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Home Field Advantage: Is “The Supreme Court of Sport” Independent?

Jakob S. Weitz

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Home Field Advantage: Is “The Supreme Court of Sport” Independent?

BY JAKOB SERGEI WEITZ*

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I. INTRODUCTION TO THE COURT OF ARBITRATION FOR SPORT AND THE SCOPE OF ANALYSIS

The article examines the independence of the Court of Arbitration for Sport (CAS), and questions whether the Court is able to be independent from the International Olympic Committee (IOC) and other prominent Sport Governing Bodies (SGBs). The issue arises at an important time in the climate of global sports law, also called *lex sportiva*, where athletes' rights and bodies have never been more in the spotlight, and the rulings of the CAS can have massive implications to the future of not just one sport, but across the entire spectrum of international sporting competition.¹ CAS has been at the heart of many of the most controversial and important sport rulings in the last decade; the future holds more disputes that have even more far-flung consequences and will set precedents and standards that will affect many generations of sporting youth.

Many have accused CAS of a lack of independence.² Many issues raised by critics of CAS focus on two main areas where the independence of CAS is questioned. First, the political and judicial organization and oversight of CAS, in regard to powerful Sport Governing Bodies (SGB) such as International Federation of Association Football (FIFA) and the IOC, who are often parties to the court's arbitration. Second, the ways in which CAS is funded, and by whom, relate to the power and influence these SGBs may have over CAS, and how relatively small the power of the individual athlete becomes. This article breaks the analysis of the independence of CAS into two parts: structural independence and financial independence. Each part will define the terms and examine whether CAS is able to fulfill their obligation to be neutral and impartial.

*J.D. Candidate, Evening Program, May 2023, Loyola Law School, Los Angeles; B.A., English and Political Science, Loyola Marymount University, 2018. Thank you to Professor Faraz Shahlaei for his guidance, feedback, and support throughout this process. I would also like to thank the staff and editors of the Loyola of Los Angeles International and Comparative Law Review for their hard work and diligent edits.

1. Ken Foster, *Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport's Jurisprudence*, 3 ENT. & SPORTS L.J. 1, 7 (2005).

2. Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes*, 35 VAL. U.L. REV. 379, 381 (2001).

In today's world, the final issue becomes the sovereignty of the athlete. As it stands, CAS and SGBs are able to prevent athletes from competing if the athlete does not adhere to the court's ruling, and in some cases, have even required athletes to undergo surgeries or medical treatments if the athlete wishes to compete.³ But is the right to sport an international human right? Or do SGBs, as private entities, have the ability to set rules and standards as they wish? This article examines the intricate balancing act between the pursuit of the right for everyone to play sports, against the fact that sports organizations are "private, voluntary associations" and are therefore "not governed by public authorities exercising statutory powers."⁴ Although there are no concrete answers yet, this is a cutting-edge issue that has already come to the forefront of international sports law.

II. THE COURT OF ARBITRATION FOR SPORT AND WHY IT MATTERS

The CAS is a legitimate dispute resolution body for sports because SGBs incorporate CAS's jurisdiction as part of their contractual agreement with athletes, often as part of their anti-doping policies.⁵ CAS works well because it allows for specialized judicial expertise focused directly on the complicated and unique world of sports.⁶ Further, because sport issues need to be resolved at a rapid pace, ceding jurisdiction to CAS allows for speedier and more flexible resolutions.⁷ However, critics of CAS question the independence of the arbitrators and the International Committee for the Arbitration of Sports (ICAS), the governing body of CAS.⁸ As a non-profit, funding for CAS is provided by institutions like FIFA and the IOC. Further, the appeal process for CAS verdicts is limited. Even though it has flaws, CAS has proved to be an essential part of international sports, providing a neutral, global ground where sports-related disputes can be fairly settled in an orderly manner.

A. "The Supreme Court" of Sport and the World Cup of Arbitration

CAS is an international institution that provides arbitration services focused on sport-related legal issues.⁹ For dispute resolution, arbitration

3. Jeré Longman, *Understanding the Controversy Over Caster Semenya*, N.Y. TIMES (Aug. 18, 2016), <https://www.nytimes.com/2016/08/20/sports/caster-semenya-800-meters.html>.

4. JOHN BARNES, SPORTS AND THE LAW IN CANADA 6 (3rd ed. 1996).

5. Foster, *supra* note 1, at 11.

6. *Id.* at 1.

7. Louise Reilly, *An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes*, 2012 J. DISP. RESOL. 63 (2012).

8. McLaren, *supra* note 2, at 383.

9. Foster, *supra* note 1, at 1.

provides an alternative method to a jury trial. CAS is necessary within the world of international sports because athletes fall under many different jurisdictions and sovereignties. Therefore, an impartial international court was needed to settle disputes amongst international athletes that used an agreed upon set of rules and procedures.¹⁰ In 1984, the IOC established CAS to do just that.¹¹

CAS has grown into a powerful settlement institution that delivers verdicts on many significant cases within the world of sports. CAS is involved in high-level events such as the Olympics, or when there are large sums of money involved, such as a new contract for a star footballer.¹² Thus, when the stakes are at their highest in the world of sport-related arbitration, that is when CAS is utilized. Like the World Cup, the highest level of sport competition, CAS is high profile, watched by many, and the results can have a lasting impact on the field of play.

Lindholm compares CAS to the “Supreme Court” of sports.¹³ Not only does CAS render rulings on cases, but these rulings have developed into a body of global case law and jurisprudence called *lex sportiva*.¹⁴ CAS has a direct and tangible impact on the world of sports. Between individual players, clubs, and the SGBs who make the rules, it is essential to have an impartial judge who understands the intricacy of each sport and render decisions quickly and fairly.

