Beyond Dispute:
International Judicial Institutions as Lawmakers

The Making of a *Lex Sportiva* by the Court of Arbitration for Sport

By Lorenzo Casini[*]

A. Introduction

"Sports law is not just international; it is nongovernmental as well, and this differentiates it from all other forms of law."[1] Sports rules are genuine "global law" because they are applied across the entire world, they involve both international and domestic levels, and they directly affect individuals: This happens, for instance, in the case of the Olympic Charter, a private act of a "constitutional nature" with which all States comply,[2] or in the case of the World Anti-Doping Code, a document that provides the framework for the harmonization of anti-doping policies, rules, and regulations within sports organizations and among public authorities.[3]

The global dimension of sport is, in the first instance, regulatory, and it embraces the whole complex of norms produced and implemented by regulatory sporting regimes at the international and domestic levels.[4] These rules include not only transnational norms set

---

* Professor of Administrative Law, Faculty of Architecture, University of Rome "La Sapienza." This paper was first presented at the Max Planck Institute International Conference on "Beyond Dispute: International Judicial Institutions as Law-Makers," Heidelberg, June 14–15, 2010. The author warmly thanks Davinia Abdul Aziz, Eyal Benvenisti, Stefano Battini, Armin von Bogdandy, Sabino Cassese, Sarah Dadush, Giacinto della Cananea, Federico Fabbrini, Isabel Feichtner, Franco Ferrari, Matthias Goldmann, Burkhard Hess, Michael Ioannidis, Rob Howse, Marc Jacob, Benedict Kingsbury, Euan MacDonald, Giulio Napolitano, Salem Hikmat Nasser, Aldo Sandulli, Stephan Schill, Nicola Selvaggi, Maja Smrkolj, Simone Stebler, Richard B. Stewart, Maria Tzanou, René Urueña, and Ingo Venzke for their helpful comments. All usual disclaimers apply.

[1] MICHAEL BELOFF, TIM KERR & MARIE DEMETRIOU, SPORTS LAW 5 (1999). According to these authors, the term "sports law" is "a valid description of a system of law governing the practice of sports." They also note that "the public's limitless enthusiasm for sport and its importance to our cultural heritage makes sports law more than mere private law" (*Id.*, 4).

[2] *See* JEAN-LOUP CHAPPELET & BRENDA KÜBLER-MABBOTT, THE INTERNATIONAL OLYMPIC COMMITTEE AND THE OLYMPIC SYSTEM: THE GOVERNANCE OF SPORT (2008); and ALEXANDRE MIGUEL MESTRE, THE LAW OF THE OLYMPIC GAMES (2009).

[3] PAUL DAVID, A GUIDE TO THE WORLD ANTI-DOPING CODE: A FIGHT FOR THE SPIRIT OF SPORT (2008).

[4] An overview is in FRANCK LATTY, LA *LEX SPORTIVA*. RECHERCHE SUR LE DROIT TRANSNATIONAL (2007); and in LORENZO CASINI, IL DIRITTO GLOBALE DELLO SPORT (2010).

https://doi.org/10.1017/S2071832200017326 Published online by Cambridge University Press

by the International Olympic Committee (IOC) and by International Federations (IFs)—i.e., "the principles that emerge from the rules and regulations of international sporting federations as a private contractual order"[5]—but also "hybrid" public-private norms approved by the World Anti-Doping Agency (WADA) and international law (such as the UNESCO Convention Against Doping in Sport).

Thus, sports law is now far from being amenable to an exhaustive explanation based on structures of private law alone, but rather presents a mixed nature, in which a regulatory framework based on private autonomy interacts constantly with public law norms. Such a phenomenon takes place at the national level especially, a level at which the sports legal regime has always been characterized by a tight dialectic between public and private law.[6] On the international level, the Olympic regime, based on private law, has been flanked by other regimes in which States actively participate. On the national level, the role of public law takes on a marked significance, to the point that the domestic sporting bodies are often regulated not only by norms produced by international sporting institution, but also by public law.[7]

Sports law, therefore, is highly heterogeneous, and, above all, it is not simply transnational, but actually "global": It is made of norms enacted not only by States, but also by central sporting institutions (such as IOC, IFs and WADA) and by national sporting bodies (such as National Olympic Committees and National Anti-Doping Organizations); furthermore, sport norms directly address and regulate individuals, such as athletes.
Global sports law operates at different levels and it is produced by several "law-makers." Amongst those, there is one very peculiar body, founded in the 1980s, which has become a key actor in the sport legal system: The Court of Arbitration for Sport (CAS).[8] In the last

---

[5] Ken Foster, *Is There a Global Sports Law?*, 2 ENTERTAINMENT AND SPORTS LAW JOURNAL 1, 4 (2003), who describes "global sports law" as a "transnational autonomous legal order created by the private global institutions that govern international sport," "a contractual order, with its binding force coming from agreements to submit to the authority and jurisdiction of international sporting federation" and not "governed by national legal systems" (*id.*, 2). This author considers "global sports law" a significant example of spontaneous global law without a State, according to the definition provided by GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997); and Gunther Teubner, *Un droit spontané dans la société mondiale*, in: LE DROIT SAISI PAR LA MONDIALISATION, 197 (Charles-Albert Morand ed., 2001).

[6] It is worth noting that private law theory in the sport context has been functionally linked to the necessity of safeguarding the autonomy of sports from interference by public authorities.

[7] From this perspective, the case of doping control measures is highly significant. The establishment of the WADA, by the IOC and by States, and the process of harmonization undertaken with the approval of the World Anti-Doping Code, have in fact led to the creation of a uniform regulatory system, and, at the same time, of a dense network of national bodies, mainly of a public nature.

[8] THE COURT OF ARBITRATION FOR SPORT 1984–2004 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds, 2006); ANTONIO RIGOZZI, L'ARBITRAGE INTERNATIONAL EN MATIÈRE DE SPORT 132 (2005); ANIELLO MERONE, IL TRIBUNALE ARBITRALE DELLO SPORT (2009); and Simone Stebler, *Court of Arbitration for Sport (CAS)*, in: INSTITUTIONAL ARBITRATION.

https://doi.org/10.1017/S2071832200017326 Published online by Cambridge University Press

two decades, the activity of this institution has become extraordinarily important. The number of decisions rendered by the CAS has increased to the point that a set of principles and rules have been created specifically to address sport: This "judge-made sport law" has been called *lex sportiva*.[9] This formula, which recalls well-known labels like *lex mercatoria* or *lex electronica*,[10] has been readily adopted and, indeed, its meaning has been extended over time: Currently, it can be used to refer more generally to the transnational law produced by sporting institutions.[11] In spite of this success, the existence of a *lex sportiva* is not universally accepted, in so far as some domestic orders have affirmed state law sovereignty over sport norms by contesting the legal nature of these rules: In 2001, for instance, the Frankfurt *Oberlandesgericht* stated that a *lex sportiva* independent from any given state law does not exist *("[E]ine von jedem staatlichen Recht unabhängige lex sportiva gibt es nicht*")[12]; in 2005, the Swiss *Bundesgericht* underlined: "*Die Regeln der (internationalen) Sportverbände können nur im Rahmen einer materiellrechtlichen*

TASKS AND POWERS OF DIFFERENT ARBITRATION INSTITUTIONS, 255 (Pascale Gola, Claudia Götz Staehelin & Karin Graf eds, 2009).

[9] James A.R. Nafziger, *Lex Sportiva and CAS*, in: THE COURT OF ARBITRATION FOR SPORT 1984–2004, 409 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds, 2006); RIGOZZI (note 8), 628; and Massimo Coccia, *Fenomenologia della controversia sportiva e dei suoi modi di risoluzione*, RIVISTA DI DIRITTO ED ECONOMIA DELLO SPORT 605, 621 (1997), adopt instead a wider definition of the *lex sportiva* (*i.e.,* referred to the large amount of customary private norms developed through international and national sports arbitrations). *See also* Michael Beloff, *Is there a lex sportiva?*, 5 SWEET &MAXWELL'S INTERNATIONAL SPORTS LAW REVIEW 49 (2005); Ken Foster, *Lex Sportiva and Lex Ludica: the Court of Arbitration for Sport's Jurisprudence*, 3 ENTERTAINMENT AND SPORTS LAW JOURNAL (available at: http://go.warwick.ac.uk/eslj/issues/volume3/number2/foster); and SPORTS LAW (LEX SPORTIVA) IN THE WORLD. REGULATIONS AND IMPLEMENTATION (Dimitrios P. Panagiotopoulos ed., 2004).

