nsource.com/html/olympics/2008096966_olyopening070.html). In their drive for perfection, Chinese organizers decided to broadcast digitally enhanced footage instead of live footage for some of the fireworks, and had a young girl lip-sync a song that was actually sung by a girl who may not have been considered as pretty. Jim Yardley, *In Grand Olympic Show, Some Sleight of Voice*, N.Y. TIMES, Aug. 12, 2008, available at <http://www.nytimes.com/2008/08/13/sports/olympics/13beijing.html>.

4. Even though the government went to great lengths to decrease pollution by ordering 1.5 million cars off the road, closing many of the city's factories, and halting construction, air quality readings still bordered on unacceptable levels. Barbara Demick, *As Olympics Near, Beijing Still Can't Beat Pollution*, L.A. TIMES, July 28, 2008, available at <http://www.latimes.com/travel/la-trw->

of new world-records,<sup>5</sup> and security precautions worthy of defending a foreign military invasion.<sup>6</sup> It was truly a unique Summer Olympic Games, and only time will tell whether the Chinese host city will, with historical perspective, be viewed favorably or with skepticism. Through all of these events the CAS was there in the form of its Ad-Hoc Division (AHD) to ensure that fair play would remain a pillar of the Olympic Games.

The Beijing Olympic Games were the fourth Summer Games at which the AHD has been present to arbitrate Olympic-related disputes.<sup>7</sup> Twelve arbitrators<sup>8</sup> from across the globe were onsite to hear disputes, and the AHD heard a total of eight cases.<sup>9</sup> The AHD, which took jurisdiction at the

fig-olyair29-2008jul29,3,665711.story. Worried about their ability to breathe, many athletes chose to train outside Beijing prior to the games and some, like Haile Gebrselassie, an Ethiopian marathon runner, even went so far as to withdraw from the event. *Gebrselassie Opts Out Of Marathon*, BBC SPORT, <http://news.bbc.co.uk/sport2/hi/olympics/athletics/7287578.stm> (last visited Oct. 12, 2009). He perceived the pollution to be too great a risk to his health and future career. *Id.*

5. The swimming and sprinting competitions witnessed a notable number of new world records. For example, American swimmer Michael Phelps, winner of eight gold medals, broke seven world records and one Olympic record in the course of winning the gold. Karen Crouse, *Phelps's epic journey ends in a perfect 8*, N.Y. TIMES, Aug. 17, 2008, available at <http://www.nytimes.com/2008/08/17/sports/17iht-OLYPHELPS.1.15361130.html>. Also, Jamaican sprinter Usain Bolt won three gold medals and broke three world records in the process. *Bolt Grabs Third Gold and Record*, BBC SPORT, <http://news.bbc.co.uk/sport2/hi/olympics/athletics/7576737.stm> (last visited Oct. 27, 2009).

6. One of the authors who was present at the Beijing Games as a Court of Arbitration for Sport (CAS) arbitrator, Richard H. McLaren, noted a prevalence of police checkpoints and heavy equipment such as tanks at the roadsides. The Olympic Village was fenced in and heavily guarded at the perimeter. The only traffic permitted to move in and out of the capital was official vehicles containing tourists or Olympic related persons. One could only enter the hotel at which the CAS arbitrators were housed if one had accreditation and would submit to a physical search. The hotel also advised the arbitrators that the Chinese government monitored email sent from the hotel.

7. The AHD has arbitrated disputes in various Olympic Summer Games. *See generally* Michael J. Beloff, *The CAS Ad Hoc Division at the Sydney Olympic Games*, INT'L SPORTS L. REV. (2001) [hereinafter Beloff, *The CAS Ad Hoc Division at the Sydney Olympic Games*]; Michael J. Beloff, *The Court of Arbitration for Sport at the Olympics*, 4 SPORT AND THE LAW JOURNAL 5 (1996) [hereinafter Beloff, *The Court of Arbitration for Sport at the Olympics*]; Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515 (2001) [hereinafter McLaren, *Introducing the Court of Arbitration for Sport*]; Richard H. McLaren, *The CAS Ad Hoc Division at the Athens Olympic Games*, 15 MARQ. SPORTS L. REV. 175 (2004) [hereinafter McLaren, *The CAS Ad Hoc Division at the Athens Olympic Games*].

8. The AHD arbitrators, in alphabetical order, were: The Hon. Michael J. Beloff Q.C. (United Kingdom), Ms. Margarita Echeverria Bermudez (Costa Rica), Mr. Liu Chi (China), The Hon. Mr. Justice Deon van Zyl (South Africa), Mr. Luigi Fumagalli (Italy), Mr. Thomas Mun Lung Lee (Malaysia), Prof. Richard H. McLaren (Canada), Dr. Stephan Netzele (Switzerland), Mr. Sharad Rao (Kenya), Mr. David W. Rivkin (United States), Mr. Alan Sullivan Q.C. (Australia), and Mr. Jingzhou Tao (France/China).

9. *See generally* Arbitration CAS 08/008, Italian Olympic Comm. v. ISAF, award of 24 Aug. 2008; Arbitration CAS 08/007, SNOC v. FILA, award of 23 Aug. 2008; Arbitration CAS 08/006,

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opening of the Olympic Village,<sup>10</sup> was not the exclusive dispute resolution provider for the XXIX Olympiad.<sup>11</sup> For the first time ever, the CAS Appeal Division heard four Olympic-related cases prior to and during the period in which the AHD had jurisdiction at the Olympic Games.<sup>12</sup> The CAS Appeal Division also heard two Olympic-related cases after the close of the Olympics in January 2009, despite the fact that these cases could have been heard by the AHD during or just after the Games.<sup>13</sup> These post-Olympic hearings compare to two cases after the Athens Summer Olympic Games<sup>14</sup> and no cases after the Torino Winter Olympic Games.<sup>15</sup>

MNOC v. IOC, award of 9 Aug. 2008; Arbitration CAS 08/005, AFHF v. FIH, award of 8 Aug. 2008; Arbitration CAS 08/004, ANOC v. FIH, award of 5 Aug. 2008; Arbitration CAS 08/003, Schuettler v. ITF, award of 4 Aug. 2008; Arbitration CAS 08/002, Simms v. FINA, order of 1 Aug. 2008; Arbitration CAS 08/001, ANOC v. FIH, award of 2 Aug. 2008.

10. On July 27, 2008.

11. See generally Arbitration CAS 2008/A/1624, FC Barcelona v. FIFA, award of 2 Oct. 2008; Arbitration CAS 2008/A/1623, SV Werder Bremen v. FIFA, award of 2 Oct. 2008; Arbitration CAS 2008/A/1622, FC Schalke 04 v. FIFA, award of 2 Oct. 2008; Arbitration CAS 2008/A/1615, HMPF v. UIPM, award of 31 Oct. 2008.

12. *Id.*

13. See CAS 2008/A/1641, Neth. Antilles Olympic Comm. v. IAAF, award of 6 Mar. 2009. The Olympics closed on August 24, 2008. *Id.* The CAS heard an appeal on January 15, 2009, by the National Olympic Committee of the Netherlands Antilles against the IAAF with respect to the 200-meter men's final. *Id.* This case is discussed *infra* in section "Olympic Cases After the Games" under the subheading "Field of Play Decision." On January 13, 2009, an appeal involving Swedish wrestler Ara Abrahamian against the IOC was heard by the CAS regarding the revocation of a medal following the Men's 84kg wrestling event. See Arbitration CAS 2008/A/1647, NOC of Sweden v. IOC, award of 12 Feb. 2009. The appellants in that case brought an application before the AHD against the International Weight Lifting Federation, FILA. *Id.* For further discussion of the case, see *infra* Section "AHD and IOC Disciplinary Decisions During the Competition Period" under the subheading "Sport Administration and the Spirit of the Games." Note that after the close of the Olympic Games there were also five cases related to equestrian events. See *Six Athletes Identified in Beijing Doping Cases*, USA TODAY, Apr. 29, 2009, available at [http://www.usatoday.com/sports/olympics/2009-04-29-beijingdoping\\_N.htm](http://www.usatoday.com/sports/olympics/2009-04-29-beijingdoping_N.htm). Those cases are not discussed in this article, nor are they included in the statistics because they had not sufficiently progressed at the time of writing this article to a point where commentary would be appropriate.

14. See generally Arbitration CAS 2004/A/748, ROC v. IOC, award of 27 June 2006; Arbitration CAS 2004/A/726, Williams v. IOC, award of 19 Oct. 2005.

15. See generally Richard McLaren, *A New Order: Athlete's Rights and the Court of Arbitration at the Olympic Games*, 7 *Olympika* 1 (1998) [hereinafter McLaren, *A New Order*], for a discussion of the AHD experience at the Nagano Games. See generally Richard McLaren, *CAS: The Ad Hoc Division at the Salt Lake City Olympic Games*, INT'L SPORTS L. REV., Issue 2 (2004), for a discussion of the Salt Lake City experience. See generally Andreas K. Zagklis, *The CAS Ad Hoc Division at the XX Olympic Winter Games in Turin*, 3-4 INT'L SPORTS L. J. 47 (2006), for a discussion of the AHD at Torino.

For the first time in the existence of the AHD, no doping cases were heard by it at the Beijing Olympics. There appear to be a variety of explanations for this. First, it is very difficult to mount a doping case defense in the time frame that the AHD rules provide for at the Games, although it has been done.<sup>16</sup> In many complicated scientific cases it is not feasible to complete the evidentiary proceedings within a time frame compatible with the needs of the Olympic Games.<sup>17</sup> The bifurcated jurisdiction between the International Olympic Committee (IOC) and the International Federation (IF) of the doping offense involved also makes it unlikely that the athlete will activate the AHD process because it does not involve the assessment of the future sanctions, only the elimination of results at the Olympic Games and the loss of accreditation to be in the Olympic Village. It is the responsibility of the IF to determine if a suspension is justified and what its length should be under its own anti-doping rules. In the case of Beijing there were many cases during the Olympic Games where the IOC Disciplinary Commission (DC) did not hold hearings or make decisions until after the Olympic Games, which resulted in cases where the athlete, who may have wanted to appeal to the AHD, instead being sent by necessity to the Appeal Division in Lausanne.<sup>18</sup>

Second, the absence of doping cases before the AHD was perhaps a consequence of the improved, broader, and more encompassing IOC and World Anti-Doping Agency (WADA) testing programs. WADA is responsible for out of competition testing prior to the opening of the Olympic Village. Prior to the opening of the Olympic Games, WADA, the IOC, and the Beijing Organizing Committee for the Olympic Games (BOCOG) collaborated on the out-of-competition testing regime, conducting tests both in Beijing and outside of China. Once the Olympic Village opened, it was the IOC to whom the responsibility fell, and is where the vast

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16. There are several doping cases at other Olympic Games. *See generally* Korneev, Gouliev & Russian NOC v. IOC 4 Aug. 1996, unreported (Bromantan doping case in Atlanta); Arbitration CAS 98/002, Rebagliati v. IOC, award of 12 Feb. 1998 (marijuana case in Nagano); Arbitration CAS00/011, Raducan v. IOC, award of 28 Sept. 2000 (in Sydney); Arbitration CAS 00/006, Baumann v. IOC, award of 22 Sept. 2000; Arbitration CAS 00/015, Melinte v. IAAF, award of 29 Sept. 2000; Arbitration CAS 02/001, Prusis v. IOC, award of 5 Feb. 2002; Arbitration CAS 04/004, Munyasia v. IOC, award of 15 Aug. 2004 (in Athens); Arbitration CAS 06/001, WADA v. USADA, award of 10 Feb. 2006.

17. GABRIELLE KAUFMANN-KOHLER, *ARBITRATION AT THE OLYMPICS* 39 (2001).

18. The first of those cases was appealed to CAS in January 2009. *Belarussian Athletes Appeal Olympic Doping Offenses, AROUND THE RINGS*, <http://www.aroundtherings.com/articles/view.aspx?id=31202> (last visited Oct. 27, 2009). It involved the Belarussian hammer throwers Devyatovskiy and Tiskhan. *Id.*

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majority of the testing occurred.<sup>19</sup> In addition to the out-of-competition, pre-games, and competitive period testing programs, four IFs also completed pre-competition blood screenings.<sup>20</sup> This network resulted in many athletes being detected before the Olympic Games<sup>21</sup> and thus never competing at the Olympic Games and raising the possibility of becoming a doping case there.

Of the nine disqualifications for doping which occurred in Beijing, none were appealed to the AHD.<sup>22</sup> Indeed, not all of the cases were completed in Beijing. Following delayed completion of the DC proceedings and their ensuing recommendations to the IOC Executive Board, the bans for some athletes were only announced as late as December of 2008.<sup>23</sup> In taking such action, the IOC only deals with the consequences of the anti-doping rule violation in so far as it pertains to the Olympic Games. The IF is left to consider what, if any, further action might be taken as a result of the

19. During the twenty-nine day period where testing fell under the auspices of the IOC, an impressive 4,770 doping tests were carried out, the most tests in Olympic history. See Report of the Independent Observers, XXIX Olympic Games, Beijing 2008, art. 4.4.5, available at [http://www.wada-ama.org/rtecontent/document/WADA\\_IO-Report\\_Beijing\\_2008\\_FINAL\\_Feb2009.pdf](http://www.wada-ama.org/rtecontent/document/WADA_IO-Report_Beijing_2008_FINAL_Feb2009.pdf) [hereinafter Report of the Independent Observers]. By comparison, 3,600 tests were carried out in Athens. *Id.* Sampling consisted of 3,801 urine tests and 969 blood tests. *Id.* Eight hundred seventeen of the urine tests were for erythropoietin (EPO), a prohibited substance, and 471 of the blood tests were for Human Growth Hormone (HGH). *Id.* This testing regime acted as a serious deterrent to those who might have otherwise cheated. *Id.* Nevertheless, five medals (excluding equestrian events) were revoked and reallocated after positive post-competition tests for nine doping-related disqualifications. *Id.*

20. The four IFs are the IAAF (Athletics), UCI (Cycling), FIS (Rowing), and UIPM (Modern Pentathlon). *Id.*

21. See *infra* Appendix A.

22. See Report of the Independent Observers, *supra* note 19, at art. 4.4.5. The following nine athletes were disqualified by the ICO for doping: Maria Moreno (Spain, Cycling); Thi Ngan Thung Do (Vietnam, Gymnastics); Jong Su Kim (North Korea, Shooting); Fani Chalkia (Greece, Athletics); Liudmyla Blonska (Ukraine, Track and Field); Igor Razoronov (Ukraine, Weightlifting); Vadim Devyatovskiy (Belarus, Athletics); Ivan Tsikhan (Belarus, Athletics); and Adam Seroczynski (Poland, Kayak). *Id.* Although further disqualifications may occur in equestrian events, at the time of writing this article those cases had not yet come to a conclusion.