[10] *See* Sergio M. Carbone, *Il contributo della lex mercatoria alla precisazione della lex sportiva*, in: DIRITTO INTERNAZIONALE DELLO SPORT, 227 (Edoardo Greppi & Michele Vellano eds, 2006); Anne Röthel, *Lex mercatoria, lex sportiva, lex technica - Private Rechtsetzung jenseits des Nationalstaats?*, 62 JURISTENZEITUNG 755 (2007); and DIE PRIVATISIERUNG DES PRIVATRECHTS – RECHTLICHE GESTALTUNG OHNE STAATLICHEN ZWANG (Carl-Heinz Witt, Matthias Casper, Liane Bednarz, Martin Gebauer, Jan Gernoth, Markus Grahn, Jens Haubold, Stefan Huber, Götz Schulze, Christoph Teichmann & Nika Witteborg eds, 2003); and Bryan H. Druzin, *Law Without The State: The Theory of High Engagement and The Emergence of Spontaneous Legal Order Within Commercial Systems*, 42 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 559 (2010).

[11] LATTY (note 4), 31, links the concept of *lex sportiva* to "les règles transnationales opérant dans le domaine du sport" and to the "manière dont elles s'agencent les unes par rapport aux autres," so that it reveals "la présence d'un ordre juridique transnational sportif unitaire" (*id.*, 39). On sports law as "transnational law," also Bruno Simma, *The Court of Arbitration for Sport* (1988), in: THE COURT OF ARBITRATION FOR SPORT 1984–2004, 21 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds, 2006).

[12] Oberlandesgericht Frankfurt, *D. Baumann / D.L.V.*, 18 April 2001, 8 ZEITSCHRIFT FÜR SPORT UND RECHT 161 (2001); on these aspects, *see* ANDREAS WAX, INTERNATIONALES SPORTRECHT: UNTER BESONDERER BERÜCKSICHTIGUNG DES SPORTVÖLKERRECHTS 173 (2009), who deals with the concept of a *lex sportiva internationalis*.

https://doi.org/10.1017/S2071832200017326 Published online by Cambridge University Press

Verweisung Anwendung finden und daher nur als Parteiabreden anerkannt werden, denen zwingende nationalrechtliche Bestimmungen vorgehen."[13]

In this paper, the term *lex sportiva* is used in a broad sense as a synonym of "global sports law." The formula "global sports law" thus covers all definitions so far provided by legal scholarship (such as *lex sportiva* or "international sports law")[14] in order to describe the principles and rules developed and applied by sporting institutions. This approach raises several problems concerning the very concept of such a kind of law and its binding force[15] as well as other problems, including those connected to wider themes such as the emergence of a "global private law" and the formation of "global private regimes."[16] Within this context, this paper will focus on the actor that is probably most prominent in constructing global sports law: The Court of Arbitration for Sport. The paper will examine the structure and functions of this institution in order to highlight a number of problems concerning judicial activities at the global level more generally. Section B will outline the organization and functions of the CAS, from its inception to the present date. In particular, this section will show how the history of the CAS is reminiscent of a famous German novel based on a biblical saga, "Joseph and his brothers" by Thomas Mann[17]: Born as the "favorite son" of the Olympic movement's founding fathers, the CAS subsequently became the target of its envious "brothers"—i.e., the International Federations and other sporting arbitration institutions—which viewed the CAS as a dangerous enemy; ultimately, the CAS defeated its opponents, gained independence and brought normative harmonization in

[13] Swiss Federal Court, 20 December 2005, BGE 132 II 285, para. 1.3 ("The rules of (international) sport federations may only be applied by means of a reference to their substantive law and therefore can only be recognized as an agreement between the parties, over which mandatory national laws take precedence.")

[14] According to JAMES A.R. NAFZIGER, INTERNATIONAL SPORTS LAW 1 (2004), "international sports law" means a process that includes "a more or less distinctive body of rules, principles, institutions and procedures to govern important consequences of transnational sports activity." For Foster (note 5), 4, international sports law embraces "general principles of law that are automatically applicable to sport." Ola O. Olatawura, *Fundamental Doctrines of International Sport Law*, INTERNATIONAL SPORTS JOURNAL 130 (2008), describes "international sport law" as "the specialized branch of transnational law that globally regulates private and public participants conduct and claims in sport." In French legal scholarship, Alegría Borras, *Existe-il un droit international du sport?*, in: NOVEAUX ITINÉRAIRES EN DROIT. HOMMAGE À FRANÇOIS RIGAUX, 187 (1993); and Jean-Pierre Karaquillo, *Droit international du sport*, 309 RECUEIL DES COURS, 9 (2004). In Germany, WAX (note 12). In Italy, DIRITTO INTERNAZIONALE DELLO SPORT (Edoardo Greppi & Michele Vellano eds, 2006); formerly, Massimo Severo Giannini, *Ancora sugli ordinamenti giuridici sportivi* (1996), in: 9 SCRITTI 1991–96, 441 (Massimo Severo Giannini ed., 2006), who wrote that in sport the term "international" refers to a "diritto superstatale," meaning not the "diritto proprio di un ordinamento giuridico a sé," but "una normativa interstato e superstato" (*id.*, 444).

[15] These issues are widely analyzed by LATTY (note 4), 416, and CASINI (note 4), 226.

[16] *See* Gunther Teubner, *Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sector?*, in: PUBLIC GOVERNANCE OF THE AGE OF GLOBALIZATION, 71 (Karl-Heinz Ladeur ed., 2004); and HARM SCHEPEL, THE CONSTITUTION OF PRIVATE GOVERNANCE. PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS (2005).

[17] JOSEPH UND SEINE BRÜDER, a four-part novel by Thomas Mann, written from 1926 to 1943.

https://doi.org/10.1017/S2071832200017326 Published online by Cambridge University Press

global sports law. Section C will focus on the role of the CAS in making a *lex sportiva*, and it will take into account three different functions: The development of common legal principles; the interpretation of global norms and the influence on sports law-making; and the harmonization of global sports law. Section D will consider the relationships between the CAS and public authorities (both public administrations and domestic courts) in order to ascertain the extent to which the CAS and its judicial system are self-contained and autonomous from States. Lastly, Section E will address the importance of creating bodies like the CAS in the global arena, and it will identify the main challenges raised by this form of transnational judicial activity. The analysis of the CAS and its role as law-maker, in fact, allows us to shed light on broader global governance trends affecting, for example, the institutional design of global regimes with specific regard to separation of powers and the emergence of judicial activities.

B. The Court of Arbitration for Sport

The CAS plays a crucial role within the sport legal system.[18] It was created in 1983, due in large part to the determination of Juan Antonio Samaranch, at that time President of the International Olympic Committee (IOC), who planned to build a centralized mechanism of international judicial review in sport, namely during the Olympics: The idea was to introduce a sort of "supreme court for world sport."[19] From this point view, Samaranch followed the path of the father of the IOC, Pierre De Coubertin, who was the first to observe that a sporting institution should, first of all, "*s'organiser judiciairement*," because it must be "*à la fois un Conseil d'Etat, une Cour d'appel et un Tribunal des conflits*."[20]

Nevertheless, the childhood of the CAS was not easy. This was mainly due to three reasons. First, activity at the beginning was not intensive, partially because there were few cases at that time: Doping scandals, for instance, were not a major issue until the late 1980s. Thus, whereas in the 1980s the CAS issued few decisions per year, during the last decade there have been over 800 rulings.[21] Second, in those years the International

[18] The history of the CAS is illustrated in THE COURT OF ARBITRATION FOR SPORT 1984–2004 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds, 2006); *see also* Daniel H. Yi, *Turning Medals Into Medal: Evaluating The Court Of Arbitration of Sport As An International Tribunal*, 6 ASPER REVIEW OF INTERNATIONAL TRADE & BUSINESS LAW 289 (2006); RIGOZZI (note 8), 132.

[19] According to Kéba Mbaye, this formula comes directly from Juan Antonio Samaranch, and it is reported in the Swiss Federal Court decision *A. et B. v. Comité International Olympique, Fédération Internationale de Ski et Tribunal Arbitral du Sport*, 4P.267/2002, 27 May 2003, BGE 129 III 445, 462. That was the famous case *Lazutina/Danilova*, in which the Swiss Court acknowledged that the CAS had gained its independence from the IOC after the 1993–94 reform.

[20] LATTY (note 4), 65; citing François Alaphilippe, *Légitimité et légalité des structures internationales du sport: une toile de fond*, REVUE JURIDIQUE ET ÉCONOMIQUE DU SPORT 15 (1993).

[21] For these data, *see* http://www.tas-cas.org/statistics.

Federations used to ignore the CAS, and some of them had their own judicial body. The most significant example is the International Association of Athletics Federations (IAAF), which had its own Arbitration Panel during the 1980s and the 1990s; it was only in 2001 that it decided to disband the Panel in favor of the CAS's jurisdiction.[22] Third, according to its original institutional design the CAS was a sort of judicial branch within the IOC, with the latter maintaining political and financial control over the former.