23. On December 11, 2008, the IOC announced in a press release that Vadim Devyatovskiy (Belarus, athletics) who came in second in the Men's Hammer Throw event, Ivan Tsikhan (Belarus, athletics) who came in third in the Men's Hammer Throw event, and Adam Seroczynski (Poland, kayak) who came in fourth in the Kayak double (K2) 1000m Men's event had committed anti-doping rule violations (a.r.v.). See Report of the Independent Observers, *supra* note 19, at art. 4.5.10. Devyatovskiy and Tsikhan were stripped of their medals and Seroczynski was stripped of his diploma. Press Release, *IOC Takes Decisions On Three Doping Cases*, Dec. 11, 2008, available at <http://www.olympic.org/>. They were all disqualified from the Beijing Olympic Games and Devyatovskiy was permanently disqualified from all future Olympic Games because the offense was his second a.r.v. *Id.*

application of the anti-doping rules for their sport. In the case of the two Belarusian athletes, CAS announced in January 2009 that appeals from these decisions had been received.

Many of the cases that did go before the AHD during the Beijing Olympic Games appear to have been motivated by gaining strategic advantages rather than refuting doping allegations, appealing selection and eligibility decisions, or dealing with other sports disputes. This strategic use, which might on occasion also be considered as strategic abuse of the tribunal by athletes and countries, has become increasingly commonplace. The Beijing Olympic Games in this respect were no different than the Atlanta, Nagano, and Athens Games where strategy and legal maneuvering were also obviously a part of the process.<sup>24</sup>

This article reviews the Beijing Olympic Games cases heard by the CAS Appeal Division before and after the Olympic Games and the AHD in Beijing, together with pertinent IOC Executive Board doping and disciplinary decisions. The discussion is in chronological order dealing first with Olympic-related cases that were heard by the ordinary and appeal divisions in Lausanne prior to the AHD taking jurisdiction of Olympic matters. Those cases are followed by appeals heard by the appeal division while the AHD took jurisdiction over Olympic matters in Beijing. A discussion of the decisions made by the AHD and IOC during the pre-games lead-up to the opening ceremonies then follows, after which attention is turned to those cases that arose during the Olympic Games and were disposed of by the AHD and IOC at the Games. Finally, the appeals made to the CAS after the close of the 2008 Beijing Olympic Summer Games but related thereto will be reviewed.

## II. BACKGROUND: JURISDICTION OF THE AD-HOC DIVISION

The legal framework that provides the AHD with its jurisdiction over Olympic-related disputes arising from the opening of the Olympic Village to the closing ceremonies has been the subject of much discussion over the years and does not require elaboration in this article.<sup>25</sup> All that is required is to discuss the jurisdiction of the AHD and of the IOC and note the changes to the process that arose in connection with the Beijing Olympic Games.

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24. See McLaren, *The CAS Ad Hoc Division at the Athens Olympic Games*, *supra* note 7, at 200.

25. For further discussion on the topic, see Beloff, *The Court of Arbitration for Sport at the Olympics*, *supra* note 7; McLaren, *Introducing the Court of Arbitration for Sport*, *supra* note 7; Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes*, 35 VAL. U. L. REV. 379 (2000); Matthieu Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, 2 INT'L SPORTS L.J. 21 (2002).

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The Olympic Movement, formed by the *Olympic Charter*, is created in full autonomy by the IOC, and is not subject to or part of any domestic legal order.<sup>26</sup> All matters of controversy of a non-technical nature concerning the Olympic Movement and the Olympic Games are decided by the IOC Executive Board, which is the sole organ empowered by the *Olympic Charter* to interpret the Olympic Rules, and where necessary, penalize organizations and individuals.<sup>27</sup> The Executive Board has the authority to form an ad hoc IOC Disciplinary Commission (DC). The DC performs a fact finding function by looking into the matter in dispute. In the past, the AHD performed this function and did so with difficulty and rather limited success.<sup>28</sup> However, the DC also has adjudicative recommendatory responsibilities. The DC gathers the facts, examines the applicable legal framework and then makes recommendations to the IOC Executive Board. The Executive Board in turn has the legal power and authority to act and impose sanctions and make the final decision on what action is to be taken, if any.

There is a dual responsibility at the Olympic Games divided between the IOC, on the one hand, and the IFs, on the other. To appreciate this division in responsibility, it is necessary to understand the distinction between the “technical” and “non-technical” aspects of sport. This is also of importance with regard to the jurisdiction of CAS.

[T]echnical questions such as disputes relating to rules of competition, technical control of certain sports and the organization of sport events . . . are to be settled by the competent sports bodies themselves: national and international federations, juries, [or in some limited circumstances] the IOC or the NOCs. To the extent that such matters relate to the Olympic Movement and the Olympic Games . . . the authority of the IFs to regulate them rests upon a delegation by the IOC . . . .<sup>29</sup>

The CAS avoids ruling on so-called technical decisions in order to avoid infringing upon the jurisdiction of any existing sports organization. Essentially, the CAS can review any sports-related matter not addressed by

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26. The Olympic Movement is comprised of the IOC, IFs, National Olympic Committees (NOCs), the Organizing Committees for Particular Olympians (OCOGs), and the Olympic Congress. See generally Report of the Independent Observers, *supra* note 19.

27. Bruno Simma, *The Court of Arbitration for Sport*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004*, at 21, 24 (Ian S. Blackshaw et al. eds., 2006).

28. See KAUFMANN-KOHLER, *supra* note 17, at 114 (discussing *Korneev v. IOC*, & *Gouliev v. IOC*, an unreported award dated August 4, 1996).

29. Simma, *supra* note 27, at 24.



the settlement provision of the *Olympic Charter* while matters relating to the Olympic Movement remain under the exclusive jurisdiction of the IOC.<sup>30</sup>

The jurisdiction of the CAS is restricted to those parties who explicitly accept its decisions.<sup>31</sup> Rule 59 of the *Olympic Charter* provides that “any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the CAS.”<sup>32</sup> To assist in ensuring the jurisdiction of the AHD, all participants in the Olympic Games must sign a waiver authorizing disputes to be submitted exclusively to CAS.<sup>33</sup> The jurisdiction of the AHD arises over the athlete specifically by way of the arbitration clause in the entry form signed by each and every participant in the Olympic Games together with Rule 59 of the *Olympic Charter*. The AHD jurisdiction over NOCs arises from Rules 3.2 and 28 of the *Olympic Charter*<sup>34</sup> and the jurisdiction over IFs is created by Rules 3.3, 26, and 27 of the *Olympic Charter*. By their mere presence at the Olympic Games, both NOCs and IFs are presumed to have subscribed to the arbitration clause in Rule 59 of the *Olympic Charter* as well.<sup>35</sup> In addition to these provisions there is typically a preexisting CAS arbitration clause in the governing documents of the relevant IF bylaws thereby deeming acceptance by a federation of the AHD’s jurisdiction by participation in the Olympic Games, and a contractual agreement between the host city and the IOC rounds out the jurisdiction of the AHD.<sup>36</sup> The jurisdiction of the AHD is restricted to

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30. 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, 348 n.1 (1994).

31. See Statute for the Court of Arbitration for Sport, Arts. 5 & 19, available at <http://www.tas-cas.org>.

32. International Olympic Committee, *Olympic Charter*, Rule 59, available at [http://www.olympic.org/Documents/olympic\\_charter\\_en.pdf](http://www.olympic.org/Documents/olympic_charter_en.pdf) [hereinafter *Olympic Charter*]. See *Steele v. CIO* (Unreported CAS Ad Hoc Division (OG Nagano)) (1998) (discussing what constitutes a dispute under the *Olympic Charter* as relates to an award in Nagano under a previous but similar wording of the charter). See also McLaren, *A New Order*, *supra* note 15, at 13 (discussing this decision).

33. Those involved in the Olympic Games agree that any “dispute arising on the occasion of or in connection with my participation in the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration (Rule 59).” See McLaren, *Introducing the Court of Arbitration for Sport*, *supra* note 6, at 524 (addressing the question of the AHD’s jurisdiction).

34. See Arbitration CAS OG 2004/006, *AOC v. IOC & ICF*, at ¶ 1; Arbitration CAS OG 08/003, *Schuetzler v. ITF & German NOC & IOC*, award of 4 Aug. 2008, at ¶ 4.2.

35. *Olympic Charter*, *supra* note 32. For example, at the Sydney Olympics, before the IAAF endorsement of CAS within its constitution, the AHD nevertheless acted as an appellate court over IAAF decisions. See Graeme Mew & Mary Jane Richards, *More Than Just a Game: Resolving Disputes in Modern Sport* (2005) (unpublished paper presented at 14th Commonwealth Law Conference, London, England).

36. *Id.*

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ensure athletes are not required to give up their rights with their respective NFs, IFs, and National Courts, while guaranteeing that the athletes have immediate recourse during major competitions. Athletes' rights are protected by the Olympics Games rules, which govern the AHD and mandate the application of the principles of natural justice and due process. Before a request for arbitration can be brought before the AHD, the claimant must have exhausted all the internal remedies available *unless* the time needed to exhaust these would make the appeal to the AHD ineffective.

Every decision of the AHD is final. There is no right of appeal from a decision except to the Swiss Federal Tribunal (SFT). For the first time in the history of the AHD the Azerbaijan Field Hockey Federation appealed the AHD decisions in Beijing to the SFT.<sup>37</sup> Under special circumstances, where the panel finds the possibility of irreparable harm, it may forgo a hearing and provide temporary relief to an applicant. Such interim awards are no longer effective once a final decision is rendered.<sup>38</sup> Thus the CAS AHD is a court of last instance for the disciplinary tribunals systems of the International Federations during the Olympics subject only to the limited jurisdiction of the SFT.

### III. OLYMPIC CASES PRIOR TO THE GAMES

For the first time in the history of the CAS, Olympic-related cases were heard prior to the Olympic Games by both the Ordinary and Appeal Divisions, and other cases were also heard while the AHD had jurisdiction of Olympic cases during the pre-games period. These arbitrations dealt with selection and eligibility issues of athletes and teams for the Beijing Olympics, which are one of a few conceivable types of Olympic-related cases that may arise prior to the Olympics. As the use of the CAS and the AHD has grown for strategic purposes, these types of cases continued to be

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37. The two decisions appealed were CAS OG 08/001 and OG 08/005. The appeal brief was filed before the SFT on September 15, 2008, and was ultimately denied. *Azer. Field Hockey Fed'n v. FIH*, 4A\_424/2008/len (2008) (Switz.).

38. This only happened once at the Salt Lake City Olympics in the Canadian ice-skating case. *See Mew & Richards, supra* note 35, at 24-25.

submitted to the CAS throughout the pre-games<sup>39</sup> and the competition period.<sup>40</sup>

The cases that were brought before the CAS in Lausanne prior to the time the AHD took jurisdiction of Olympic matters and those that took place while the AHD was in session are summarized below.

#### A. Ordinary Division Cases

The Ordinary Division was active prior to the Beijing Olympic Games and before the AHD commenced operations. The two cases were essentially grievances between a National Federation and an International Federation regarding the selection and eligibility of athletes for the Olympic Games. The domestic equivalent of this type of case arises in various countries in selection disputes between the National Sport Federation and the National Olympic Committee.<sup>41</sup>

##### 1. MPAGB & Woodbridge v. MPA & Parygin, CAS 2008/O/1581

This case is an example of the increasing use of the CAS for strategic means. The Modern Pentathlon Association of Great Britain (MPAGB) used the Ordinary Division of CAS to have an Australian pentathlete, Alex Parygin, deemed ineligible for Olympic competition, which meant that a British athlete would take his place.

Parygin won a gold medal for Kazakhstan at the 1996 Summer Olympics in Atlanta, competed for Australia at the 2004 Summer Olympics in Athens, and thought he had qualified to represent Australia again at the Beijing Olympics. However, the MPAGB appealed his eligibility for Olympic competition to the CAS claiming that Parygin had failed to meet the eligibility criteria to qualify him for the Olympics because the qualifying event he competed in did not include show jumping, one of five modern pentathlon disciplines.<sup>42</sup> The show jumping leg had been banned at the time

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39. See *infra* Section "AHD and IOC Disciplinary Decisions During the Pre-Games" (discussing the selection and eligibility cases).

40. See *infra* Section "AHD and IOC Disciplinary Decisions During the Competition Period" (discussing the eligibility cases).

41. See *Lindland v. United States Wrestling Association*, 230 F.3d 1036, 1038 (7th Cir. 2000); *Lindland v. United States Wrestling Association*, 228 F.3d 782, 783 (7th Cir. 2000); *Sieracki v. United States Wrestling Association*, No. 00-CV-5348 (N.D. Ill. Filed August 29 2000); *Lindland v. United States Wrestling Association*, 227 F.3d 1000, 1003-04 (7th Cir. 2000). See Stephen J. Thompson, *Olympic Team Arbitrations: The Case of Olympic Wrestler Matt Lindland*, 35 VAL. U. L. REV. at 407 (2000-2001) (discussing the cases in detail).

42. The other four events are shooting, fencing, swimming and running.

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because of an equine influenza outbreak in the region and so was never held at that event.

The MPAGB claimed that the governing IF (the Union International de Pentathlon Moderne) should not have sanctioned the Oceania event without the equestrian leg. The appeal was upheld with CAS finding that Parygin had achieved his Beijing qualifying scores in events that were not officially recognized by modern pentathlon's governing body. The effect of the CAS decision was that Parygin's place at the Olympics was taken by the next highest ranked athlete—Britain's Nick Woodbridge.<sup>43</sup>

## 2. Boxing Australia v. Association Internationale De Boxe, CAS 2008/O/1455

Like the *Woodbridge* case this dispute also involved an NF and IF at odds with one another. Boxing Australia and the Association Internationale De Boxe (AIBA) had a disagreement regarding rules at the Oceania Continental Boxing Championship (OCBC), which the AIBA had originally indicated would be deemed an Olympic qualification tournament. The OCBC rules instituted by the Oceania Boxing Association stated that each member association could enter two boxers in each competition category and Australia had intended to do so. In contrast, the AIBA had indicated that only one boxer could be entered in each category for qualification tournaments and objected to Boxing Australia's attempt to instead enter two per category.<sup>44</sup> In order to prevent Australia from doing so, the AIBA decided to replace the OCBC with a generic Olympic qualification tournament held under the jurisdiction of the AIBA rules and regulations and taking place in Apia, Samoa. The dispute then, was a matter of whether or not an IF's rules could be paramount to a NF's rules with regard to the same event.

The CAS Ordinary Division held that the AIBA specifically referred the OCBC to the Olympic pathway athletes of the continent must follow to qualify for the Olympics. Therefore, the qualification tournament could not

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43. For a similar case in canoeing which took place at the Athens Summer Games, see Arbitration CAS OG 04/006, AOC v. IOC & ICF.

44. International Boxing Association, Technical & Competition Rules, R2.2, available at [http://www.aiba.org/documents/site1/Articles%20%20Rules/2008/technical\\_and\\_competition\\_rule\\_s\\_e.pdf](http://www.aiba.org/documents/site1/Articles%20%20Rules/2008/technical_and_competition_rule_s_e.pdf). The one boxer rule was created in an attempt to level the playing field between all member countries. It was thought by the AIBA that countries that were able to enter two boxers in the tournament would have an unfair advantage against those countries that could not do so.

be a separate ad hoc event. Although the AIBA technically had the authority to implement new rules regarding the qualifications, it would need the IOC's approval to do so. There was no evidence of the IOC's approval of the change before the panel, and the CAS considered changing the qualification criteria just months before the Games as a violation of the principle of procedural fairness<sup>45</sup> and the prohibition of *venire contra factum proprium*.<sup>46</sup> Coming to this conclusion, the CAS noted that such a decision was consistent with prior CAS case law.<sup>47</sup> The CAS also concluded that the two-boxer rule created by the OBA for the Oceania Championships was legitimate. It had been relied on in the past and there was no new AIBA provision requiring otherwise. Although the AIBA had the jurisdiction to require such criteria, it had not done so in any fair and explicit way through its rules and regulations.

As a matter of convenience, the two foregoing cases used the Ordinary Division of CAS to resolve Olympic sports related disputes. The Appeal Division of CAS was also active before the AHD took up its position in Beijing.

#### *B. Appeal Division Cases Prior to the Opening of the AHD*

The CAS Appeal Division heard three disputes prior to the AHD assuming jurisdiction of Olympic matters for the Beijing Olympic Games. This is an unprecedented number and illustrates how there is a growing need to rationalize the activities of the CAS in Lausanne and that of the AHD.

##### 1. Australia Olympic Committee & Australian Wrestling Union v. FILA, 2008/A/1502

In February of 2008, the Australia Olympic Committee (AOC) had asked FILA to review the eligibility of two wrestlers, Faamunu Aele of Samoa and Florian Skilang Temengil of Palau, who had qualified for the

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45. Several cases address changing qualification rules just prior to the Winter Olympic Games in Turin. Compare Arbitration CAS OG 06/008, Dal Balcon v. Comitato Olimpico Nazionanle Italiano, award of 18 Feb. 2006, with Arbitration CAS OG 06/002, Schuler v. Swiss Olympic Association & Swiss Ski, award of 12 Feb. 2006.

46. The panel indicated that this is a doctrine under Swiss law which provides that where the conduct of one party has induced legitimate expectations in another party, the first party is estopped from changing its course of action to the detriment of the second party. Arbitration CAS 2008/O/1455, Boxing Australia v. AIBA, award of 16 Apr. 2008, at ¶ 4.9.

47. See Arbitration CAS 1998/200, AEK Athens, Slavia Prague v. UEFA, award of 20 Aug. 1999; Arbitration CAS 2002/O/410, GFA v. UEFA, award of 7 Oct. 2003; Arbitration CAS OG 02/006, NZOC v. FIS, IOC, SLOC, award of 20 Feb. 2002.

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Beijing Olympics. By the AOC's perspective, the two wrestlers were incorrectly qualified, and the spots should have instead gone to two Australian wrestlers. The AOC argued that Aele and Temengil had failed to participate in the wrestling event in which they were deemed to be qualified at the 2007 World Championships, a requirement for Olympic eligibility. FILA reviewed the matter and replaced Temengil with Australian wrestler Ali Abdo but did not replace Aele. The AOC continued to protest, but FILA maintained its position, keeping Aele on the qualified list for the Olympics.

On March 7, 2008, the AOC and the Australian Wrestling Union (AWU) filed an appeal of the FILA decision with the CAS. The parties chose to have the matter heard based solely on written arguments. The AOC and AWU argued that awarding Temengil a qualification spot was in breach of FILA's own qualification criteria. In order for Temengil to qualify for the 2008 Continental Championships, he needed to have competed in the same weight category at the 2007 World Championship. Competing at the 2008 Continental Championships was one of the criteria for being eligible to participate in the Beijing Olympics. Since he did not compete in the 2007 World Championships, the AOC and AWU argued that Temengil was ineligible and the spot should instead be awarded to one of six Australian athletes who were eligible for qualification.<sup>48</sup> FILA maintained that athletes from Oceania benefit from special qualification conditions; most importantly, they could compete at the Continental Championships regardless of participation at the 2007 World Championship.<sup>49</sup>

The reason for the dispute came down to the wording of the FILA provisions, which provide the exception for athletes from Oceania. The AOC and AWU believed the provision should be interpreted to mean that the athletes from Oceania did, in fact, have to participate at the 2007 World Championships whereas FILA interpreted the provision as providing FILA the discretion necessary to permit athletes from Oceania to qualify based on slightly different criteria.

In interpreting the provision, the CAS decided that based on the interpretation of contracts under Swiss law, provisions in statutes should also be analyzed first by the actual text, then by the parties' intentions, and thirdly—if neither of the first two evaluative factors can be established—an

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48. The athletes were Ivan Popov, Eoghn Julian-Tivoli, Cory O'Brien, Gentian Balashi, Ian Wardell, and Farzad Tarash.

49. Oceania receives special treatment because of the small number of National Wrestling Federations representing the continent.

objective determination should be made on how the provision should be interpreted.<sup>50</sup>

Through a textual interpretation, the CAS concluded that the provision was clear that Oceania should receive special treatment.<sup>51</sup> Therefore, FILA did have the discretion to allow Temengil to compete in the Continental Championships without having first competed in the World Championships. As a result, Temengil was properly eligible to compete in the 2008 Beijing Summer Olympic Games.

## 2. Vukovic v. FIFA, 2008/A/1590

Danny Vukovic, a goalkeeper for the Central Coast Mariners in the A-League of the Australian Football Championship, was suspended by the Independent Match Review Panel of the A-League for nine months for deliberately striking a referee during a match he played in February of 2008. Since the suspension overlapped with the Beijing 2008 Olympic Games, Vukovic appealed the suspension to the Disciplinary Committee of the Australian Football Federation (AFF). On hearing the appeal, the AFF Disciplinary Committee essentially upheld the decision of the Independent Match Review Panel. Vukovic appealed the matter again to the Appeal Committee of the AFF. The Appeal Committee altered the suspension by splitting it into two separate ones, the effect of which would have meant he was not suspended during the Olympic competition period. The Appeal Committee noted that missing the Olympics for a young player could have severe consequences, the scope of which went beyond the necessary penalty for his behavior, and so the penalty would not fit the offense. The AFF then requested that FIFA extend the suspension on an international level. FIFA, however, took a different view and the FIFA Disciplinary Committee again changed the suspension to run through the Olympic period. Vukovic's subsequent appeal to the FIFA Appeal Committee fell on deaf ears and was denied. Finally, Vukovic took the whole matter to the CAS asking the Panel to reinstate the final AFF suspension terms.<sup>52</sup> The athlete argued that FIFA had not imposed the suspension that the AFF had requested it to and instead extended the suspension to include the Olympic period.

The CAS panel found that FIFA had been correct to change the suspension to a continuous one. Nothing in the FIFA Statutes or grievance

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50. A similar approach to contract interpretation may be found in the interim measures award of the CAS in the Valverde cases. See Arbitration CAS 1396/A/2008, WADA v. REFC & Valverde; Arbitration CAS 1402/A/2008, UCI v. REFC & Valverde, at ¶¶ 6.4-22.

51. On April 17, 2008.

52. On June 27, 2008.

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procedures provided for an interruption in an international suspension to allow an athlete to compete in an international event such as the Olympics. The penalty that the AAF Appeal Committee crafted to allow Vukovic to compete in the Olympics had no legal basis, was tailor made to the athlete, and “violate[d] fundamental principles of the law.” Furthermore, FIFA could not be asked—or expected to enforce—a national decision that, in its creation, was blatantly in violation of FIFA Statutes and Rules. The applicable FIFA Statutes and Rules did not provide for an interruption of a suspension to allow a player to compete in a certain competition. Consequently, CAS dismissed the appeal, confirmed the FIFA Appeal Committee decision, and Vukovic was not permitted to compete in the Beijing Olympics.<sup>53</sup>

### 3. D’Arcy v. Australian Olympic Committee<sup>54</sup>

During an altercation at a bar, Australian swimmer Nicholas D’Arcy stuck a man in the face with his elbow, inflicting serious injuries upon him. As a member of the Australian Olympic Swim Team, D’Arcy was required by the conditions of his membership agreement to not “by acts or omissions, engage in or participate in . . . conduct which, if publicly known, would be likely to bring . . . [him] into disrepute or censure.”<sup>55</sup> As a result of the fight, D’Arcy was eventually thrown off of the team by the Australian Olympic Committee (AOC) on April 18, 2008.

That same day D’Arcy appealed the decision to the CAS in an attempt to be reinstated to the team.<sup>56</sup> On May 27, 2008, this First Panel made a partial award, declaring that D’Arcy’s conduct was likely to and did bring him into disrepute, and thus breached the conditions of the Membership Agreement. However, the proper procedures regarding his termination from the team had not been followed, and so the First Panel set aside the decision to terminate D’Arcy’s membership from the swim team.

After publication of the First Award, the parties made submissions to the CAS as to whether the matter should be remitted to the AOC for it to

53. On July 12, 2008.

54. Arbitration CAS 2008/A/1574, D’Arcy v. Australian Olympic Committee, award of 7 July 2008.

55. Australian Olympic Committee, Ethical Behavior By-law, Clause 2.2(6), *available at* [http://corporate.olympics.com.au/files/52/AOC\\_Ethical\\_Behaviour\\_ByLaw.pdf](http://corporate.olympics.com.au/files/52/AOC_Ethical_Behaviour_ByLaw.pdf).

56. The application was originally filed with the CAS Oceania Registry in the Ordinary Division. The CAS court office then assigned the case to the CAS Appeals Division.



consider the exercise of discretion under the Membership Agreement, or whether the parties would consent to the First Panel exercising that discretion. D'Arcy argued that the CAS properly exercised discretion and the matter did not need to be returned to the AOC. The AOC, however, wanted the issue back in order to make its own decision.

A Second Award was made by the First Panel on June 2, 2008. The AOC's decision to terminate D'Arcy's membership was still set aside, but now the matter had to be remitted to the AOC for the purposes of deciding whether it should exercise the discretion afforded to it under the Membership Agreement. When the matter was returned to the AOC, the AOC Executive resolved unanimously to terminate D'Arcy's membership from the team. On June 11, 2008, D'Arcy lodged another appeal against the new second award to the CAS.<sup>57</sup>

The first issue presented concerned the powers available to the Panel on the hearing of this appeal. The Panel held that private parties could, through their agreement, agree on a process such as arbitration by which a matter in "dispute between them can be reviewed and determined by an award."<sup>58</sup> The parties, by their agreement, may also include an appellate arbitration process. They can also agree on the powers which the independent arbitrators involved in the agreed appellate process can exercise in determining such an appeal.<sup>59</sup> In this case, the Membership Agreement indicated that the parties agreed to have their dispute arbitrated according to the Appeals Arbitration Procedure of the CAS Code.<sup>60</sup> As a result, the Panel had the power to hear the appeal.

The Panel also held that, on proper construction of the contractual provisions in this case, in conformity with the law of New South Wales, the hearing before the Appeal Arbitration Panel was a fresh hearing of the dispute.<sup>61</sup> The Panel further held that appeal arbitration is a continuing internal review process rather than a process that requires a demonstration of error in the initial decision.<sup>62</sup> As a result, this appeal was a complete re-hearing of the dispute, and not one narrowly focused on finding error in the original decision.<sup>63</sup>

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57. The hearing took place on June 16, 2008, in Sydney. Arbitration CAS 2008/A/1574, D'Arcy v. Australian Olympic Committee, award of 7 July 2008.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

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D'Arcy contended before the CAS that the AOC decision to terminate his membership was unfair, unreasonable, disproportionate to his actions, and did not place adequate weight upon the consequences of termination of his membership. He further contended that the consequences of his actions brought only himself into disrepute, and not necessarily the sport of swimming, the AOC, or the team.<sup>64</sup> The Panel, however, held that the fact that there could have been graver forms of conduct, which would bring the sport, the AOC, and the team into disrepute, was irrelevant; what matters was that D'Arcy's conduct brought him into disrepute.<sup>65</sup> Doing so triggered the exercise of discretion adversely to him.<sup>66</sup> D'Arcy's conduct was serious enough to form an ample basis for the exercise of discretion to terminate his membership from the team.<sup>67</sup> Thus, the decision of the AOC Executive was not disproportionate, nor manifestly excessive so as to give rise to the finding of irrationality.<sup>68</sup> Accordingly, the Panel dismissed the appeal.<sup>69</sup>

### *C. Appeal Division Cases Heard During AHD Jurisdiction*

The following four cases were heard by the CAS Appeal Division in Lausanne while the AHD had jurisdiction over Olympic disputes. In the football cases, the CAS Appeal Division was used as the forum for the cases because the sport disputes centered upon professional footballers in Europe and also because the FIFA is based in Zurich. Therefore, it was a matter of convenience to use the Appeal Division and not the AHD, which was half a world away from where the parties to the dispute were located. The modern pentathlon case was also brought to Lausanne for much of the same reasons. Nevertheless, they do raise the specter of what criteria parties should be deciding to bring forth in cases to the CAS in Lausanne versus the AHD. Neither the CAS Code nor the special rules for the AHD specify that Olympic competition-related appeals must go to the AHD when it is in session at the Olympic Games. Therefore, there will undoubtedly be some forum shopping in the future if the matter is not addressed in the Code and the special rules for the AHD at the Olympic Games.