After a decade, however, there was a turning point in the history of the CAS. In 1993, the Swiss Federal Court stated that the CAS did not meet all of the standards required for international arbitrations, namely the independence of the arbitral body[23]: This issue would have been problematic had the IOC been a party in a CAS arbitration, for instance.[24] The episode forced the IOC to reform the CAS, which was re-organized along the lines of the current model with the so-called 1994 Paris Agreement.[25]

Nowadays the Court of Arbitration for Sport is a permanent arbitration structure, and its mission is to "settle sports-related disputes through arbitration and mediation."[26] Such disputes "may arise out of an arbitration clause inserted in a contract or regulations or of a later arbitration agreement (*ordinary arbitration proceedings*) or involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies or a specific agreement provides for an appeal to the CAS (*appeal arbitration proceedings*)."[27] Sports-related disputes "may involve matters of principle relating to sport or matters of pecuniary or other interests brought into play in the practice or the development of sport and, generally speaking, any activity related or connected to sport."[28] Disputes, for instance, can be of a commercial nature (e.g.,

[22] The Panel had jurisdiction over all disputes between national athletic federations affiliated to the IAAF, or between national member federation and the IAAF Council or Congress, *see* LAURA TARASTI, LEGAL SOLUTIONS IN THE INTERNATIONAL DOPING CASES – AWARDS BY THE IAAF ARBITRATION PANEL 1985–1999 (2000); and Christoph Vedder, *The Heritage of Two Decades of Arbitration in Doping-Related Disputes*, in: THE COURT OF ARBITRATION FOR SPORT 1984–2004, 266 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds, 2006).

[23] Swiss Federal Court, *Gundel v. Fédération Equestre Internationale*, 15 March 1993, BGE 119 II 271.

[24] The Court in fact observed that the IOC "est compétent pour modifier le Statut du TAS; il supporte en outre les frais de fonctionnement de ce tribunal et joue un rôle considérable dans la désignation de ses membres" (*BGE* 119 II 280).

[25] *See* Diane Kane, *Twenty Years On: An Evaluation of the Court of Arbitration for Sport* (2003), in: THE COURT OF ARBITRATION FOR SPORT 1984-2004, 455, 458 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds, 2006).

[26] Art. S1 Statutes of the Bodies Working for the Settlement of Sports-related Disputes. Therefore the CAS can be likened to institutions such as the International Court of Arbitration (ICC), the International Centre for the Settlement of the Investment Disputes (ICSID) or, for the USA, the American Association of Arbitration (AAA).

[27] R27 CAS Procedural Rules.

[28] *Id.*

https://doi.org/10.1017/S2071832200017326 Published online by Cambridge University Press

sponsorship or management contracts or player transfers), or of a disciplinary nature following a decision by a sports organization (e.g., doping cases or the selection of athletes).

Regarding standing, "any individual or legal entity with capacity to act may have recourse to the services of the CAS. These include athletes, clubs, sports federations, organisers of sports events, sponsors or television companies."[29] However, "for a dispute to be submitted to arbitration by the CAS, the parties must agree to this in writing."[30] With respect to the recognition and enforcement of CAS awards, these can be enforced in countries which are signatories to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and they can be challenged before the Swiss Federal Tribunal, according to the Swiss Federal Act on Private International Law.

With regard to its structure, the Court of Arbitration for Sport is composed of two distinct bodies, both situated in Lausanne (Switzerland): The International Council of Arbitration for Sport (ICAS) and the CAS itself.[31]

The ICAS was created in 1994 in order to provide the CAS with genuine independence from the IOC. It is a foundation regulated by Swiss civil law; its board is composed of twenty members chosen to represent the Olympic movement and to ensure its autonomy.[32] The task of the ICAS is to facilitate the settlement of sports-related disputes through arbitration or mediation and to safeguard the independence of the CAS and the rights of the parties. To this end, it looks after the administration and financing of the CAS.[33] Moreover, the

---

[29] *See* http://www.tas-cas.org/en/20questions.asp/4-3-218-1010-4-1-1/5-0-1010-13-0-0.

[30] And "Such agreement may be on a one-off basis or appear in a contract or the statutes or regulations of a sports organization. Parties may agree in advance to submit any future dispute to arbitration by the CAS, or they can agree to have recourse to the CAS after a dispute has arisen" (http://www.tas-cas.org/en/20questions.asp/4-3-219-1010-4-1-1/5-0-1010-13-0-0).

[31] There are also two field offices, one in New York and the other in Sydney.

[32] *See* Art. S4 Statutes of the Bodies Working for the Settlement of Sports-related Disputes: The ICAS is composed of 20 members, namely high-level jurists appointed in the following manner: a. 4 appointed by the International Sports Federations, *viz.* 3 by the Summer Olympic IFs and 1 by the Winter Olympic IFs, chosen from within or from outside their membership; b. 4 appointed by the Association of the National Olympic Committees, chosen from within or from outside its membership; c. 4 appointed by the IOC, chosen from within or from outside its membership; d. 4 appointed by the 12 members of the ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes; e. 4 appointed by the 16 members of the ICAS listed above and chosen from among personalities independent of the bodies designating the other members of the ICAS. Some say, however, that these mechanisms would give to the Olympic movement even more influence on the CAS than before: on these aspects, Yi (note 18), 316.

[33] According to the Art. S6 Statutes of the Bodies Working for the Settlement of Sports-related Disputes, ICAS adopts and amends its Statute and the Statute of the CAS; it looks after the financing of the CAS; it supervises the activities of the CAS Court Office; if it deems such action appropriate, it sets up regional or local, permanent or *ad*

https://doi.org/10.1017/S2071832200017326 Published online by Cambridge University Press

ICAS appoints the personalities who are to constitute the list of arbitrators and the list of CAS mediators and can remove them from those lists.[34] There are at least 150 arbitrators and at least fifty mediators: The former provide "the arbitral resolution of disputes arising within the field of sport through the intermediary of arbitration provided by panels composed of one or three arbitrators"; the latter provide "the resolution of sports-related disputes through mediation."[35]

The CAS carries out several different activities.[36] It provides mediation,[37] and it can also render nonbinding advisory opinions upon request of the IOC, the International Federations, the National Olympic Committees, WADA and the organizations recognized by the IOC and the Organizing Committees for Olympic Games about any legal issue with respect to the practice or development of sport or any activity related to sport.

Its main task, however, is to settle disputes. To this end, the CAS is composed of two divisions, the *Ordinary Arbitration Division* and the *Appeals Arbitration Division*.[38] The

---

hoc arbitration structures; it may create a legal aid fund to facilitate access to CAS arbitration for natural persons without sufficient financial means; it may take any other action which it deems likely to protect the rights of the parties and, in particular, to best guarantee the total independence of the arbitrators and to promote the settlement of sports-related disputes through arbitration.

[34] Before the 1994 reform, the list included only 60 personalities. The personalities designated by the ICAS appear on the CAS list for a renewable period of four years. The ICAS reviews the complete list every four years; the new list enters into force on 1 January of the following year. In establishing the list of CAS arbitrators, the ICAS shall call upon personalities with full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language. In addition, in designating the arbitrators the ICAS shall respect, in principle, the following distribution: 1/5th shall be selected from among the persons proposed by the IOC, chosen from within its membership or from outside; 1/5th shall be selected from among the persons proposed by the IFs, chosen from within their membership or outside; 1/5th shall be selected from among the persons proposed by the NOCs, chosen from within their membership or outside; 1/5th shall be chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes; 1/5th shall be chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with Art. S14. In appointing the personalities who appear on the list of arbitrators, the ICAS shall, wherever possible, ensure fair representation of the continents and of the different juridical cultures. (Arts S13 *et seq*. Statutes of the Bodies Working for the Settlement of Sports-related Disputes). In 2009, the list of arbitrators included around 300 personalities; some of them appeared also in a special list regarding soccer (http://www.tas-cas.org/arbitrators-genlist).

[35] Art. S3 Statutes of the Bodies Working for the Settlement of Sports-related Disputes.

[36] The CAS includes a Court Office composed of a Secretary General and one or more Counsel, who replace the Secretary General when required (Art. S22 Statutes of the Bodies Working for the Settlement of Sports-related Disputes). The activities of the CAS Court Office are supervised by the ICAS, which appoints the CAS Secretary General.

[37] *See* IAN S. BLACKSHAW, MEDIATING SPORTS DISPUTES: NATIONAL AND INTERNATIONAL PERSPECTIVES (2009).