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64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

1. FC Schalke 04, SV Werder Bremen, FC Barcelona v. FIFA<sup>70</sup>

During the pre-games period—when the AHD had taken up residency in Beijing—an appeal of a FIFA decision was brought to the CAS by football clubs FC Schalke 04, SV Werder Bremen, and FC Barcelona.<sup>71</sup> A decision on July 30, 2008, by a single judge of the FIFA Players' Status Committee concluded that the release of players under the age of twenty-three, by their respective clubs, to participate in the Summer Games was mandatory for all clubs.<sup>72</sup> The decision was made on the basis of a customary practice, which dated back to 1988 when the FIFA Congress decided that players under the age of twenty-three could compete in the Olympics. The FIFA Congress reiterated that decision in 2006. The single judge also held that the international match calendar was not a relevant consideration in determining whether clubs are obliged to release players for the Summer Olympic Games, and that it would not be justifiable to prevent any player under the age of twenty-three from competing in the Olympics because of the unique opportunity that it afforded an athlete of any Olympic sport discipline.<sup>73</sup> Therefore players under the age of twenty-three were free to join their teammates for the Olympic Games, contrary to the wishes of their respective home clubs.

Appeals by the three clubs were made to the CAS on July 31, 2008.<sup>74</sup> As a matter of convenience the Panel was convened in Zurich on August 5, 2008, to review the single FIFA judge's decision. The Panel overturned the July 30, 2008, decision in its entirety by concluding that there was no specific decision of the FIFA Executive Committee that established any positive obligation on the clubs to allow players under twenty-three to play in the Olympics.<sup>75</sup> Furthermore, the requirements of justifying a positive legal obligation of the clubs to release players under the age of twenty-three for the Olympics on the basis of customary law were not met.<sup>76</sup> Therefore,

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70. Arbitration CAS 2008/A/1622 & 1623 & 1624, FC Schalke 04, SV Werder Bremen, FC Barcelona v. FIFA, award of 2 Oct. 2008.

71. *Id.*

72. This mirrored the conclusion on the same issue drawn by the FIFA Emergency Committee the previous day, on July 29, 2008.

73. Arbitration CAS 2008/A/1622 & 1623 & 1624, FC Schalke 04, SV Werder Bremen, FC Barcelona v. FIFA, award of 2 Oct. 2008.

74. Those appeals were subsequently joined into one proceeding. See Arbitration CAS 2008/A/1622 & 1623 & 1624, FC Schalke 04, SV Werder Bremen, FC Barcelona v. FIFA, award of 2 Oct. 2008.

75. *Id.*

76. The Panel also noted that the Olympic Football Tournament at the Beijing Summer Games was not included on the Coordinated Match Calendar. *Id.*

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the clubs did not have to release their players to participate in the Olympics.<sup>77</sup>

However, the decision had a condition. It did not affect the eligibility of players who had already been validly entered by their NOC to compete at the Games. Those players would remain fully eligible to participate at the Beijing Summer Games. The Panel also made a recommendation. In consideration of Olympic spirit and FIFA's request to the clubs that they release their players, the Panel suggested that FIFA and the clubs come to an amicable solution with regard to the players who wanted to be able to represent their countries at the Olympic Games.<sup>78</sup>

## 2. HMPF v. UIPM, AOC, MPA & Darby<sup>79</sup>

In another eligibility dispute, the Hellenic Modern Pentathlon Federation (HMPF) was at odds with the Union Internationale De Pentathlon Moderne (UIPM), the Australian Olympic Committee (AOC), and Modern Pentathlon Australia (MPA) about whether Australian pentathlete Angela Darby was qualified to participate in the Beijing Olympics or if she should be replaced by Greek athlete Donna Vakalis.<sup>80</sup> The issue was placed before the UIPM Court of Arbitration, which held that Darby was in fact properly eligible for Olympic competition since she met the qualification criteria set out by UIPM.<sup>81</sup>

The HMPF appealed the decision to CAS on July 24, 2008, claiming that one of the competitions Darby had participated in, the Open Australian Championship, was not an official UIPM competition nor did it comply with

77. On reflection of the CAS decision FIFA President, Joseph Blatter, stated that "FIFA is surprised and disappointed by this decision, but we respect it. Nevertheless, I appeal to the clubs: Let your players take part in the Olympic Games. It would be an act of solidarity in perfect harmony with the Olympic spirit. It would be wonderful for the players, for the fans and for the game itself." Press Release, FIFA, FIFA Disappointed by CAS Decision (Aug. 6, 2008), available at <http://www.fifa.com/mensolympic/organisation/media/newsid=839287.html>.

78. Arbitration CAS 2008/A/1622 & 1623 & 1624, FC Schalke 04, SV Werder Bremen, FC Barcelona v. FIFA, award of 2 Oct. 2008.

79. Arbitration CAS 2008/A/1615, HMPF v. UIPM, AOC, MPA & Darby, award of 31 Oct. 2008.

80. *Id.*

81. *See id.*

the Competition Rules<sup>82</sup> and therefore could not be used as a basis for meeting eligibility criteria.<sup>83</sup>

On the first argument the CAS held that the UIPM had gone to great lengths to ensure that the event would be acceptable by appointing a technical observer to attend the event to ensure that it was executed according to UIPM rules.<sup>84</sup> As the HMPF had not demonstrated that the technical observer came to inaccurate conclusions, the CAS deferred to the expertise of the technical observer that the event ran successfully and in such a way that the results were reliable for eligibility purposes.<sup>85</sup> On the second argument, the CAS noted that although there was a compliance issue, it was not grave enough to have the entire event disqualified along with the results of its participants.<sup>86</sup> Therefore, Darby could rely on her results from the event to properly qualify for the Beijing Olympics and Vakalis could not take her place.

#### IV. AHD AND IOC DISCIPLINARY DECISIONS DURING THE PRE-GAMES

Proceedings at the CAS Ad-Hoc Division are governed by the CAS *Arbitration Rules for the Olympic Games* (CAS Ad-Hoc Rules) enacted by the International Council of Arbitration for Sport (ICAS).<sup>87</sup> They are also governed by the *Swiss Private International Law Act* (PIL Act) as a result of the express choice of law in Article 17 of the CAS Ad-Hoc Rules and because of the choice of Lausanne, Switzerland, as the seat of the Ad-Hoc Division of CAS.<sup>88</sup> The jurisdiction of the CAS Ad-Hoc Division arises also out of the entry form signed by each participant in the Olympic Games, as well as out of Rule 59 of the Olympic Charter.<sup>89</sup> The Ad-Hoc Division panel has “full power to establish the facts on which the application is based,” according to Article 16 of the CAS Ad-Hoc Rules.<sup>90</sup>

The following cases were heard by the AHD or the IOC Disciplinary Commission during the lead-up to the Olympic Games.

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82. The invitation to the event had not complied with the applicable UIPM rules.

83. Arbitration CAS 2008/A/1615, HMPF v. UIPM, AOC, MPA & Darby, award of 31 Oct. 2008.

84. On Aug. 6, 2008. *Id.*

85. *Id.*

86. *Id.*

87. Arbitration CAS OG 08/004, ANOC v. FIH, award of 5 Aug. 2008, at ¶ 3.1.

88. *Id.* See also KAUFMANN-KOHLER, *supra* note 15, at 47, for a discussion of the legal significance.

89. See Arbitration CAS 08/002, Simms v. FINA, order of 1 Aug. 2008, at ¶ 2.2.

90. *Id.*

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### A. Selection and Eligibility Cases

The first application to the CAS Ad-Hoc Division was registered on August 1, 2008, when the Azerbaijan National Olympic Committee (ANOC) and the Azerbaijan Field Hockey Federation (AFHF) complained about the qualifying round, which resulted in the selection of the Spanish team as eligible to compete at the Games.<sup>91</sup> The AFHF brought three cases in an attempt to deselect the Spanish field hockey team out of the Olympics and insert the Azerbaijan team. The next eligibility case followed quickly in *Schuettler v. ITF*,<sup>92</sup> and then *Simms v. FINA*.<sup>93</sup> All five of these cases dealt with selection and eligibility for the Olympic Games.

Increasingly, the CAS is being used to decide on matters of eligibility. Although it has always played this role as adjudicator of eligibility disputes, the number of cases seems to expand with each new Olympic Games.<sup>94</sup> The novel twist in Beijing was that a team that would not otherwise qualify for a major event such as the Olympic Games might be found technically eligible by CAS.<sup>95</sup> Generally, eligibility disputes arise when there is a change in team or athlete rankings due the disqualification of individual athletes or teams for a variety of reasons. The other unusual feature of this category is that it generated the first ever appeal of an Olympic Games AHD decision to the Swiss Federal Tribunal (SWF).<sup>96</sup>

91. See Arbitration CAS 08/001, ANOC v. FIH, award of 2 Aug. 2008.

92. See Arbitration CAS 08/003, Schuettler v. ITF, award of 4 Aug. 2008.

93. See Arbitration CAS 08/002, Simms v. FINA, order of 1 Aug. 2008.

94. For eligibility disputes at prior games see, e.g., Michael J. Beloff, *The Court of Arbitration for Sport at the Olympics*, 4 SPORTS & L.J. 5 (1996); Richard H. McLaren, *A New Order: Athlete's Rights and the Court of Arbitration for Sport at the Olympic Games*, 7 OLYMPIKA 1 (1998); Richard H. McLaren, *CAS: The Ad Hoc Division at the Salt Lake City Olympic Games*, 2 INT'L SPORTS L. REV. (2004); Richard H. McLaren, *The CAS Ad Hoc Division at the Athens Olympic Games*, 15 MARQ. SPORTS L.J. 175 (2004); Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L.J. 515 (2001); Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes*, 35 VAL. U. L. REV. 379 (2000); Matthieu Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, 2 INT'L SPORTS L.J. 21 (2002).

95. There were two further attempts before the AHD to accomplish this feat after the initial application in CAS OG 08/001. See Arbitration CAS 08/004, ANOC v. FIH, award of 5 Aug. 2008; Arbitration CAS 08/005, AFHF v. FIH, award of 8 Aug. 2008.

96. See *infra* Section "Azerbaijan NOC, AFHF v. FIH CAS OG 08/001 & 004 & 005" (discussing the case). After three tries before the AHD, the Azerbaijanis appealed to the Swiss Federal Tribunal. Arbitration CAS 08/001, ANOC v. FIH, award of 2 Aug. 2008; Arbitration CAS 08/004, ANOC v. FIH, award of 5 Aug. 2008; Arbitration CAS 08/005, AFHF v. FIH, award of 8 Aug. 2008.

1. Moldova National Olympic Committee v. IOC<sup>97</sup>

In this case, the National Olympic Committee of Moldova (MNOC) made an application to set aside an earlier decision of the IOC that held that “Octavian Gutu was not eligible to represent the Republic of Moldova in the Beijing 2008 Olympic Games.”<sup>98</sup> Gutu was a citizen of Moldova and represented Moldova as a swimmer in a number of competitions, including a National Swimming Championship in 2008.<sup>99</sup> “At the 2007 World Swimming Championships held in Melbourne, Australia, however, he had represented Romania.”<sup>100</sup> “This representation, the MNOC stated, was ‘without any approval by Moldova’ and was hence ‘illegal.’”<sup>101</sup> As such, the MNOC stated that “he should be divested of all awards arising from his performances” at these championships, thereby allowing Gutu to represent Moldova once again at the Beijing Olympic Games.<sup>102</sup> On the other hand, the IOC relied on Rule 42 of the *Olympic Charter* which requires a period of three years to lapse since the competitor in question last represented his or her former country.<sup>103</sup> This period may be reduced or waived by the IOC Executive Board only with the approval of the relevant National Olympic Committees and the relevant International Federation.<sup>104</sup> In this case, the time period had not expired, and there had been no approval by the International Swimming Federation (FINA).<sup>105</sup>

The MNOC provided a document signed by the Secretary General of the MNOC and Chef de Mission of the Moldova Olympic Team to Beijing to the Director of the NOC Relations Department of the IOC, which indicated that Gutu represented Moldova in the Athens 2004 Olympic Games.<sup>106</sup> The MNOC also provided a letter from the “Romanian Swimming and Modern Pentathlon Federation to the President of the MNOC stating that Mr. Gutu is not a member of the Romanian Olympic team and as such it had no

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97. Arbitration CAS 08/006, MNOC v. IOC, award of 9 Aug. 2008.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* This provision in the Charter had vexed the AHD division of the CAS during the Sydney Summer Olympic Games when the IOC refused to permit Arturo Miranda to compete for the Canadian diving team because he had not been a Canadian national for the requisite three-year period and the Cuban NOC had not permitted him to waive the requirement. See Arbitration CAS 00/008, Miranda v. IOC, award of 24 Sept. 2000; Arbitration CAS 00/003, Miranda v. IOC, award of 13 Sept. 2000.

106. *Id.*

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objection to his participation on behalf of Moldova in the Beijing Olympics.”<sup>107</sup> Likewise, the National Olympic Committee of Romania (RNOC) did not object.

Despite the fact that both the RNOC and MNOC did not oppose Gutu’s membership on the Moldova Olympic team, CAS held that since there was no clear indication that FINA approved of his participation, he could not represent Moldova in Beijing.<sup>108</sup> The fact that Gutu appeared prepared to have his participation for Romania in the 2007 Swimming World Championships invalidated was also irrelevant for purposes of the application. Instead, CAS held that the Panel must defer to Rule 42 of the *Olympic Charter*.<sup>109</sup> CAS held that the purpose of Rule 42 is to prevent the holder of dual or multiple nationalities from switching “allegiance from one to the other at his or her convenience,” thereby making “it possible for an athlete to move opportunistically from one team to another should the former not select the [athlete] and the latter be willing to include [the athlete on] its national team.”<sup>110</sup> Consequently, CAS dismissed the application and Gutu was not permitted to compete.<sup>111</sup>

## 2. Azerbaijan NOC, AFHF v. FIH CAS OG 08/001 & 004 & 005<sup>112</sup>

During the Women’s World Hockey Qualifier Competition in Baku, Azerbaijan, Spain defeated Azerbaijan 3-2, which meant that the Azerbaijan team did not qualify to compete at the Olympic Games. Had they won the match they would have qualified. After the match an eligibility dispute arose as a result of a doping allegation against two players on the Spanish team.<sup>113</sup> Two samples taken from different players during the match indicated adverse analytical findings.<sup>114</sup> The results were confirmed by the B-Samples. The matter was a concern to the Azerbaijan team because

107. Arbitration CAS 08/006, MNOC v. IOC, award of 9 Aug. 2008

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. Arbitration CAS 08/001, ANOC v. FIH, award of 2 Aug. 2008; Arbitration CAS 08/004, ANOC v. FIH, award of 5 Aug. 2008; Arbitration CAS 08/005, AFHF v. FIH, award of 8 Aug. 2008.

113. The two athletes were Gloria Comerma and another unidentified player. *Id.* The second player’s name remains unknown because she was not found to have committed an anti-doping violation and so she is protected by confidentiality.

114. On May 21, 2008. *See* Arbitration CAS 08/001, ANOC v. FIH, award of 2 Aug. 2008



Article 11.1 of the Federation International de Hockey (FIH) *Anti-Doping Policy* provided that if more than one member of the team tested positive, the entire team could be subject to disqualification or other disciplinary action.<sup>115</sup>

When the matter was heard before the FIH Judicial Commission on July 17, 2008, the Commission held that only one of the two players committed an anti-doping rule violation,<sup>116</sup> and furthermore, the player who did commit the infraction was not negligent or at fault.<sup>117</sup> Consequently, no sanction was imposed against the player, and more importantly to Azerbaijan, since one of the two players had been entirely exonerated, the Spanish team could not be disqualified under Article 11.1 of the FIH *Anti-Doping Policy*.

The Azerbaijan team and the Azerbaijan Field Hockey Federation (AFHF) filed an application with the AHD in an attempt to have the Spanish team disqualified and the Azerbaijan team deemed qualified to compete at the Olympics. The AHD found that all the proper doping-related procedures had been followed and that the Judicial Commission had made an acceptable decision. The AHD also noted that the Spanish players' doping cases were personal matters in which the Azerbaijan team, as applicants, had no individual interest and therefore had no standing to be present before the Judicial Commission.<sup>118</sup> Any parties to an appeal of the doping decision must fall under Article 13.2.3 of the FIH *Anti-Doping Policy*, including the athlete, FIH, IOC and WADA. The Azerbaijan team did not fall under any of these enumerated categories. Furthermore, since one Spanish player had been cleared by the FIH's doping procedures of fault or negligence, and the other had been entirely exonerated, the AHD noted that the disqualification of the team for two doping offenses—which was in any event discretionary—could not be triggered and as a result, the Spanish team was not required to withdraw. Therefore, the AHD dismissed the application.<sup>119</sup>

Faced with the decision of determining whether they had standing to bring their own appeal, the Azerbaijan team filed another application with the AHD seeking an order that the FIH bring such an appeal against the

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115. See International Hockey Federation (FIH), *Anti-Doping Regulations*, Article 11.1, available at <http://www.worldhockey.org> (Click on "Anti-Doping").

116. One player was fully exonerated because the FIH Judicial Commission found that on the balance of probabilities her sample had been substituted with another sample that was not hers. *Id.*

117. The Judicial Commission found that eleven out of fourteen people at a dinner on April 17, 2008, had ingested a prohibited substance. See Arbitration CAS 08/005, AFHF v. FIH, award of 8 Aug. 2008, ¶ 4.11. This included the athlete whom was found to have committed an anti-doping violation, but was not negligent or at fault. See Arbitration CAS 08/005, AFHF v. FIH, award of 8 Aug. 2008, ¶ 4.11.

118. Arbitration CAS 08/001, ANOC v. FIH, award of 2 Aug. 2008, ¶ 3.10.

119. On August 2, 2008. *Id.*

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Spanish team on the basis that the FIH improperly exercised its discretionary power by not appealing the previous decision.<sup>120</sup> The Panel upheld the previous ruling in its entirety, stating that an IF should not have to appeal every time its own internal body decides not to issue a sanction in a doping matter, particularly where WADA and the IOC, as eligible parties to an appeal, have independently decided not to appeal as well.<sup>121</sup> To hold otherwise would mean that an IF would have to bring an appeal every time a doping related decision did not result in finding a doping violation.<sup>122</sup> Azerbaijan's second application was dismissed as well.<sup>123</sup>

Azerbaijan, not satisfied with these first two rejections by the AHD brought a third application to the tribunal.<sup>124</sup> This time Azerbaijan asked for the AHD to find that the decision of the FIH Judicial Commission had been in violation of the principles of procedural fairness, contrary to Article 22.1 of the FIH Statutes and By-Laws, and therefore, that the decision should be annulled. After obtaining a copy of the Judicial Commission decision, the Azerbaijan team claimed they had discovered that the team had been openly accused of sabotaging the Spanish team and that the Judicial Commission had endorsed those allegations. Therefore, conclusions of the Judicial Commission were made in circumstances where the Azerbaijan team were entitled to be heard and were not. Being denied the opportunity to be heard in such circumstances, they argued, was contrary to the FIH Statutes and By-Laws, Article 6.1 of the *European Convention on Human Rights*, and general principles of law.

The AHD considered itself well enough informed through the first and second awards and the applicants' submissions to resolve the dispute without holding a hearing. Upon review of the Judicial Commission's decision, the AHD found that no adverse finding was made against the Azerbaijan team and no breach of the rules of procedural fairness could have occurred. Given that without the adverse finding, the issue before the third panel was the same as the one before the first panel, the AHD decided that it could not come to a conclusion different than that of the first panel when all the material facts were the same and there was no indication that the first panel's reasoning was erroneous. Therefore, the third AHD panel concluded

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120. See Arbitration CAS 08/004, ANOC v. FIH, award of 5 Aug. 2008.

121. *Id.*

122. *Id.*

123. On August 5, 2008. *Id.*

124. On August 7, 2008. See Arbitration CAS 08/005, AFHF v. FIH, award of 8 Aug. 2008.

that the applicants had no standing to bring the application, and as a result, it was dismissed.<sup>125</sup>

The Azerbaijanis remained skeptical of the decisions of the AHD in Beijing and have for the first time in the history of the AHD applied to the Swiss Federal Tribunal for a judicial review of the decisions. The appeals were subsequently denied.<sup>126</sup>

### 3. Schuettler v. International Tennis Federation<sup>127</sup>

Changes in rankings may occur due to disqualification pursuant to the rules of an IF or by voluntary athlete withdrawal from competition. There is constant tension between NOCs and IFs over athlete eligibility, given that IFs usually reserve the right to enter athletes in competitions at their discretion. In disputes arising from proper or improper exercise of this discretion, athletes may choose to use the CAS AHD as an administrative veto of the IF's exercise of discretion. Of course, at the Olympic Games, athletes may also be supported by the desires of their NOC to field their very best competitors, thereby increasing the nation's chances of medaling in the sport.

The Rainer Schuettler case, which pitted Schuettler and the German NOC against the International Tennis Federation (ITF), provides an illustration of the tension between the conflicting objectives of an NOC and an IF. Schuettler had reached the Men's Singles semi-finals at Wimbledon in 2008.<sup>128</sup> ITF selection criteria for the Olympics in Beijing were to be based upon their computerized rankings of the ITF published as of June 9, 2008. The results of Wimbledon were not taken into account because they were unknown at that date. Schuettler was ranked eighty-ninth on the ranking list of June 9, 2008. There were four German men who met the eligibility criteria set out by the ITF and ranked higher than Schuettler. Based on their objective standard of the computerized ranking system, the ITF believed that the top four ranked eligible German men had to be nominated for the Beijing Olympics. That group did not include Schuettler.

The German NOC, however, wanted Schuettler to represent the country because it was thought his recent high-level performance at Wimbledon was a better and more recent indicator of his potential success at the Olympics rather than his performance over time, which is what the ranking list

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125. On August 8, 2008. *Id.*

126. See AFHF V. FIH, 4A\_424/2008/len, award of 22 Jan. 2009.

127. Arbitration CAS 08/003, Schuettler v. ITF, award of 4 Aug. 2008.

128. He lost to Spain's Rafael Nadal, who subsequently won the gold in Men's singles at the Beijing Olympics.

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essentially measured. Various factors went into compiling the ranking list and one of them became contentious between the ITF and German NOC. If the ITF was required to enter the top four national players on the list which the German NOC had nominated then Schuettler would be able to compete in the Olympics. The issue boiled down to whether the ITF, as the governing body for the sport, had primacy to enter players for the Olympics based purely on an objective standard, or whether the NOCs had primacy to select. If the latter was true, the ITF would be obliged to enter athletes who had better and more recent results from the eligible pool of candidates and as a consequence were thought to best represent their country but also met the ITF eligibility criteria.

When the issue was presented before the CAS,<sup>129</sup> the AHD panel found that the ITF rules did not oblige the NOCs to nominate players strictly in accordance with the ranking list and no ITF rule subordinated the NOCs' power of selection to the ITF. The CAS noted that this was a common system across other sports such as track and field where the IF is responsible for setting out the basic selection criteria and then the NOCs decide which of those eligible athletes that meet criteria will represent the country at the Olympics. The panel held that the ITF was required to enter Schuettler in the Men's Single Tennis Tournament at the Beijing Olympics.<sup>130</sup> This decision was criticized by the ITF in a press release where the IF stated:

[T]he decision . . . could ultimately harm the rights of International Federations to set qualification criteria and puts the role of the International Federation in the Olympic Games into discussion. It is very disturbing for the ITF, and should be for the IOC, when players who do not meet the ITF qualification criteria, approved by the IOC, are entered at the expense of players who qualified and deserve to represent their countries at the 2008 Olympic Games.<sup>131</sup>

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129. See Arbitration CAS 08/003, *Schuettler v. ITF*, award of 4 Aug. 2008.

130. At the Beijing Olympics Schuettler lost in the second round of Men's Singles to Novak Djokovic of Serbia. See ATP World Tour, Rainer Schuettler, <http://www.atpworldtour.com/Tennis/Players/Top-Players/Rainer-Schuettler.aspx?t=pa> (last visited Oct. 27, 2009). In Men's Doubles Schuettler and his partner Nicolas Kiefer lost in the first round to Austria. *Id.* Kiefer made it to the third round in Men's Singles, losing to Paul-Henri Mathieu of France. *Id.*

131. Press Release, ITF, ITF Reaction Regarding Rainer Schuettler (Aug. 4, 2008), available at <http://www.itftennis.com/olympics/news/newsarticle.asp?articleid=19043>. The press release ended with an overtly sarcastic line: "[t]he ITF wishes [Schuettler] the best of luck even if he was not eligible for Beijing." *Id.* The statement was picked up by at least one major news outlet. See Lisa Dillman, *Olympic Fire and Rainer*, L.A. TIMES, Aug. 4, 2008, available at [http://latimesblogs.latimes.com/olympics\\_blog/2008/08/fire-and-rainer.html](http://latimesblogs.latimes.com/olympics_blog/2008/08/fire-and-rainer.html).

#### 4. Simms v. FINA<sup>132</sup>

The issue of nationality is a salient aspect of Olympic eligibility for athletes and their representative organizations. Athletes (and nations) may align themselves strategically to enhance their individual chances of attending the Olympic Games as an Olympian.<sup>133</sup> Christel Simms was born in Hawaii, USA, but also holds Philippine citizenship due to her parents' heritage. In prior years she swam for the United States, but then Simms applied for membership with the Philippine Amateur Swimming Association (PASA) and was accepted. FINA rules dictate that an athlete may be affiliated with one member nation only.<sup>134</sup> She was thereafter offered a place on the Philippine Olympic team provided that she achieve the Fédération Internationale de Natation (FINA) qualifying times, which she did.

Seeing Simms' potential, PASA requested that she be granted a change of sport nationality in compliance with the FINA *General Rules* applicable to dual citizens. FINA denied this application. However, reference was made to a prior correspondence where it was confirmed that Simms could enter and participate at the Olympic Games in Beijing without qualification or other limitation.<sup>135</sup> As a result of the denial, Simms applied to CAS requesting that such a decision be stayed so that the Philippine Olympic Committee might present a request to the IOC Executive Board for approval.

Rule 42 of the *Olympic Charter* provides that a competitor in the Olympic Games must be a national of the country of the NOC which is entering the competitor in the Olympic Games. The bylaw to the Rule in paragraph two then requires that a competitor who is a national of two or more countries at the same time and previously competed at the world level under one nationality must wait three years before attempting to compete under a different nationality. If the competitor does not complete the three-

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132. Arbitration CAS 08/002, *Simms v. FINA*, order of 1 Aug. 2008.

133. This same issue is relevant the case of *Moldova Olympic Committee v. IOC*, CAS OG 08/006. See the discussion of the case above in the section titled "AHD and IOC Disciplinary Decisions During the Pre-Games" under the subheading "Selection and Eligibility Cases."

134. Federation Internationale de Natation, General Rules, GR 2.5, available at [http://www.fina.org/project/index.php?option=com\\_content&task=view&id=43&Itemid=119](http://www.fina.org/project/index.php?option=com_content&task=view&id=43&Itemid=119). At prior Olympics there had been a similar provision in the *Olympic Charter*. That provision gave rise to five cases before the AHD at the Sydney Olympics. See Arbitration CAS OG SYD 00/001, *USOC/USA Canoe-Kayak v. IOC*, award of 13 Sept. 2000 (Perez I); Arbitration CAS OG SYD 00/003, *Miranada v. IOC*, award of 13 Sept. 2000 (Miranda I); Arbitration CAS OG SYD 00/005, *Perez v. IOC*, award of 19 Sept. 2000 (Perez II); Arbitration CAS OG SYD 00/008, *Miranada, COA, CADA v. IOC*, award of 24 Sept. 2000 (Miranda II); Arbitration CAS OG SYD 00/009, *Perez v. IOC*, award of 25 Sept. 2000 (Perez III).

135. Arbitration CAS 08/002, *Simms v. FINA*, at ¶ 1.9.

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year waiting period, the bylaw provides that the three-year period may be reduced or cancelled with the agreement of the relevant NOCs and IF, with the agreement of the IOC. The NOCs for the Philippines and United States both agreed to change Simms' sport nationality, but FINA did not. However, through a series of miscommunications, it had appeared to Simms and the PASA that FINA did in fact approve of Simms' change of sport nationality.

The athlete relied on the perceived approval by FINA to allow her to swim for the Philippines. The AHD Panel believed that FINA was estopped from executing the decision to prevent Simms from representing the Philippines. The Panel looked to the injustice that would have resulted if Simms had been found ineligible to swim for the Philippines, as FINA, through its inadvertent representation, induced the PASA to train Simms. The Panel referenced a previous decision by the CAS AHD raising the estoppel doctrine at the Winter Games in 2002.<sup>136</sup>

### B. Doping Cases

None of the doping cases at the Beijing Olympics were ever appealed to the AHD.<sup>137</sup> All doping infractions were processed through the IOC DC of the IOC Executive Board during, and in some cases, after the close of the Olympic Games.<sup>138</sup> At the time of writing there had been two doping-related appeals to the Appeal Division after the close of the Olympic Games.<sup>139</sup> Frequently, the doping cases do not go beyond the DC and the actions taken on their recommendation by the IOC Executive Board.