[38] Art. S20 Statutes of the Bodies Working for the Settlement of Sports-related Disputes. Arts R27-R37 CAS Procedural Rules establish provisions as to Application of Rules, Seat, Language, Representation and Assistance,

https://doi.org/10.1017/S2071832200017326 Published online by Cambridge University Press

Ordinary Arbitration Division constitutes Panels, whose task is to resolve disputes submitted to the ordinary procedure, and performs, through the intermediary of its President or his deputy, all other functions in relation to the smooth running of the proceedings conferred upon it by the CAS Procedural Rules.[39] The Appeals Arbitration Division constitutes Panels, whose task is to resolve disputes concerning the decisions of federations, associations or other sports-related bodies insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide.[40] Arbitration proceedings submitted to the CAS are assigned by the CAS Court Office to one of these two divisions according to their nature.[41] In addition to these two divisions, there are *ad hoc* chambers created for the Olympic Games (from 1996) and for other sports events such as the *Fédération Internationale de Football Association* (FIFA) World Cup.[42]

This variety of tasks produces different models of judicial activities within the CAS, although its proceedings are formally an arbitration (and mediation). The CAS, in fact, resembles a civil court when it deals with commercial law cases (such as player transfers), an administrative court when it has to decide claims against sporting institutions' decisions, a constitutional court when it must resolve conflicts between different institutions of the Olympic movement, and even a criminal court when it has to balance evidence in doping violations.[43] As a matter of fact, the coexistence of different jurisdictional models is common in international courts or tribunals: Take, for instance, the World Trade Organization (WTO) Dispute Settlement System, in which there are both constitutional features (concerning the interpretation of Treaties or the protection of fundamental rights) and administrative law and civil law ones (relating to the review exercised by panels and Appellate Body over decisions and proceedings).[44]

Lastly, the activities of the CAS have expanded in the last fifteen years, so that the growing number of its decisions has led to the formation and consolidation of a set of principles

---

Notifications and Communications, Time limits, Independence and Qualifications of Arbitrators, Challenge, Removal, Replacement, Provisional and Conservatory Measures.

[39] *See* Arts R27-R37 and R38-46 CAS Procedural Rules.

[40] *See* Arts R27-R37 and R47-59 CAS Procedural Rules.

[41] Such assignment may not be contested by the parties or raised by them as a cause of irregularity. *See* THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT, CAS & FSA/SAV Conference Lausanne 2006 (Antonio Rigozzi & Michele Bernasconi eds, 2007); and MERONE (note 8), 105.

[42] The early experiences of the CAS Olympic games *ad hoc* division are analyzed by GABRIELLE KAUFMANN-KOHLER, ARBITRATION AT THE OLYMPICS – ISSUES OF FAST-TRACK DISPUTE RESOLUTION AND SPORTS LAW (2001).

[43] LATTY (note 4), 296.

[44] Barbara Marchetti*, Il sistema di risoluzione delle dispute del WTO: amministrazione, corte o tertium genus?*, RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 933 (2008).

https://doi.org/10.1017/S2071832200017326 Published online by Cambridge University Press

and rules.[45] This complex of norms stems from both the interpretation of sports law and the creation of new principles specific to sport (such as the principle of "fair play," or that of "strict liability" in doping cases). This set of principles and rules has been labeled *lex sportiva*[46] and is often relied upon by CAS panels as well as by other institutions: Even the World Anti-Doping Code refers to CAS awards.

This result is mainly due to the necessity of harmonizing sports regulations (especially anti-doping rules, which were particularly different from jurisdiction to jurisdiction before the adoption of the World Anti-Doping Code) and to the need for protecting fundamental rights of the athletes within the sport legal system (so that they do not have to file a case before domestic courts). In order to ensure the CAS's supremacy, all of the basic legal documents of the sports system contain *ad hoc* clauses. The Olympic Charter has established CAS jurisdiction over IOC decisions and regarding any disputes arising during—or in connection with—the Olympic Games.[47] IFs Statutes and Regulations have introduced specific clauses in which they devolve disputes to the CAS.[48] The World Anti-Doping Code appoints the CAS as a court of last instance in doping cases.[49]

The CAS Novel thus comes to a happy end. Born as the favorite son of the IOC, after an initial period of difficulty, it has constantly widened its jurisdiction due to several factors: Its enhanced legitimacy after the 1994 Reform, functional needs (e.g., the need for harmonization of sports disputes), and increasing economic and commercial interests which favour alternative dispute resolution mechanisms such as arbitration. Thus, the CAS has finally come to be viewed as a supreme court for sport by all sporting institutions: The IOC, WADA, and even IFs. Through its decisions, the CAS has made a crucial contribution to the making of global sports law. It develops common legal principles among sporting bodies; it interprets and harmonizes sports law; it reviews sporting institutions' decisions; and it helps affirm the separation of powers within the sport legal system.[50]

---

[45] Nafziger (note 9); 409, and Foster (note 9).

[46] *For instance*, TAS 2007/A/1424, *Federación Española de Bolos (FEB) v. Fédération Internationale des Quilleurs (FIQ) & Federació Catalana de Bitlles i Bowling (FCBB)*, Award of 23 April 2008, para. 17; TAS 2004/A/776, *Federacio Catalana de Patinatge (FCP) v. International Roller Sports Federation (FIRS)*, Award of 15 July 2005, para. 15; or CAS 2002/O/373, *Canadian Olympic Committee (COC) & Beckie Scott / International Olympic Committee (IOC)*, Award of 18 December 2003, para. 14.

[47] *See* Arts 15.4, 45.6 and 59 of the Olympic Charter.

[48] *See*, *for instance*, Art. 62, para. 3 of FIFA Statutes or Art. 36 of Fédération Internationale de Basketball Amateur (FIBA) General Statutes or Arts 74 *et seq.* of Union Cycliste Internationale (UCI) Constitution.

[49] *See*, *for instance*, Art. 13 of the World Anti-Doping Code.

[50] The role of the CAS as the "the more suitable regulator" to supervise the international sport system is argued by Marcus Mazzucco & Hilary Findlay, *The Supervisory Role of the Court of Arbitration for Sport in Regulating the International Sport System*, 1 INTERNATIONAL JOURNAL OF SPORT AND SOCIETY 131 (2010).

https://doi.org/10.1017/S2071832200017326 Published online by Cambridge University Press

C. The Role of the CAS in Making a *Lex Sportiva*

Among the different activities carried out by the CAS, some are especially relevant to the formation of global sports law. In particular, we can distinguish at least three different functions. Firstly, the CAS has been applying general principles of law to sporting institutions, and it has also been creating specific "*principia sportiva.*" Secondly, the CAS plays a significant role in interpreting sports law, thus influencing and conditioning rulemaking activity by sporting institutions. Thirdly, the CAS greatly contributes to the harmonization of global sports law, not least because it represents a supreme court, the apex of a complex set of review mechanisms spread across the world: For instance, doping case decisions issued by national anti-doping panels can be appealed to the CAS.

I. Development of Common Legal Principles

The first issue relates to the adoption of legal principles by the CAS. From this perspective, one can consider, on the one hand, when awards apply or refer to general principles of law; and, on the other, when awards develop new principles specifically conceived for sport.

As to the first part, the CAS often refers to public international law principles. In the *Dodô case*, for instance, the Brazilian national soccer federation (*Confederação Brasileira de Futebol*) was held responsible for decisions issued by the *Superior Tribunal de Justiça Desportiva do Futebol* (STJD), a body partially independent from the national federation, because of the principle that "States are internationally liable for judgments rendered by their courts, even if under their constitutional law the judiciary is wholly independent of the executive branch."[51] Another example comes directly from the Arbitration Rules for the Olympic Games, which establish that the CAS "shall rule on the dispute pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate."[52]

Furthermore, the CAS often adopts public law principles, such as due process, duty to give reasons, and procedural fairness.[53] Therefore, a relevant difference emerges between other forms of global law or transnational law, such as *lex mercatoria*: While *lex mercatoria* adopts principles that are mostly—if not exclusively—based on private law, *lex*

---

[51] CAS 2007/A/1370, *FIFA v. Superior Tribunal de Justiça Desportiva do Futebol & Confederação Brasileira de Futebol & Mr. Ricardo Lucas Dodô*; CAS 2007/A/1376, *WADA v. Superior Tribunal de Justiça Desportiva do Futebol & Confederação Brasileira de Futebol & Mr. Ricardo Lucas Dodô*, para. 88.

[52] *See* http://www.tas-cas.org/d2wfiles/document/422/5048/0/rules%20English%20(2008.07.04).pdf.

[53] With regard to the principle of procedural fairness, *for instance*, CAS 2008/O/1455, *Boxing Australia v. AIBA*, Award of 16 April 2008.

https://doi.org/10.1017/S2071832200017326 Published online by Cambridge University Press

sportiva, and in particular CAS awards, have mostly developed using and in accordance with public law principles, particularly those drawn from criminal law and administrative law.[54]

The CAS itself, in fact, highlighted that there is "an evident analogy between sports-governing bodies and governmental bodies with respect to their role and functions as regulatory, administrative and sanctioning entities."[55] This is why the CAS often reviews sporting institutions' actions by comparing them to public administration: In the *Pistorius v. IAAF* case, for instance, the CAS evaluated the decision-making process followed by the IAAF in order to verify whether the decision challenged by the athlete was "procedurally unsound."[56]

The most important example of a public law principle applied by the CAS is probably the principle of due process. The CAS has issued several decisions that have allowed this principle to be introduced as a fundamental right in global sports law.