The decisions of the DC are the subject of discussion because they illustrate the full dimension of the doping problems at the Beijing Olympic Games despite the fact that the actions taken were neither appealed to the AHD or the Appeal Division in Lausanne. They also reveal the role of determining the facts and how the DC acts as a fact finding body for the

136. Arbitration CAS OG 02/006, *New Zealand Olympic Committee v. Salt Lake Organizing Committee for the Winter Games of Olympics*, award of 20 Feb. 2002.

137. Reasons for this are suggested in the introductory remarks at the beginning of this article.

138. See *infra* Section "Olympic Cases After the Games."

139. In athletics, Vadim Devyatovskiy and Ivan Tsikhan of Belarus, respectively the silver and bronze medal winners of the Men's Hammer throw at the Beijing Olympics, have appealed to CAS the IOC Executive Board decision to strip them of their medals for committing doping infractions. At the time of writing this article these appeals had not yet been heard. For further explanation on the IOC's decision in these two cases see the discussion *infra* Section "Olympic Cases After the Games."

decision maker, the IOC Executive Board. Several of these decisions involve revocation of medals and require discussion to reveal the range of adjudication that goes on at the Olympic Games. Furthermore, the post-games decision to retest some stored samples from the Olympic Games for CERA first revealed in testing done during the Tour de France in July of 2008, may result in more disciplinary actions.<sup>140</sup>

#### 1. IOC Disciplinary Decision: Maria Isabel Moreno

Spanish cyclist Maria Isabel Moreno was the first athlete to be expelled from the Beijing 2008 Olympic Games after returning a positive pre-competition urine and blood drug test for EPO. The IOC President notified Moreno of the positive result; however, immediately after being tested, Moreno left the Olympic Village and fled back to Spain.

Ms. Moreno informed the IOC DC that it was not possible for her to appear at the hearing. She also challenged the entire process as being null for various reasons, including alleged irregularities at the doping control station in relation to her identification, as well as during the sample collection process. She also claimed that the language of the letter dated August 10, 2008, was incomprehensible. Finally, Moreno protested about the fact that the notification took place on a Sunday—a holiday.

The DC rejected Moreno's arguments, unanimously concluding that, given the presence of the prohibited substance EPO in her body, Moreno had committed an anti-doping rule violation pursuant to Article 2.1 of the *IOC Anti-Doping Rules Applicable to the Games of the XXIX Olympiad, Beijing 2008*. On the recommendation of the DC, the IOC Executive Board decided to exclude Moreno from the Beijing 2008 Olympic Games and had her Olympic identity and accreditation card immediately cancelled. Her file was

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140. The first analytical positive for CERA was announced on January 17, 2009, and involved Athanasia Tsoumeleka. Sports Briefing | Olympics, Ex-Champion Tests Positive, N.Y. TIMES, Jan. 18, 2009, available at <http://query.nytimes.com/search/sitesearch> (Search "Athanasia Tsoumeleka"). The Greek athlete is the 20 kilometer walk gold medallist from the 2004 Athens Games. *Id.* She tested positive for CERA, a newer version of the endurance-enhancing hormone EPO during a retesting of a sample she provided two days before the Beijing Olympics opening ceremony. Karolos Grohmann, *Beijing 1,500 Gold Medalist Tests Positive*, REUTERS, Apr. 29, 2009, <http://www.reuters.com/article/sportsNews/idUSTRE53S5FJ20090429> (last visited Oct. 27, 2009). Her B-Sample test confirmed the result. *Id.* Tsoumeleka finished ninth in Beijing in the 20 kilometer walk event. *Id.* She was nearly 3½ minutes behind the winner, Olga Kaniskina of Russia. 2008 Beijing Olympics, Track & Field, <http://www.nbcolympics.com/trackandfield/resultsandschedules/rsc=ATW092100/index.html> (last visited Oct. 27, 2009). After learning of the positive B-Sample she announced her immediate retirement from the sport. Sports Briefing | Olympics, Ex-Champion Tests Positive, N.Y. TIMES, Jan. 18, 2009, available at <http://query.nytimes.com/search/sitesearch> (Search "Athanasia Tsoumeleka").

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also transmitted to the UCI, which was requested to consider any further action within its own competence. Moreover, the NOC of Spain and BOCOG were to ensure full implementation of this decision.

#### V. AHD AND IOC DISCIPLINARY DECISIONS DURING THE COMPETITION PERIOD

Five decisions by the IOC Executive Board and two by the AHD were made during the course of competition at the Beijing Olympic Games. The IOC Executive Board decisions were all in relation to doping, and two of them indicated that athletes' coaches may have overtly participated in the administration of performance enhancing substances. The AHD, on the other hand, dealt with one eligibility case where a gold medal was at stake, and another case that became the basis for a bitter dispute between an IF and an NF that is still continuing. It is possible that had the AHD remained open just a few days later after the closing ceremonies this heated dispute could have been avoided or at least dealt with in an expedited fashion at considerably less cost.

##### A. *Breach of Competition Rules*

###### 1. Italian NOC & Spanish NOC v. ISAF & Danish NOC<sup>141</sup>

Perhaps the most interesting case of the Olympic Games was a case involving an attempt to remove the Danish winner of the gold medal from the 49er Class sailing event Medal Race on the grounds of violation of the sailing rules. The violation occurred through use of another competitor's sailing boat, thereby changing the final podium standings for the competition.

Prior to start of the gold Medal Race the Danish team broke their mast.<sup>142</sup> The Danish team coach immediately requested that the International Race Committee postpone the Medal Race while the Danes repaired their damaged boat. The request was denied. Unfortunately, there was no way the Danish crew could repair the damage prior to the start of the

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141. Arbitration CAS OG 08/008, Italian NOC & Spanish NOC v. ISAF & Danish NOC, award of 23 Aug. 2008.

142. The collateral damage included the mainsail, gennaker, and mast step. *Id.* at ¶ 2.3.



race. In a gesture of true Olympic sportsmanship worthy of the film *Chariots of Fire*, the Croatian team who had failed to qualify for the Medal Race lent their boat fully rigged but for light airs to the Danes. The Danish team sailed the race, leaving the formalities of such an equipment change to be dealt with onshore when the race was over. While arguably at a severe disadvantage given the late start and the fact that the Danish crew was racing a boat individualized for another crew and rigged for light wind conditions when they were competing in strong wind conditions, the Danes managed to place seventh in the race in some of the worst sailing conditions of the entire series of races.<sup>143</sup> Every single boat in the Medal Race capsized at least once and several pitch-poled, unable to finish due to sustained damages. Combined with their previous standings, the Medal Race results merited the Danish a gold medal in the 49er Class. The silver medal was awarded to the Spanish team, the bronze to the Germans, with the Italians finishing overall in fourth place.

Once ashore the Croatian boat borrowed by the Danes was inspected and approved to be in compliance with the rules. The use of the boat itself was approved the next morning subject to a ruling on the matter by the International Federation for the Sport of Sailing's International Jury (the Jury). The Jury ruling was required to determine whether or not the Danish team's results were acceptable given that they had broken a number of sailing rules as a result of the boat switch.<sup>144</sup>

Both the International Race Committee and the Spanish team filed protests with the Jury immediately following the Medal Race. The Jury decided that the protest from the Spanish team was invalidated as per Articles 21.2 and 21.3 of the *Sailing Instructions* and that the protest of the IRC should be dismissed. The Jury used discretion afforded to it under the applicable sailing rules to allow the Danish team's boat replacement<sup>145</sup> and breach of the rules because the team had not gained any competitive advantage through either. When the Spanish team made a second protest

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143. The Danish team managed to cross the start line in the Croatian boat with only three seconds to spare of the four-minute grace period to commence the race. *Id.* at ¶ 5.4.7.

144. Specifically, the boat appeared to be Croatian during the race because of the markings and flag. *Id.* at ¶ 5.3.4. Sailing rules required that the Danish flag be displayed on the spinnaker and mainsail, and that the crew members' names had to be visible on the mainsail along with the national lettering. *Id.* at ¶ 4.5. In fact, the Danes were only identifiable by their bibs, which read "DEN." *Id.* at ¶ 2.4. Furthermore, the Croatian boat was not outfitted with a camera or a dummy weight in its place, and the boat had not been subject to quarantine the night prior to the race as the rest of the competing boats had. *Id.*

145. Normally replacement permission would only be granted for specific items damaged on a boat. *Id.* at ¶ 5.4.4. The Olympic Measurement Committee (OMC) had allowed replacement of the entire boat in the circumstances because there had been no time for repairs before the start of the medal race. *Id.* at ¶ 5.4.5.

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joined by the Italian team asking for redress of the decision, the Jury denied the protest as well.<sup>146</sup> The following day the two teams filed an appeal with the CAS AHD challenging the ISAF Jury's decisions.<sup>147</sup>

The appeals were combined and consolidated before the AHD at a hearing on August 23, 2008. The issues the AHD had to decide were whether (i) the Italian NOC had standing to bring the appeal to CAS,<sup>148</sup> (ii) the ISAF Jury had misinterpreted the applicable sailing rules, and (iii) the replacement of an entire boat in 49er Class was permitted at all.

On the first issue the AHD held that the Italian NOC had standing as full party. Under the rules, filing a request for redress did not require filing a prior protest. On the second issue the AHD found that as the Jury was afforded a large degree of discretion under the applicable rules, the Jury was not compelled in the circumstances to disqualify the team. The Panel also concluded that the Jury had conducted proper legal procedure according to the applicable rules, applied its own guidelines, and exercised its discretion relying on the expertise and experience of its members. In doing so, the Panel could find no indications that the Jury was biased or conducted themselves with a lack of good faith or not in accordance with due process.<sup>149</sup>

The third issue before the AHD was whether or not it was permissible to allow a team to switch an entire boat before a race. Under the definition of the applicable sailing rules, "hull" was defined as equipment and so was subject to the rules pertaining to equipment replacements. The Panel's view was that the restriction regarding the replacement of damaged and undamaged parts must be interpreted in light of the specific circumstances and the general principles of competitive sport which were enumerated in the sailing rules. The OMC is empowered to permit replacement when it is satisfied that the item is damaged, not deliberately so, and cannot be

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146. On August 19, 2008.

147. On August 20, 2008.

148. The ISAF and Danish NOC Respondent disputed the Italian NOC's standing because it had not joined the initial protests before the Jury. Arbitration CAS OG 08/008, Italian NOC & Spanish NOC v. ISAF & Danish NOC, award of 23 Aug. 2008, at ¶ 5.2.1.

149. Arbitration CAS 04/009, Kaklamanakis v. ISAF, award of 21 Aug. 2004 (relied upon for this standard). In that decision, the AHD held that there would be no sufficient reason to overrule the International Federation's decision-making body or the rules it was interpreting so long as the body conducted itself in accordance with due process and the given rules were used as a basis making for the decision. *Id.*

repaired.<sup>150</sup> The AHD Panel indicated that the definition of what constitutes a “damaged part which cannot be repaired satisfactorily” must necessarily take the time to repair the damage into consideration. Since the Danish team had no time to repair all of the damaged parts, their only option in order to be able to compete in the Medal Race was to replace the entire boat. The AHD Panel concluded that given that the 49er Class is a class with virtually identical boats and its sole purpose is to be a competition between sailors rather than designers and manufacturers, the OMC was correct in granting the Danish crew permission to replace the entire boat.<sup>151</sup>

In dismissing the appeal, the AHD Panel declared the Danish crew was entitled to take part in the Medal Race; therefore, their gold medal final standing was clearly correct and was upheld by the AHD.

### *B. Doping Cases of the IOC Disciplinary Commission*

The AHD is not the only adjudicative body operating at the Olympic Games as previously discussed. Rule 21 of the *Olympic Charter* provides for the President to establish an ad hoc Disciplinary Commission (DC) whenever it appears necessary. A practice has emerged whereby the President appoints an ad hoc DC to examine each alleged anti-doping rule violation and make recommendations for action to the IOC Executive Board. The same procedure has been used with respect to disciplinary matters other than doping such as the actions of a Swedish wrestler in rejecting his bronze medal during the Olympic Medal ceremony.<sup>152</sup> The DC is always chaired by an IOC member who is trained as a lawyer and the President appoints two other members, not necessarily lawyers. The President establishes the terms of reference, designates all the members and decides when to dissolve the DC once the mandate has been fulfilled. The IOC Executive Board then acts upon the recommendation of the DC depending on what action it sees fit to take in the given circumstances. It is at this point that the athlete or other person being disciplined can bring an application before the AHD. Of course, if they are satisfied that they received a fair hearing and their right to be heard had been upheld then they may elect to stop at this first level of adjudication and not proceed to the AHD.

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150. See International Sailing Federation (ISAF), ISAF Regulations 21, available at <http://www.sailing.org/documents/isaf-regulations.php>.

151. The Panel noted it was a remarkable example of Olympic spirit for the Croatian crew to grant their Danish colleagues such generous support.

152. See Arbitration CAS OG 08/007, Swedish NOC & Ara Abrahamian v. FILA, award of 23 Aug. 2008; Arbitration CAS 2008/A/1647, NOC of Sweden v. IOC, award of 12 Feb. 2009; see also *infra* Section “AHD and IOC Disciplinary Decisions During the Competition Period” under the sub-heading “Sport Administration and the Spirit of the Games.”

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### 1. IOC Disciplinary Decision: Thi Ngan Thuong Do

On August 10, 2008, Ms. Thi Ngan Thuong Do competed in the Women All-Around qualification for Artistic Gymnastics in Beijing, in which she placed 59th. She provided a sample immediately following her competition, which was later alleged to be an adverse analytical finding for the prohibited substance furosemide. Following the B-Sample confirmation a DC was established. During the hearing, Ms. Thi Ngan Thuong Do stated that she had taken pills, bought directly at a pharmacy in Hanoi, in order to lose weight, and look slim and lean, not to enhance her performance. She explained that she purchased these pills after speaking with older athletes in Vietnam who told her it was the best way to lose weight, and did not consult a doctor prior to making this purchase. The Chef de Mission admitted that inexperience and absence of knowledge led to the current situation, recognizing that the NOC had made an error.

The DC unanimously concluded that, with the presence of the prohibited substance furosemide in her body, Ms. Thi Ngan Thuong Do had committed an anti-doping rule violation.<sup>153</sup> The IOC Executive Board accepted the recommendations of its DC and disqualified her from the Women All-Around qualification for Artistic Gymnastics, excluded her from the Beijing Olympic Games, canceled her Olympic identity, and accreditation and banned her from the Olympic Village.