In 1995, for instance, the CAS stated:

> The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorized bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion.[57]

Some years later, the CAS observed that it "has always considered the right to be heard as a general legal principle which has to be respected also during internal proceedings of the federations . . . . Federations have the obligation to respect the right to be heard as one of

---

[54] LATTY (note 4), 320. In CAS-JO[-TUR] 06/008, *Isabella Dal Balcon v. Comitato Olimpico Nazionale Italiano (CONI) & Federazione Italiana Sport Invernali (FISI)*, *for instance*, the activity of Italian National Olympic Committee and Italian National Skiing Federation, which had excluded an athlete from the Olympic team, was judged "arbitrary" and "unfair."

[55] CAS 98/200, *AEK Athens & S.K. Slavia Prague v. UEFA*, Award of 20 August 1999, para. 58.

[56] CAS 2008/A/1480, especially para. 56 *et seq*.

[57] CAS 94/129, *USA Shooting & Q. v. Union Internationale de Tir (UIT)*, 23 May 1995, para. 34. *See also*, *ex plurimis*, CAS *ad hoc* Division (O.G. Atlanta) 96/005, *A., W. and L. v. NOC Cape Verde (NOC CV)*, 1 August 1996: "Any person at risk of withdrawal of accreditation should be notified in advance of the case against him and given the opportunity to dispute it, in accordance with the elementary rules of natural justice and due process."

the fundamental principles of due process."[58] In 2004, the CAS stated that it "will always have jurisdiction to overrule the Rules of any sport federation if its decision-making bodies conduct themselves with a lack of good faith or not in accordance with due process."[59]

The importance of this jurisprudence is crucial if we consider that the World Anti-Doping Code—which recognizes the right of athletes to a fair hearing in anti-doping proceedings—entered into force only in 2003.[60] From this perspective, the CAS acted as a law-maker, in so far as it introduced into the sports legal system the principle of (procedural) due process.[61] The CAS, in fact, has always affirmed its role in "curing" procedural defects, meaning that such defects can be "cured" before the CAS without necessarily upholding sporting institutions' decisions.[62] However, it is worth noting that amongst the few cases—to date—in which a CAS award has been successfully challenged before the Swiss Federal Court, two of them were based on a violation of due process.[63]

---

[58] CAS 2001/A/317, *A. v. Fédération Internationale de Luttes Associées (FILA)*, 9 July 2001; citing CAS 91/53 *G. v. FEI*, Award of 15 January 1992, Digest, 79, 86.

[59] CAS OG 04/009, *H.O.C. & N. Kaklamanakis v. I.S.A.F.*, 24 August 2004.

[60] On these aspects, Michael S. Straubel, *Doping Due Process: A Critique of the Doping Control Process in International Sport*, 106 DICKINSON LAW REVIEW 523 (2002); and Dimitrios Panagiotopoulos, *International Sports Rules' Implementation-Decisions' Executability: The Bliamou Case*, 15 MARQUETTE SPORTS LAW REVIEW 1 (2004).

[61] *See* Jeremy Lever, *Why Procedure Is More Important than Substantive Law*, 48 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 285 (1999); and JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1986).

[62] "A procedural violation is not enough in and by itself to set aside an appealed decision (*see* CAS 2001/A/345, Digest of CAS Awards III, 240 and the references quoted therein); it must be ascertained that the procedural violation had a bearing on the outcome of the case. Whenever a procedural defect or unfairness in the internal procedure of a sporting body could be cured through the due process accorded by the CAS, and the appealed decision's ruling on the merits was the correct one, CAS panels had no hesitation in confirming the appealed decision" (CAS 2004/A/777, *ARcycling AG v. Union Cycliste Internationale (UCI)*, 31 January 2005, para. 56). *See also* CAS 2006/A/1175, *D. v. International Dance Sport Federation*, Award of 26 June 2007, para. 18: "the virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance "fade to the periphery" (CAS 98/211, *B. v. Fédération Internationale de Natation*, CAS Digest II, 255, 264, citing Swiss doctrine and case law)." *See* Arts R44.2 and R57CAS Procedural Rules, which establish provisions regarding Hearing.

[63] Judgment of 22 March 2007, that annulled CAS 2005/A/951, *Cañas v. ATP*, Award of 23 May, because "le droit d'être entendu du recourant a été méconnu par le TAS. Etant donné la nature formelle de ce droit . . . , la sentence attaquée doit être annulée, sans égard au sort qui sera réservé aux arguments subsidiaires avancés par le recourant." Following this decision, the CAS has anyhow confirmed its precedent award: CAS 2005/A/951, *Cañas v. ATP*, 23 May 2007, Revised award). *See also* Swiss Federal Tribunal, 4A_400/2008, Judgment of 9 February 2009, 1ère Cour de droit civil: "[L]e TAS a-t-il violé le droit d'être entendu du recourant. Semblable violation a eu une incidence concrète sur la situation juridique de cette partie, puisque celle-ci ne dispose d'aucun moyen pour faire sanctionner par le Tribunal fédéral l'application erronée, voire arbitraire, de la LES [Loi fédérale suisse du 6 octobre 1989 sur le service de l'emploi et la location de services] qui a entraîné le rejet de sa demande pécuniaire" (para. 3.2).

This is different from cases where the CAS not only applies general principles of law, but also develops "new" principles. This happens, for instance, whenever the CAS refers to the so-called "principia sportiva" (i.e., principles developed for sport only, such as "fair play" or the principle of "strict liability" applied to doping cases).[64] This example provides us with an interesting case of judge-made law at the international level and highlights some relevant trends in global regimes.

As a matter of fact, the emergence of global regulatory regimes and global courts leads to the development of autonomous sets of norms, principles and procedures. In this process, two distinct phenomena take place. First, these regimes imitate the machinery of the State, selecting principles and mechanisms that can be adapted to their own contexts, and second, they try to develop their own legal principles, which are binding within the regime that created them. The first phenomenon contributes to the development of principles of public law and administrative law at the global level through a mimetic process. The second is an attempt to build autonomous and complete legal orders. This phenomenon, however, encounters many obstacles, mainly because these regimes often remain in some ways connected to the State. With respect to sports, CAS awards, for example, can be enforced according to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the so-called "New York Convention"), and they can be challenged before the Swiss Federal Court.[65] In this case, the linkage between CAS awards and private international law has strengthened the CAS and it ensures the effectiveness of its decisions. In other words, in order to create an effective international "court" for sports, it was necessary to choose international arbitration anchored in the system based on the 1958 New York Convention.

II. Interpreting Sports Law and Influencing Rulemaking

The second function carried out by the CAS in making a *lex sportiva* is the influence it has on sporting institutions' regulatory activities. This function is connected with the role played by the CAS in interpreting sports law and it leads directly to one key question: What is the weight of CAS jurisprudence? Is there any rule of binding precedent?

---

[64] "Principles of sports law" or "Principia sportiva" are often referred to by the CAS (*see*, *ex plurimis*, CAS 98/200, *AEK Athens & S.K. Slavia Prague v. UEFA* (note 55), para. 158). The most famous ones are probably the "fairness and integrity of international competitions" and the "fair play." On the "strict liability" principle, *see* JANWILLEM SOEK, THE STRICT LIABILITY PRINCIPLE AND THE HUMAN RIGHTS OF ATHLETES IN DOPING CASES (2007). A complete list of such principles is in LATTY (note 4), 305; *see also* Eric Loquin, *L'utilisation par les arbitres du TAS des principes généraux du droit et le développement d'une Lex sportiva*, in: THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT, CAS & FSA/SAV Conference Lausanne 2006, 85, 101 (Antonio Rigozzi & Michele Bernasconi eds, 2007); and MERONE (note 8), 233.

[65] *See* Luigi Fumagalli, *La circolazione internazionale dei lodi sportivi: il caso del Tribunale arbitrale dello sport*, RIVISTA DI DIRITTO ED ECONOMIA DELLO SPORT 364 (1994); and FRANK OSCHÜTZ, SPORTSCHIEDSGERICHTSBARKEIT. DIE SCHIEDSVERFAHREN DES TRIBUNAL ARBITRAL DU SPORT VOR DEM HINTERGRUND DES SCHWEIZERISCHEN UND DEUTSCHEN SCHIEDSVERFAHRENSRECHTS (2005).

https://doi.org/10.1017/S2071832200017326 Published online by Cambridge University Press

Formally, there is no rule of this kind for CAS awards, meaning that no panel is bound by preceding decisions issued by other panels. However, panels demonstrate a consistent deference to CAS jurisprudence; arbitrators often refer to prior CAS decisions. There is an analogy here between the CAS and other international courts or tribunals, such as the WTO tribunals: Although there is no formal principle of stare decisis in the decisions of the WTO Appellate Body or panels, they do tend to follow their own prior "jurisprudence."[66]

Due to this informal but consistent rule of precedent, the CAS exercises a strong influence on sports law-making. The clearest example comes from anti-doping rules. In this case, during the formation process of the World Anti-Doping Code (both the first and the revised versions), CAS decisions were taken in due account, and the commentary to the Code refers to CAS jurisprudence in comments pertaining to specific articles.[67]

Finally, another activity which illustrates the law-making role played by the CAS is the issuance of advisory opinions in response to requests from the IOC, International Federations, WADA or other sporting institutions. Although these opinions are not binding, they have the power of moral suasion and can influence the choices of sporting entities. In this case, the CAS acts like the French *Conseil d'Ètat* or the Italian *Consiglio di Stato*, which operate not only as judges, but are also called upon to advise the legislature. This is a fundamental function of these tribunals, which to date remains underdeveloped within sporting institutions.

III. Harmonizing Global Norms Through the Appeals Procedure

Lastly, the third function of the CAS to be considered is that of normative harmonization. This kind of "law-making" is effected through the appeals procedure. The CAS, in fact, represents the apex of a very complex judicial system, made up of two or even three levels. At the first two levels, there are either national sporting tribunals or international sporting federation tribunals or both; at the top level, as the court of last instance, there is the CAS. This kind of system creates a centralized mechanism of review that seems to be very effective: It has been working very well, for instance, in doping matters, where the

---

[66] On these aspects, *see* the trilogy written by Raj Bhala, *The Myth about Stare Decisis and International Trade Law*, 14 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 845 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication*, 9 JOURNAL OF TRANSNATIONAL LAW & POLICY 1 (1999); and Raj Bhala, *Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication*, 33 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 873 (2001). *See also* Ingo Venzke, *Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*, in this issue; and Marc Jacob, *Precedents: Lawmaking Through Adjudication*, in this issue.

[67] Comments to Arts 3.1 (Burdens and Standards of Proofs), 3.2.4 (as to drawing an inference adverse to the Athlete or other Person who is asserted to have committed an anti-doping rule violation), and 4.2.2 (Specific substances).

CAS can now intervene after the other two bodies have already reached a decision concerning a particular case. Through the appeals procedure, therefore, the CAS—acting like a supreme court—plays a significant role in harmonizing global sports law.

In any event, an appeal against the decision[68] of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.[69] The arbitration agreement represents the legal basis and legitimation for a CAS intervention (i.e., the same kind of legitimation of the entire sports legal system and of private law more generally, although it can be argued that professional athletes are not truly free to decide about this once they are affiliated with a sport federation).[70] The CAS has "full power to review the facts and the law,"[71] so that it "may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance"[72]: The CAS, therefore, can be either an appellate judge or a "*Cour de Cassation*." The appeals procedure—based on a review of a decision issued by a sporting body—is another peculiarity of the CAS, in comparison with other forms of international arbitrations, where contracts are usually at stake.[73] Within the sports legal system, this kind of procedure is essential for ensuring the equal treatment of athletes and for avoiding excessive influence of national sporting institutions over cases regarding domestic

[68] "In order to determine whether there exists a decision or not, the form of a communication has no relevance. . . . What is decisive is whether there is a ruling—or, in the case of a denial of justice, an absence of ruling where there should have been a ruling—in the communication." (CAS 2004/A/748).

[69] R47 CAS Procedural Rules. *See*, *ex multis*, CAS 2008/A/1583, *Sporting Lisboa e Benfica Futebol SAD v. UEFA, & FC Porto Futebol SAD*; CAS 2008/A/1584, *Vitória Sport Clube de Guimarães v. UEFA, & FC Porto Futebol SAD*, Award of 15 September 2008, para. 5.1: "there must be a 'decision' of a federation, association or another sports-related body"; "the (internal) legal remedies available" must have been exhausted prior to appealing to the CAS; the parties must have agreed to the competence of the CAS"; on these aspects, Michele Bernasconi, *When is a "Decision" an Appealable Decision?*, in: THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT, CAS & FSA/SAV Conference Lausanne 2006, 261 (Antonio Rigozzi & Michele Bernasconi eds, 2007).

[70] Here there is a different legitimacy compared with those international judicial institutions addressed in Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, in this issue. This is due to the peculiar nature of the CAS, that is, it is neither a Court or a pure Arbitration body.

[71] Jean-Pierre Karaquillo, *Le rôle du Tribunal du sport en tant qu'instance d'appel externe aux fédérations sportives*, in: THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT, CAS & FSA/SAV Conference Lausanne 2006, 33 (Antonio Rigozzi & Michele Bernasconi eds, 2007).

[72] R57 CAS Procedural Rules. An in-depth analysis of these issues is in RIGOZZI (note 8), 552.

[73] *See* Richard H. McLaren, *Sports Law Arbitration by CAS: is it the Same as International Arbitration?*, 29 PEPPERDINE LAW REVIEW 101 (2001).

https://doi.org/10.1017/S2071832200017326 Published online by Cambridge University Press

athletes.[74] Moreover, the appeals procedure may be the first time that a case is brought before a truly impartial body,[75] because it often happens that sporting tribunals are not completely independent from their own federations[76] (even the CAS, however, has been criticized because arbitrators might be biased in favor of the interests of the parties which have nominated them (amongst the list of arbitrators appointed by the ICAS), especially when one of the parties to the dispute is a powerful sporting institution).[77]

In any event, the appeals procedure is an arbitration. It implies that:

> [The Panel] shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.[78]

Moreover, the parties have to accept CAS jurisdiction; that is why sporting institutions' statutes and regulations establish an *ad hoc* clause.[79] This confirms that the most significant form of legitimacy of sport judicial activity is based upon consensus.[80]

---

[74] *See* CAS 96/156, *F. v. FINA*, Award of 10 November 1997, in which the need of ensuring an international review of national federations' decisions is underlined.

[75] This point is raised by RIGOZZI (note 8), 552, who observed that the CAS appeal procedure is not a "procédure appellatoire à proprement parler."

[76] CAS 2007/A/1370, *FIFA v. Superior Tribunal de Justiça Desportiva do Futebol & Confederação Brasileira de Futebol & Mr Ricardo Lucas Dodô* (note 51), para. 71.

[77] And this despite of R33 CAS Procedural Rules, according to which "Every arbitrator shall be and remain independent of the parties and shall immediately disclose any circumstances likely to affect his independence with respect to any of the parties."

[78] R58 CAS Procedural Rules.

[79] And this is what almost all federations did. An exception is in CAS 2006/A/1190, *WADA v. Pakistan Cricket Board & Akhtar & Asif*, Award of 28 June 2006, regarding cricket.

[80] Though it is doubtful that athletes are truly free to decide whether to sign or not these *ad hoc* clauses embodied in sporting institutions' statutes. Sports legal orders, therefore, have developed additional forms of legitimacy than consensus, namely involving public authority, for instance, the hybrid public and private anti-doping regime.

Through the appeals procedure, the CAS connects and harmonizes both transnational and national sports law. This function is thus closely connected to the development of common legal principles,[81] such as legality, fairness and good faith,[82] as well as "general principles of law drawn from a comparative or common denominator reading of various domestic legal systems and, in particular, the prohibition of arbitrary or unreasonable rules and measures."[83] Therefore, the CAS, like an international or *mercatique* judge, is "*amené à déduire d'une comparaison des différent systèmes juridiques nationaux l'existence de règles de droit positif applicables à l'activité dont il est le juge.*"[84]

D. The Relationships Between the CAS and Public Authorities

The CAS is an example of a centralized review mechanism over sporting institutions' activities. It is one of the most experienced among international tribunals, which are continually growing in numbers.[85] The creation of the CAS is also attributable to the necessity of limiting the intervention of domestic courts in sporting matters, of which there have been increasing instances since the end of the 1980s (largely due to the rise in doping cases and to the commercialization of sports, such as in the well-known cases of *Reynolds* and *Krabbe*).[86] National courts' intervention was perceived by sporting institutions as posing a "threat" which might undermine the autonomy of sporting institutions and, more generally, of the sports legal system.[87] As a consequence, in order to strengthen the role of the CAS, most IFs have dismissed their own arbitration bodies (e.g., the IAAF), although some of them have retained jurisdiction over specific matters (for instance, FIFA has not devolved to CAS disputes concerning violations of the rules of the game of football).[88] The role of domestic courts within the sports system, however, brings to the fore another crucial issue: The relationships between the CAS and public authorities.