### 2. IOC Disciplinary Decision: Jong Su Kim

On August 13, 2008, Jong Su Kim, a Korean shooter, became the subject of one of the most severe cases dealt with at the Beijing Olympic Games. Kim had won silver in the men's 50-metre air pistol and bronze in the men's 10-metre air pistol competitions. He was subsequently stripped of those medals when he tested positively for a doping infraction. Kim's urine samples, provided at the completion of each event, revealed positive traces of propranolol, a banned beta-blocker pursuant to the IOC *Anti-Doping Rules*. IOC medical commission chairman, Arne Ljungqvist, called the incident "a deliberate intake" of a banned substance, due to propranolol's specific benefit of preventing trembling in events like shooting and archery. The IOC Executive Board invoked the recommendations of the DC to expel Jong Su Kim from the Games and revoke his accreditation.

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153. International Olympic Committee (IOC), *Anti-Doping Rules*, art. 2.1 (2008).

### 3. IOC Disciplinary Decision: Igor Razoronov

Ukrainian weightlifter Igor Razoronov was required to provide a urine sample after finishing sixth in the Mens' 105kg weightlifting event on August 18, 2008. Four days later, the sample was reported as an adverse analytical finding because it contained the WADA prohibited substance nandrolone.<sup>154</sup> Razoronov did not bother to request a confirmatory analysis of the B-Sample, submit any written defense, or attend the IOC DC hearing. The IOC Executive Board then disqualified Razoronov from his event and withdrew his accreditation as penalty for commission of the anti-doping violation. It was then up to the International Federation to determine what other infractions of its doping control rules might have occurred. The International Weightlifting Federation handed Razoronov a four year suspension.

#### *C. Possible Incidents of Detrimental Coaching & Positive Doping Results*

Unfortunately for athletes, when their coaches act detrimentally to their interests and unknowingly provide them with performance enhancing substances, there is little the athlete can do. A positive test will still be held as doping infraction. Although it is nearly impossible to discern whether it is the coaches or athletes or both whom intended that the athlete should cheat, the following two cases illustrate the possibility that sometimes athletes may be victim to poor coaching decisions. Unfortunately for the athlete, intent has nothing to do with doping infractions as it is a strict liability offense.

#### 1. IOC Disciplinary Decision: Fani Chalkia

Another non-CAS doping decision regarded a Greek hurdler. Per request, Ms. Fani Chalkia provided a urine sample for a pre-competition doping control on August 10, 2008. The laboratory analysis of the A-sample indicated the presence of the prohibited substance methyltrienolone.

When notified of the positive test result, Ms. Chalkia requested an analysis of the B-sample. The laboratory analysis of the B-sample confirmed the adverse analytical finding of the A-sample. Ms. Chalkia then

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154. Richard H. McLaren, *WADA Drug Testing Standards*, 18 MARQ. SPORTS L. REV. 1, 14 (2007-2008). The prohibited substance nandrolone was first banned by the IOC in 1976. *Id.* It has had a controversial history as in 1996 it was discovered that nandrolone can be produced naturally in the human body, although in extremely limited quantities. *Id.* This led to a threshold for the substance in testing standards. *Id.* at 15.

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sent a written submission to the IOC DC claiming innocence and that she suspected acts of tampering by third parties.

At the DC hearing, the IOC's medical director indicated that methyltrienolone had been found in the tests relating to twelve other Greek athletes. The DC unanimously concluded that Chalkia had committed an anti-doping rule violation. The DC also noted that Chalkia's personal coach, George Panagiotopoulos, who was not appointed by the NOC of Greece, was also the personal coach of Tassos Goussis.<sup>155</sup> Because methyltrienolone can lead to serious health risks to athletes, the DC considered it necessary to report the matter to the Greek authorities, requesting that they investigate possible violations of Greek law, in particular relating to the coach, George Panagiotopoulos. Finally, the IOC Executive Board, accepting the recommendations of its DC, excluded Chalkia from the Olympic Games and had her Olympic identity and accreditation card immediately cancelled.

## 2. IOC Disciplinary Decision: Liudmyla Blonska

Ukrainian athlete Liudmyla Blonska placed second in the Women's Heptathlon Final in Beijing. The urine and blood samples she provided at the conclusion of the event indicated the presence of the prohibited substance methyltestosterone. On August 21, 2008, at an IOC DC hearing Blonska explained that the result of the test came as a shock to her. She explained that her husband, Mr. Sergii Blonskyi, who had also been her coach for the last five years, oversaw her training and diet. She also indicated that her relationship with her husband was difficult. She added that they had expressly agreed that she would not take any prohibited substances. Ms. Blonska further explained that her previous positive test result in 2003, which led to a two year suspension, had also come to her as a shock, and she had never found any explanation for the prohibited substance found in her body at the time.

The DC unanimously concluded that Blonska had committed an anti-doping rule violation. Blonska was subsequently disqualified from the Women's Heptathlon event, excluded from the Beijing Olympic Games, and had her silver medal, Olympic identity and accreditation card immediately withdrawn by the IOC Executive Board. The DC also noted, as the Commission did in *Chalkia*, that the relevant sporting authorities needed to

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155. Goussis was one of the other twelve athletes to have been caught with methyltrienolone in her body.

follow up on the circumstances surrounding the behavior of Blonska's coach. The IOC also reserved its right to take sanctions or measures in relation to Sergii Blonskyi, Blonska's husband.

*D. Sport Administration & The Spirit of the Olympic Games*

The CAS AHD will not interfere in "field of play" decisions made by referees, judges, or umpires that interpret the rules of play absent the presence of arbitrariness, maliciousness, or an error of law.<sup>156</sup> The refusal to hear field of play decisions is based on the assumption that the officiator of the game or match is in a better position to apply technical rules of the game at the time the game is played, as opposed to a CAS panel after the fact.<sup>157</sup> Even if the official makes a mistake, the CAS considers it a risk of the game that the athlete must accept.<sup>158</sup> When Swedish wrestler Ara Abrahamian found himself subject to what he considered to be unjust refereeing, he complained to his IF and subsequently the AHD. However, rather than attacking the referees' interpretation of the rules, he and his National Olympic Committee appealed on the grounds that the IF did not have proper internal appeal procedures. After he was denied restitution by the IF and the application was dismissed by the AHD, Abrahamian was disqualified from his event by the IOC Executive Board. The case highlights the scope of issues that may appear before the CAS.

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156. In *Mendy*, the panel held that a technical decision would only be reviewed where there was an error of law or where a decision was arbitrary, made with malicious intent, or violated general principles of law or a social rule. Arbitration CAS OG 1996/006, *Mendy v. Association Internationale de Boxe Amateur*, award of 1 Aug. 1996. See also Arbitration CAS 2000/013, *Bernardo Segura v. IAAF*, award of 30 Sept. 2000; Arbitration CAS 2000/012, *Rumyana Dimitrova Neykova v. International Rowing Federation & IOC*, award of 29 Sept. 2000; Arbitration CAS 2002/007, *Korean Olympic Committee v. International Skating Union*, award of 23 Feb. 2002.

157. A CAS panel elaborated on this idea in *Korean Olympic Committee* by suggesting that CAS would exercise self restraint from making decisions on field of play issues for a number of reasons including: the arbitrator's lack of expertise in the technical side of sport; subjective nature of a referee's call such as differences in physical perspectives, the disadvantages created by constant interruptions, and the course of play for judicial reasons; and issues with rewriting the outcome of a competition after the fact given that it has many variables. Arbitration CAS OG 2002/007, *Korean Olympic Committee v. International Skating Union*, award of 23 Feb. 2002.

158. In *Mendy*, the panel held that an official's decision is final even if they make a mistake as mistakes are simply part of the game, which have to be accepted by competitors as a risk. Arbitration CAS OG 1996/006, *Mendy v. Association Internationale de Boxe Amateur*, award of 1 Aug. 1996.

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1. Swedish NOC & Ara Abrahamian v. FILA<sup>159</sup>

The Men's Greco Roman 84kg semi-final was tied 1-1 after the second period when match officials issued a warning to the Swedish wrestler Ara Abrahamian during the break before the tie breaking third period.<sup>160</sup> The warning resulted in a point change such that the third period was no longer required and Abrahamian lost the match.<sup>161</sup> Had the warning been applied during the match, it is possible that Abrahamian could have altered his strategy to win more points, but when the ruling was made retroactively after the period, he had no means of rectifying the point deficiency resulting in his loss.<sup>162</sup>

Immediately after the match the Swedish coach requested a video check as provided for in FILA rules but his request was denied.<sup>163</sup> The Swedish coach and the Chef de Mission then attempted to file a formal protest with FILA claiming a departure from procedure by the bout's referees. FILA also denied this request.<sup>164</sup>

During the medal awards Abrahamian abruptly placed his bronze medal on the floor and walked out of the ceremony. Consequently, on the recommendation of the IOC DC after a hearing on the matter,<sup>165</sup> Abrahamian was disqualified from the Men's Greco Roman 84kg event and his Olympic accreditation was withdrawn by the IOC Executive Board for breach of Rule 41 of the *Olympic Charter* which calls on athletes to recognize the Olympic spirit of fair play.<sup>166</sup>

In the first appeal to the CAS AHD, the Swedish NOC requested that the CAS disqualify the match officials for violation of FILA procedures.<sup>167</sup> The Swedish team also claimed that FILA did not have any proper internal

159. Arbitration CAS OG 08/007, Swedish NOC & Ara Abrahamian v. FILA, award of 23 Aug. 2008.

160. *Id.*

161. *Id.*

162. *Id.* During the second period, the referee indicated to the match judge that he wanted to issue a warning. *Id.* Because the judge opposed it and the mat chairman remained silent, the match continued. *Id.* It was after the match that the three agreed to give Abrahamian a warning, which was then applied retroactively, resulting in his loss of the match. *Id.*

163. *Id.*

164. *Id.*

165. On August 15, 2008.

166. *Id.*

167. *Id.* On August 19, 2008.



appeal procedures for disputes.<sup>168</sup> The Swedes stated that FILA's refusal to accept the protests violated Abrahamian's rights and expectations.<sup>169</sup> The AHD Panel held that FILA is required by the *Olympic Charter* and its own internal rules to provide a procedure in its rules for an appeal jury.<sup>170</sup> The panel further held that the appeal jury must be able to promptly hear claims by athletes or others affected, and that the relevant officials in a competition had not complied with FILA rules and procedures.<sup>171</sup> Although Article 22 of the FILA Wrestling Rules may provide such a procedure, that rule was not properly invoked in the circumstances.<sup>172</sup> FILA also did not provide any other appropriate appeal mechanism in its rules. CAS accepted the Swedish argument and stated that Abrahamian was entitled to implement the disciplinary process in Article 36 of the Constitution instituting a three-person Sport Appeal Commission.<sup>173</sup> FILA decided not to appear before the CAS AHD Panel during the hearing.

After the CAS decision, the Swedish NOC asked the IOC to reconsider the proportionality of the disqualification penalty handed out to Abrahamian for his unsportsmanlike conduct given the CAS ruling and the circumstances surrounding his behavior. The President of the IOC rejected the request.<sup>174</sup> The Swedish NOC and Abrahamian then filed an appeal of the IOC Executive Board's decision with the CAS Appeal Division.<sup>175</sup>

The CAS Appeal Panel held that the IOC Executive Board had used the appropriate balance of considerations when applying disciplinary action to Abrahamian. The Executive Board was not required to take into account the background circumstances that may have motivated him to act in an unsportsmanlike manner. The Panel supported the IOC Executive Board's primary consideration of Abrahamian's conduct at the medal ceremony for the disciplinary action. Any other considerations as to the conduct of the match officials and breach of FILA rules was FILA's responsibility, not the IOC Executive Board's. The Appeal Panel did note however, that it was "deplorable that [a warning was retroactively issued] and there was no apparent method of appeal for the Athlete in light of this potential rule violation."<sup>176</sup> Nevertheless, although the circumstances were unfortunate,

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168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. On September 2, 2008.

175. On September 4, 2008. See Arbitration CAS 2008/A/1647, NOC of Sweden v. IOC, award of 12 Feb. 2009.

176. Arbitration CAS 2008/A/1647, NOC of Sweden v. IOC, at ¶ 9.23.

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Abrahamian made a choice to use the medal ceremony as a means of personal protest and act in an unsportsmanlike manner. He had usurped the ceremony to achieve his own purpose. That was not the proper forum in which to protest his perception of the FILA rule violations.

The FILA subsequently, in their own disciplinary proceedings, handed a two year suspension to Abrahamian, imposed a fine on him and the Swedish coaches, and banned the Swedish Wrestling Federation from holding international FILA sanctioned events for two years. At the time of writing this article, this FILA decision, was appealed to the CAS.

## VI. OLYMPIC CASES AFTER THE GAMES

Olympic-related legal disputes have continued to arise since the closing ceremonies of the 2008 Beijing Olympic Games. There have now been four appeals to the CAS Appeal Division, in addition to a group of equestrian cases that have progressed slowly and have not developed far enough to comment on at the time of writing this article.<sup>177</sup> That these athletes and their nations have to wait nearly five months after the close of the Olympics before the conclusion to their cases seems completely out of step with the romanticism and spirit of the Olympic Games—a spirit that diminishes a little more with each related legal battle. This result highlights the need for the AHD to remain open for business after the closing ceremonies in order to tie up loose ends and to provide answers to athletes, nations, and spectators within the twenty-four hour window in which disputes are normally dealt with when arising earlier in the Olympic Games.

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177. Ara Abrahamian appealed the IOC Executive decision to revoke his medal. See *supra* section “AHD and IOC Disciplinary Decisions During the Competition Period” under the subheading “Sport Administration and the Spirit of the Games.” The Belarusian hammer throwers Vadim Devyatovskiy & Ivan Tsikhan have both appealed the IOC Executive Board’s decisions to disqualify them and to revoke their medals for doping infractions. *Belarusians Appeal to Win Back Olympic Medals*, Jan. 6, 2009, <http://trackfield.teamusa.org/news/article/11780> (last visited Oct. 27, 2009). Finally, the Netherlands Antilles NOC and Churandy Martina appealed an International Association of Athletics Federations (IAAF) decision to disqualify Martina for running out of his lane in the 200 meter sprint. Jaime Aron, *US Men’s Sprint Medal Jeopardized by Protest*, Aug. 24, 2008, available at <http://hosted.stats.com/olympics/story.asp?i=20080824050918598513008>. The Devyatovskiy, Tsikhan, and Martina decisions are discussed immediately below. Note that the four appeals do not include the equestrian cases, from which there has already been at least one application to the CAS at the time of writing. See Arbitration CAS 2009/A/1768, Hansen v. FEI, award of Oct. 2009.