---

[81] *Supra* section C.I.

[82] Several cases are reported by RIGOZZI (note 8), 644.

[83] CAS 98/200, *AEK Athens & S.K. Slavia Prague v. UEFA* (note 55).

[84] LATTY (note 4), 308.

[85] *See* Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 LAW & CONTEMPORARY PROBLEMS 37 (2008); for some data, *see* the Project on International Courts and Tribunals (http://www.pict-pcti.org/).

[86] DAVID (note 3), 36.

[87] Jack Anderson, *'Taking Sports Out Of The Courts': Alternative Dispute Resolution and the International Court of Arbitration for Sport*, 10 JOURNAL OF LEGAL ASPECTS OF SPORT 123 (2000).

[88] *See* Art. 63 FIFA Statutes.

https://doi.org/10.1017/S2071832200017326 Published online by Cambridge University Press

Some of the domestic decisions appealed to the CAS may have been taken by public bodies, or even domestic courts. In these cases, the CAS can be called upon to judge the decisions of public authorities.

Sometimes States themselves leave the last word to the CAS: In Italy, for instance, a specific provision establishes that doping sanctions issued by the national anti-doping tribunal (a public body) can be appealed to the CAS. In other circumstances, the CAS itself has resolved the matter by simply ignoring the domestic decision.[89] In particular, the CAS stated that "the coexistence of national and international authority . . . is a familiar feature, and it is well established that the national regime does not neutralize the international regime."[90] Therefore, national sovereignty—i.e., in this case, the power to sanction athletes—"*n'a, en principe, vocation à s'appliquer que sur le seul territoire national*" and "*la décision nationale peut toutefois être remplacé par une décision de l'autorité internationale—le TAS—pour que soit assurée la nécessaire uniformité du droit.*"[91] In conclusion, it would be possible in theory that one State imposes its own decisions during sports events held in its own territory and against the will of the "*autorité internationale*," such as IFs or the CAS; but were this to happen, that State would not be allowed to host any international sport competition.[92]

In light of the factual review of administrative decisions by the CAS, the question arises whether its practice in this regard may itself amount to an exercise of public authority, even if it rests on a private law basis. The "publicness" of the authority, in this case, can find a legal basis both in the New York 1958 Convention and in the 2005 UNESCO Convention Against Doping in Sport. The New York Convention provides a linkage between CAS awards and private international law and ensures the effectiveness of CAS decisions. The UNESCO Convention mandates that the principles of the World Anti-Doping Code (WADC) be "the basis" for national measures, thus enabling governments to align their domestic policy with the WADC and thereby harmonizing global sports regulation and

[89] CAS/A/1149 and CAS/A/1211, *World Anti-Doping Agency (WADA) v. Federación Mexicana de Fútbol (FMF) and Mr. José Salvador-Carmona Alvarez*, Award of 16 May 2007; citing CAS 96/156, *F. v. FINA*, Award of 10 November 1997; TAS 98/214, *B. v. Fédération Internazionale de Judo (FIJ)*, Award of 17 March 1999; CAS 2005/A/872, *UCI v. Muñoz and Federación Colombiana de Ciclismo*; TAS 2006/A/1119, *Union Cycliste Internationale (UCI) v. L. & Real Federación Española de Ciclismo (RFEC)*, Award of 19 December 2006; and TAS 2006/A/1120, *Union Cycliste Intertationale (UCI) v. G. & Real Federación Española de Ciclismo (RFEC)*, Award of 19 December 2006.

[90] CAS/A/1149 and CAS/A/1211 *WADA v. FMF and Mr. José Salvador-Carmona Alvarez* (note 89), para. 26.

[91] TAS 2006/A/1119, *UCI v. L. & RFEC* (note 89), para. 30.

[92] *Id.*, para. 30; cited by CAS/A/1149 and CAS/A/1211, *WADA v. FMF and Mr. José Salvador-Carmona Alvarez* (note 89).

public legislation in the fight against doping in sport.[93] Furthermore, the WADC appoints the CAS as a court of last instance in doping cases.

It is worth noting, however, that domestic courts have intervened mostly in doping cases. From this perspective, the creation of the World Anti-Doping Agency and the formation of a public-private anti-doping regime, followed by the adoption of the World Anti-Doping Code and the signature of the above-mentioned UNESCO Convention against doping in sport, have minimized the risk of actions being brought before national judges.[94] Furthermore, while looking at the process of "nationalization" that accompanied the formation of the anti-doping regime, some scholars have found a relationship of "international delegation" between States and the CAS.[95] This would offer a further explanation of the high effectiveness of CAS procedures, which during the Olympic Games are also extremely fast (cases are resolved within twenty-four hours).[96] In addition, CAS decisions—such as disqualifying an athlete or changing a result—are often very easily executed.[97] Finally, due to the autonomy granted by States to the sports system and sporting institutions, relationships between CAS activities and regulatory proceedings in domestic jurisdiction are not particularly complicated.[98]

Thus conflicts between public authorities and the CAS are not frequent. Evidence of this can be found in the relatively low number of claims against CAS awards before the Swiss Federal Court.[99] In twenty-five years, with around 1,000 awards decided, around sixty

---

[93] *See* Art. 3 UNESCO Convention.

[94] Lorenzo Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, in: Symposium on "Global Administrative Law in the Operations of International Organizations, 6 INTERNATIONAL ORGANIZATIONS LAW REVIEW, 411 (Laurence Boisson de Chazournes, Lorenzo Casini, Benedict Kingsbury eds, 2009); and Kathryn Henne, *WADA, the Promises of Law and the Landscapes of Antidpoing Regulation*, 33 POLITICAL AND LEGAL ANTHROPOLOGY REVIEW 306 (2010).

[95] *See* Abbas Ravjani, *The Court of Arbitration for Sport: A Subtle Form of International Delegation*, 2 JOURNAL OF INTERNATIONAL MEDIA & ENTERTAINMENT LAW 241 (2002). On the notion of "international delegation," *see* Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 LAW & CONTEMPORARY PROBLEMS 1 (2008).

[96] Art. 18 Arbitration rules for the Olympic Games.

[97] The effects of such decisions, however, might be particularly devastating in terms of money and reputation. *See* Giulia Mannucci, *La natura dei lodi del Tribunale arbitrale dello sport tra fenomenologia sportiva e ordinamento generale*, DIRITTO AMMINISTRATIVO 229 (2010).

[98] The situation may be different with regard to criminal proceedings, especially in doping cases and in countries where doping is regulated not only by sports rules, but also by criminal law (such as in Italy, where an interesting case emerged during the Winter Olympics of Turin 2006, though without any specific dispute: *see* Thomas Schultz, *La lex sportiva se manifeste aux Jeux olympiques de Turin: suprématie du droit non étatique et boucles étranges*, JUSLETTER of 20 February 2006). In any event, CAS jurisdiction refers only to sports aspects, and there is low risk of overlapping with domestic criminal proceedings.

[99] *See* Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and*

such claims were made against CAS awards, and of those, only a few resulted in the annulment of the award in question, though there has been an increase in the last two years.[100] From this point of view, the Swiss Federal Court is the "closing gate" of the whole system, and it may be called upon to decide on an award issued in any part of the world,[101] according to the Swiss Federal Act on Private International Law.[102]

In conclusion, the case of sport shows some divergences in comparison to the general trends of international law. Some scholars have observed that globalization and the rise of international institutions and their activities produce reactions from national courts. The latter, due to a lack of review mechanisms at the global level, have begun to act like review bodies over international organizations.[103] The sport legal system does not fit this paradigm, but, in a certain way, it confirms the hypothesis. In the past, in fact, national judges sought to fill the gaps in global sports law, particularly in doping matters. Once both a global anti-doping regime and a complex judicial system had been created, the weight of domestic courts diminished. However, there are still issues where national law applies and national judges play a crucial role in the sports system, such as for TV licenses or when a "decision" adopted by a given sporting institution has no chance of appeal before the CAS.

Therefore, there are still gray areas in the sports judicial system. It has reached a high level of maturity in doping cases (yet there are still significant controversial disputes, as the

---

Observations, 9 PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL 51 (2009); and RIGOZZI (note 8), 655. As to the USA, Maureen A. Weston, *Simply a Dress Rehearsal? U.S. Olympic Sports Arbitration and De Novo Review at the Court of Arbitration for Sport*, 38 GEORGIA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 99 (2009).

[100] Amongst the most recent cases, *see* the following decisions issued by the Swiss Bundesgericht I. zivilrechtliche Abteilung, 4A_456/2009, Decision of 3 May 2010; 4A_490/2009, Decision of 13 April 2010; 4A_358/2009, Decision of 6 November 2009; 4A_400/2008, Decision of 9 February 2009. This increase is due to the growing number of cases decided by the CAS, and also by the rising importance of sports disputes, which produce significant legal and economic effects.

[101] This is why the New South Wales Court of Appeal, *Raguz v. Sullivan* [2000] NSWCA 240, dismissed an appeal filed against a CAS award issued in Sydney, observing that the CAS arbitration rules are "transnational, universal, global," and their application "is not dependent on a territorial nexus, nor is restricted territorially": *see* Damian Sturzaker & Kate Godhard, *The Olympic Legal Legacy*, 2 MELBOURNE JOURNAL OF INTERNATIONAL LAW 245 (2001).

[102] Art. 190, ann. 2, Loi fédérale du 18 décembre 1987 sur le droit international privé. See RIGOZZI (note 8), 684; and MERONE (note 8), 155.

[103] *See* Eyal Benvenisti & George Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EJIL 59 (2009); and Benedict Kingsbury, *Weighing Global Regulatory Rules and Decisions in National Courts*, ACTA JURIDICA 90 (2009). More generally, as to the relationships between courts, YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS (2003); YUVAL SHANY, REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS (2007); and SABINO CASSESE, I TRIBUNALI DI BABELE. I GIUDICI ALLA RICERCA DI UN NUOVO ORDINE GLOBALE (2009).

https://doi.org/10.1017/S2071832200017326 Published online by Cambridge University Press

Pechstein case demonstrates),[104] but not in other fields such as the selection process for the Olympic Games or the review of IOC decisions more generally.[105] In addition, in some States, particularly developing countries, national judicial bodies might be influenced by the most powerful IFs.[106]

In any event, the sports legal system is equipped with judicial machinery that is more advanced than in any other *private* regime, including that of the internet.[107] At the same time, this system is even more effective than other *public* international law mechanisms (the CAS has been likened to the ECJ)[108] because States do not easily accept the delegation of powers to an international court.[109] In sport, however, this risk is not present because States are not parties to the disputes.[110]

---

[104] Claudia Pechstein is a famous German speed skater and winner of many Olympic medals. In 2009, she was banned from all competitions for two years after high levels of reticulocytes were found in her blood (no forbidden substances were actually found, therefore this was a case of doping based on "circumstantial evidence"). Pechstein appealed the ban before the CAS, which dismissed her appeal (CAS 2009/A/1912, *Claudia Pechstein v. International Skating Union*; and CAS 2009/A/1913, *Deutsche Eisschnelllauf Gemeinschaft e.V. v. International Skating Union*, Award of 25 November 2009; *see also* CAS *ad hoc* Division OG 10/04, *Claudia Pechstein v. DOSB & IOC*, Award of 18 February 2010); she also appealed the CAS award and filed a complaint against the International Skate Union before the Swiss Federal Court, in both cases unsuccessfully at least to date (*see* Swiss Bundesgericht I. zivilrechtliche Abteilung, 4A_612/2009, Decision of 10 February 2010).

[105] Most recently, *see* the 2009 decisions issued in Canada, by the Supreme Court of British Columbia and the British Columbia Court of Appeal, regarding the Vancouver Organizing Committee. On these aspects, *see* Mazzucco & Findlay (note 50).

[106] *See* Migai Akech, *The Maurice Odumbe Investigation and Judicial Review of the Power of International Sports Organizations*, 6 ENTERTAINMENT AND SPORTS LAW JOURNAL (2008), available at: http://go.warwick.ac.uk/eslj/issues/volume6/number2/akech.

[107] The Uniform Domain Name Dispute Resolution Policy (UDRP) adopted by ICANN, for instance, refers to a different arbitration body, such as the WIPO Arbitration and Mediation Center), but does not exclude the right to bring the dispute "to a court of competent jurisdiction for independent resolution" (Art. 4(k) UDRP): *see* DAVID LINDSAY, INTERNATIONAL DOMAIN NAME LAW. ICANN AND THE UDRP 95 (2007).

[108] LATTY (note 4), 308.

[109] Alter (note 85), 38; Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EJIL 73 (2009); and CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION (2007).

[110] Ravjani (note 95), 244, who refers to a "low visibility delegation" made by States.

https://doi.org/10.1017/S2071832200017326 Published online by Cambridge University Press

E. Towards a Sporting "Judicial Branch"?

Judicial activity plays a crucial role in sport and exhibits peculiar features in this field, as can be seen from the formation of the complex system governed by the CAS.

First, this system has both review and dispute settlement functions, which can be carried out by the same institution (i.e., the CAS). Second, the high degree of effectiveness of CAS proceedings and decisions confirms the importance of granting independence to tribunals and courts as well as the usefulness of creating multi-level judicial systems. Third, the sport judicial system illustrates the integration between the supranational and national levels, often realized by involving public administrative authorities instead of domestic courts, thus blurring the dividing line between the judiciary and the administration. Similarly, the adoption of arbitration proceedings by public bodies blurs the distinctions between public law and private law.[111] Fourth, the formation of a sports "judicial branch" provides evidence of the strategic role played by courts and tribunals in global law-making.[112]

The case of the CAS and its system, therefore, allows us to draw some comparisons between sport and other international regimes.

A first similarity concerns the functions carried out by these kinds of bodies. In the sports system, as in other international contexts, courts are created both to settle disputes and to review and control the exercise of powers by international organizations: this happens in traditional treaty-based institutions (e.g., the ILO)[113] and in private regimes (e.g., the internet).[114] At the same time there is an increasing need to ensure the observance of minimum standards and to protect fundamental rights (such as in the anti-doping regime).[115] A second analogy comes from the strategic role played by courts at the global level. In many regulatory regimes, judges, panels or tribunals contribute, as does the CAS, to the development of common rules and principles: Take, for instance, the case of WTO tribunals, which has been conceived of by some scholars as an example of global

[111] This point emerges in several CAS decisions, and it is more generally discussed by Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INTERNATIONAL COMPARATIVE LAW QUARTERLY 371 (2007).

[112] *See* SABINO CASSESE, IL DIRITTO GLOBALE 137 (2009).

[113] Arts 26, 27, 28 and 33 ILO Constitution.

[114] Art. IV on "Accountability and Review" of the ICANN Bylaws.

[115] *See* MAURO CAPPELLETTI, DIMENSIONI DELLA GIUSTIZIA NELLE SOCIETÀ CONTEMPORANEE: STUDI DI DIRITTO GIUDIZIARIO COMPARATO 39 (1994), who observed an extraordinary expansion of constitutional and transnational justice, due to the need to control political power and to protect fundamental rights.

"constitutionalism."[116] Furthermore, international courts and tribunals increase connections between regimes.[117] From this perspective, the CAS has certainly developed many links between different sports regimes (such as the Olympic regime, the Anti-Doping regimes, and those of the several International Federations), although—at least, to date—it does not "dialogue" very much with other international courts and tribunals.[118]

Global sports law shows that the effectiveness of an international judicial system also depends on the variety of judicial models that it adopts and the variety of remedies that it can offer. However, decisions issued by international courts or tribunals must often be executed or are subject to review by domestic courts: This happens with CAS awards, which are enforceable pursuant to the 1958 New York Convention and can be challenged before the Swiss Federal Court. Nevertheless, once the sports legal system had developed a complex and formalized global judiciary, independent from the executive, the number of cases reviewed by domestic courts was reduced. Extrapolating from this, one can see that the more global regulatory regimes imitate State systems, the less they will require States' intervention. A peculiarity of global sports law emerges here, in comparison with other private or hybrid regimes: Sports judicial mechanisms display many more similarities with public international law regimes than with private ones. This is a further confirmation of the theory that the more complex private regimes become, the more they will come to resemble public law regimes.[119]

---

[116] Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EJIL 39 (2001); *see also* Judith L. Goldstein & Richard H. Steinberg, *Regulatory Shift: The Rise of Judicial Liberalization at the WTO*, in: THE POLITICS OF GLOBAL REGULATION, 211, 227 (Walter Mattli & Ngaire Woods eds, 2009).

[117] CASSESE (note 103).

[118] This is mostly due to the "specificity" of sport. However, it is most likely that there will soon be a more intensive dialogue between the CAS and other courts, such as the European Court of Justice or the European Court for Human Rights: the number of sports cases that may affect antitrust regulation or fundamental rights of the athletes, in fact, has been increasing. The increasing economic and commercial relevance of sport could also involve the WTO system in a more significant way than what happened to date (e.g., in the dispute *U.S. — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO DS285, regarding the cross-border supply of gambling and betting services).

[119] Annelise Riles, *The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State*, 56 AMERICAN JOURNAL OF COMPARATIVE LAW 605, 629 (2008); and Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, 8 CHICAGO JOURNAL OF INTERNATIONAL LAW 513, 516 (2008).