*A. Doping Cases of the IOC Disciplinary Commission*

1. IOC Disciplinary Decision: Vadim Devyatovskiy & Ivan Tsikhan

Even though August 24, 2008, was the last day of the 2008 Beijing Olympic Games, it still proved to be eventful in the anti-doping realm. Two Belarusian Athletics competitors, Vadim Devyatovskiy and Ivan Tsikhan, were notified of adverse analytical findings after their participation in the Men's Hammer event on August 17, 2008. Their A-Samples contained traces of testosterone. Both athletes' B-Samples confirmed the adverse analytical finding. Because the Olympics were essentially over, the IOC decided that the DC hearing would not take place until late September. The IOC President decided that in these cases the DC decision would constitute the final decision of the IOC and no further decision by the IOC Executive Committee would be necessary.<sup>178</sup> After the hearings the IOC DC disqualified both athletes for committing anti-doping violations.<sup>179</sup> Devyatovskiy had his silver medal revoked and was handed a lifetime ban from all future Olympic competitions because this was his second anti-doping violation.<sup>180</sup> Tsikhan was also disqualified from the Beijing Olympic Games and stripped of his bronze medal. These rulings made December 11, 2008, a hard day for Belarus. The issue was appealed to the CAS in January 2009, but at the time of this writing, the applications had not been heard.<sup>181</sup>

2. IOC Disciplinary Decision: Adam Seroczynski

Polish kayaker Adam Seroczynski was informed on September 2, 2008, of an adverse analytical finding for the presence of clenbuterol in his body.<sup>182</sup> Seroczynski had placed fourth in the Kayak Double 1000 meter Men's Final with his teammate. The IOC DC hearing took place on September 21, 2008. The IOC Executive Board, on recommendation of the DC, subsequently announced that Seroczynski was disqualified from the event as a consequence of the anti-doping violation.<sup>183</sup> Unfortunately, Seroczynski's behavior caused serious collateral damage. Because the event

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178. International Olympic Committee (IOC), Anti-Doping Rules, art. 7.1.4 (2008).

179. The hearings took place on September 21, 2008, and December 11, 2008.

180. The lifetime ban had to be ratified by the IOC Executive Committee. International Olympic Committee (IOC), Anti-Doping Rules, art. 7.1.4 (2008).

181. Appeals were announced on January 6, 2009.

182. The result was confirmed in a B-Sample test. This was the only doping case involving Clenbuterol in the Beijing Games.

183. On December 11, 2008.

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was a team event, the team had to be disqualified for the anti-doping violation. As a result, teammate Mariusz Kujawski also lost the right to claim title to being part of the fourth fastest kayaking team in the world. This decision was made despite the fact that Kujawski had not committed any anti-doping violation and competed fairly. One could imagine that if there was a friendship between the two teammates before the Games, it is surely strained now.

### B. *Field of Play Decision*

#### 1. Netherlands Antilles Olympic Committee v. IAAF & USOC<sup>184</sup>

The men's 200 meter final took place on August 20, 2008. In first place was Usain Bolt, followed by Churandy Martina of the Netherlands in second, Wallace Spearmon of the U.S.A. in third, Shawn Crawford of the U.S.A. in fourth, and Walter Dix of the U.S.A. in fifth place.<sup>185</sup> Following the race, the IAAF determined that Spearmon had committed a lane violation and consequently disqualified him, moving Crawford into third and Dix into fourth place.<sup>186</sup> At 2308 hours on August 20, 2008, the United States Olympic Committee (USOC) filed an appeal to the Jury, claiming that Martina had also committed a lane violation and so should be disqualified.<sup>187</sup> If Martina were disqualified, it would have moved Crawford and Dix into second and third place, giving the U.S.A. another medal finish.<sup>188</sup> The Jury accepted the appeal and Martina was disqualified.<sup>189</sup>

On August 23, 2008, the Netherlands Antilles Olympic Committee (NAOC) appealed to the AHD.<sup>190</sup> On August 24, 2008, the Sole Arbitrator decided that the dispute would be referred to the regular CAS division because the IAAF said it would not be available to deal with the case before the close of the Olympic Games.<sup>191</sup> It also appeared that other parties might

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184. Arbitration CAS 2008/A/1641, Netherlands Antilles Olympic Committee v. IAAF & USOC, award of 6 Mar. 2009.

185. *Id.* at 2.

186. *Id.*

187. *Id.* at 3.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 3-4.

become involved in the dispute—as did the USOC eventually.<sup>192</sup> The hearing was not held until January 15, 2009.<sup>193</sup>

At the hearing, the AHD, noting that it could not interfere in a field of play decision except under exceptional circumstances,<sup>194</sup> had to determine whether the scope of the field of play doctrine covered the procedural aspects leading to a technical decision.<sup>195</sup> In other words, the AHD had to decide if it had jurisdiction to determine—in connection with the technical decision—whether the protest regarding the matter was filed in a timely manner, if the USOC had the authority to make the protest, and the impact on the NAOC's procedural rights.<sup>196</sup> Because none of the exceptional factors that would permit the AHD to review a field of play decision were present, the sole arbitrator held that not only was the Jury decision not open to review on its merits as a field of play decision, but also that the procedural aspects leading to the decision could not be revised by the tribunal.<sup>197</sup> Martina remained disqualified and the U.S.A. took the silver and bronze medals.<sup>198</sup>

Churandy Martina's and Ara Abrahamian's appeals were not heard by the CAS until January 2009.<sup>199</sup> Abrahamian's case could have been easily brought to a close immediately after the Olympics had the AHD remained open. Likewise, the Martina appeal should have been dealt with more expediently by the AHD after the close of the Olympic Games, rather than postponing the issue five months before the Appeal Division in Lausanne could hear it.

## VII. RECOMMENDATIONS

It is in the interests of nations, athletes, spectators, and the Olympic Games itself to aim to reduce the increasing volume and complexity of legal issues surrounding the Olympic Games. Selection and eligibility issues

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192. *Id.*

193. *Id.* at 1.

194. *See, e.g.*, Arbitration CAS OG 1996/006, Mendy v. Ass'n Internationale de Boxe Amateur, award of 1 Aug. 1996 (holding that a field of play decision would only be reviewed where there was an error of law or where a decision was arbitrary, made with malicious intent, or violated general principles of law or a social rule).

195. Arbitration CAS 2008/A/1641, Netherlands Antilles Olympic Committee v. IAAF & USOC, award of 6 Mar. 2009, at 17.

196. *Id.*

197. *Id.*

198. *Id.* at 2.

199. *See supra* Section "AHD and IOC Disciplinary Decisions During the Competition Period" under the sub-heading "Sport Administration and the Spirit of the Games" (discussing Abrahamian's case).

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arising prior to the Games need to be addressed quickly in order to allow athletes and nations to organize and train for the competition. Strategic use of the CAS to make selection and eligibility decisions should be used in only the most complex circumstances. Nothing will be gained by allowing the sports federations and athletes to increasingly insist that the CAS address those decisions when the results do not meet their expectations. Deciding who should and should not compete must not become a primary role of the tribunal. The *Woodbridge*, *AOC & AWU*, *Vukovic*, and *D'Arcy* cases are arguably not the sort of cases CAS should have to deal with. These cases involved interpretation of rules and issues that should, and probably could, have been solved at the federation and organizing committee level if there was proper motivation and cooperation there to do so.

Once the AHD has assumed jurisdiction of Olympic disputes, it should strive to enable controls preventing applicants from forum shopping. Permitting such strategy to continue will unnecessarily increase the demands placed on the CAS and CAS AHD, and create an environment that may contribute to inconsistencies in the ever-evolving *lex sportiva*. There is also a loss of finality to the AHD cases; matters can be brought to the regular CAS after the Olympic Games when such matters could have been dealt with at the Games by the AHD. The activities between the CAS in Lausanne and the AHD at the Olympics need to be rationalized to prevent such results. Furthermore, the IOC and sports federations must participate in the process by ensuring that they have sufficient internal controls to prevent such forum shopping from occurring between their own decision-making bodies and those of the AHD. The jurisdiction to bind all who may be involved in the AHD cases needs some reexamination.

In order to preserve the spirit of the Olympic Games, steps must be taken to prevent disputes from spilling over into the CAS Appeal Division. Not doing so does a disservice to everyone involved in the Games and ultimately its audience. Contention should not exist six months after the closing ceremonies regarding the award of medals. The AHD should be the final stop for Olympic disputes and ensure that no preventable loose ends are left untied before closing shop. To these ends, a number of recommendations may be made.

First, during the Olympic selection period, prior to the commencement of the pre-games and AHD jurisdiction over Olympic matters, an expedited appeal process should be instituted by the CAS to hear and make decisions on applications within one week. Doing so would ensure the timely resolution of selection and eligibility disputes prior to the finalization of

competitors to the Olympic Games. By increasing court costs on a discretionary sliding scale, it would be possible to penalize and ultimately deter sports federations from making frivolous applications seeking strategic advantage through the tribunal. It would also preserve the ability of athletes to apply to the court on legitimate grounds when they believe to have been wronged by their representative sports bodies.

Second, insist that all Olympic-related cases be heard by the AHD after its assumption of jurisdiction in order to prevent forum shopping and to prevent taxing the resources of the CAS beyond its means. This would have prevented both the *football* and *D'Arby* cases from being heard by the Appeal Division when the AHD was operating and the resources for it to operate had been put in place.

Third, ensure that the loose ends of any reasonably predictable Olympic disputes are tied up before closing the AHD. The goal would be to prevent circumstances arising such as the ones both Ara Abrahamian and Churandy Martina found themselves in, with their grievances being sent to the Appeal Division and consequently having no timely resolution to their disputes and possession of medals. In order to prevent cases spilling over and losing the benefit of the twenty-four hour AHD window, the IOC would have to contribute by ensuring that IOC DC recommendations are made to the IOC Executive Board and that a decision is rendered quickly. Consequently, athletes would be able to appeal to the AHD should they choose to do so. The AHD should remain open until all IOC Executive Board decisions have been made and the time period for appeal has lapsed. This ensures that disputes arising on the last few days of competition may still enjoy the benefit of the onsite AHD to dispose of the matter efficiently.

Finally, once the AHD has closed, any unforeseeable Olympic-related appeals submitted to Lausanne should be heard on an expedited basis with a goal of hearing and deciding on a given dispute within one week of an application being made. Doing so would provide greater certainty to medal holders, lend greater credibility to the Olympic Games, and contribute to enhancing and preserving the spirit of the Olympics.

The Beijing Olympics was an enormous success from nearly all vantage points. However, with each Olympics the law creeps increasingly further into sport. Given the size of the stakes, the combination of law and sport at the Olympics is here to stay. Unfortunately, the legal disputes surrounding the Olympic Games—with their startling feats of athleticism, competition, and camaraderie—are disillusioning. Neither spectator nor athlete wants to hear that a performance shattering a world record may be invalidated because of a technicality discovered after the fact and appealed by another nation seeking one more medal on its trophy shelf. As cold as it may be, that is a reality of today's sporting world. Such acts diminish the spirit,

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romanticism, entertainment that the Olympic Games have stood for in decades past. All is not lost, however. We can take steps to minimize the impact of the law on the Olympic Games by dealing with disputes efficiently and discretely; we may strive to keep the undesirable aspects behind the scenes in order to keep our children's and our own eyes widened, jaws dropped, and excitement peaked as we all take in the greatest show on earth.



**APPENDIX A**  
**Infractions Committed Prior to Olympic Pre-Games Resulting in**  
**Withdrawal from Olympic Competition<sup>200</sup>**

<b>Date</b>	<b>Athlete</b>	<b>Sport</b>	<b>Country</b>	<b>Substance/ Reason</b>
06/13/2008	Multiple ( <i>11 athletes</i> )	Weightlifting	Greece	Methyltrienolone
06/27/2008	Ouyang Kunpeng	Swimming	China	Unknown
06/20/2008	Dmitriy Gaag	Triathlon	Kazakhstan	EPO
08/13/2008	Chang Tai-Shan	Baseball	Taiwan	Unknown
07/21/2008	Irina Bakhanouskaya	Steeplechase	Belarus	Stanozolol
07/22/2008	Yulia Leantsyuk	Shot-put	Belarus	Testosterone
07/26/2008	Elizabeth Muthuka	Sprinter	Kenya	Nandrolone
07/05/2008	Marta Bastianelli	Road Cycling	Italy	Flenfluramina
07/28/2008	Peter Riis Andersen	Mountain Biking	Denmark	EPO
07/29/2008	Julien Dunkley	Track and field	Jamaica	Boldenone
07/28/2008	Multiple ( <i>11 athletes</i> )	Weightlifting	Bulgaria	Methandienon
07/31/2008	Multiple ( <i>7 athletes</i> )	Athletics	Russia	Caught substituting urine
07/31/2008	Elena Antoci	Middle distance running	Romania	EPO
07/31/2008	Cristina Vasiloiu	Middle distance running	Romania	EPO

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200. This list of infractions committed before the commencement of the IOC's jurisdiction over doping control has been compiled based on doping infractions reported in news sources. Although it is the authors' belief that the lists are accurate, the lists may underestimate the number of positive tests as some cases may not have been as widely reported as others, if at all. Since many of the positive tests may stem from a nation or the National Federation's own doping testing programs, the results are not necessarily made known to WADA or the IOC.

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PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

**Infractions Committed After Commencement of Pre-games Resulting in Disqualification from Olympic Competition<sup>201</sup>**

<b>Date</b>	<b>Athlete</b>	<b>Sport</b>	<b>Country</b>	<b>Substance/ Reason</b>
7/31/2008	Maira Isabelle Moreno	Cycling	Spain	EPO
08/01/2008	Andrea Baldini	Fencing	Italy	Furosemide
08/05/2008	Vladimir Gusev	Cycling	Russia	Irregular blood values
08/09/2008	Tassos Gousis	Track and Field	Greece	Methyltrienolone
08/09/2008	Jong Su Kim	Shooting	North Korea	Propranolol
08/10/2008	Thi Ngan Thuong Do	Artistic Gymnastics	Vietnam	Furosemide
08/16/2008	Fani Chalkia	Hurdles	Greece	Methyltrienolone
08/18/2008	Igor Razoronov	Weightlifting	Ukraine	Nandrolone
08/20/2008	Lyudmila Blonska	Track and Field	Ukraine	Methyltestosterone
12/11/2008	Vadim Devyatovskiy	Hammer Throw	Belarus	Testosterone
12/11/2008	Ivan Tsikhan	Hammer Throw	Belarus	Testosterone
12/11/2008	Adam Seroczynski	Kayak	Poland	Clenbuterol

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201. This list was compiled based on press releases from the IOC.