B. Playing Fair on the International Stage: How CAS Maintains Jurisdiction Over SGBs and International Athletes

According to CAS, the scope of the court is “[a]ny dispute directly or indirectly linked to sport.”¹⁵ The disputes generally fall into two categories: commercial, such as a trade contract for a high-level footballer, or “of a disciplinary nature following a decision by a sports organisation,” such as determining the length of a ban in a doping case or whether discipline by a SGB was fair to the athlete.¹⁶ However, the scope of the court is quite broad, and the court could theoretically adjudicate a sport-related dispute that did not fall into one of those two general categories.

10. JOHAN LINDHOLM, THE COURT OF ARBITRATION FOR SPORT AND ITS JURISPRUDENCE : AN EMPIRICAL INQUIRY INTO LEX SPORTIVA 3 (Ben Van Rompuy & Antoine Duval eds., 2019).

11. *History of the CAS*, CAS, <https://www.tas-cas.org/en/general-information/history-of-the-cas.html>. (last visited Apr. 24, 2022) [hereinafter *History of the CAS*].

12. *Id.*

13. LINDHOLM, *supra* note 10, at 5.

14. Reilly, *supra* note 7, at 74-75.

15. *Frequently Asked Questions*, CAS, <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html> (last visited Apr. 24, 2022) [hereinafter *Frequently Asked Questions*].

16. *Id.* at 1.

In order for CAS to have jurisdiction over a dispute, it is required that the dispute falls within the scope of a valid arbitration agreement.¹⁷ Arbitration agreements can be found in a variety of locations within a sport. It may be found in the charter of an event, such as with the Olympics;¹⁸ and it may also be found in the participation contract between an athlete and a league, such as with the Ultimate Fighting Championship (UFC).¹⁹ CAS provides model arbitration clauses to SGBs.²⁰ These clauses confer exclusive jurisdiction upon CAS to resolve all disputes arising in connection with a competition.²¹

CAS's governing rules limit the jurisdiction of CAS to disputes only within the world of sports.²² The disputes that CAS resolves usually relate to two categories: disciplinary action and commercial disputes.²³ Disciplinary action can relate to World Anti-Doping Agency (WADA) doping violations, misconduct, use of excessive force or other types of violence, and abuse of officials or fans.²⁴ In the contracts between athletes and clubs, and clubs and SGBs, there will usually be a CAS arbitration agreement.²⁵ Sometimes these types of cases are originally handled by the SGB itself through its disciplinary arm. Those decisions are then appealed to CAS by the affected association, club, or athlete.²⁶

Commercial disputes often arise over sponsorships, television agreements, or team and player contracts.²⁷ For CAS to have jurisdiction over this type of dispute, there needs to be a CAS arbitration agreement between the parties as a part of the contract.²⁸ For instance, in 2018 CAS dealt with a breach of contract case involving the €740 million purchase of top-flight Italian football club AC Milan, where the buyer had missed the payment date for €32 million.²⁹

17. LINDHOLM, *supra* note 10, at 35.

18. *Olympic Charter*, INTERNATIONAL OLYMPIC COMMITTEE 108 (Aug. 8, 2021), https://www.stillmed.olympics.com/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf?_ga=2.19644415.613940009.1652046883-774517074.1652046883.

19. *UFC Anti-Doping Policy*, USADA (Jan. 1, 2022), <https://www.ufc.usada.org/wp-content/uploads/UFC-anti-doping-policy-EN.pdf>.

20. *History of the CAS*, *supra* note 11.

21. Reilly, *supra* note 7, at 66.

22. LINDHOLM, *supra* note 10, at 37.

23. *Id.* at 36.

24. *History of the CAS*, *supra* note 11.

25. Reilly, *supra* note 7, at 63.

26. *Id.* at 74.

27. *Id.* at 64.

28. LINDHOLM, *supra* note 10, at 35.

29. AC Milan v. UEFA, CAS 2018/A/5808, Certified Award, at 2-3, 5 (Oct. 1, 2018), https://www.tas-cas.org/fileadmin/user_upload/Award_Final_5808.pdf.

In either type of dispute, CAS findings are binding and final in over 125 jurisdictions.³⁰ CAS is based in Switzerland, and therefore disputes are carried out under Swiss law, unless the parties specifically agree to a different type of law.³¹ CAS findings can only be appealed to the Swiss Federal Tribunal (SFT), and for a narrow list of reasons.³² In fact, the only time a CAS verdict has been overturned on the merits and not for a procedural reason was in the case of Brazilian footballer Matuzalem, who had signed a five-year contract with one club and left after three years to play with another.³³ CAS awarded the first club a payment of €6.8 million.³⁴ When Matuzalem appealed, CAS raised the payment to €11.86 million.³⁵ Matuzalem appealed to the SFT, which decided that CAS's verdict was against public policy, and that the court verdict forced "excessive commitment."³⁶

The UFC provides an interesting example of how CAS draws jurisdiction over athletes, and how a CAS verdict can dramatically affect an individual athlete for the greater good of the sport. As part of their contract, UFC athletes agree to the UFC Anti-Doping Program (ADP).³⁷ Part of the UFC ADP is a clause which states that the athletes will be tested by WADA.³⁸ The athletes also agree to arbitration proceedings for potential anti-doping policy violations that are heard by specially trained arbitrators from CAS.³⁹ Athletes can appeal awards and verdicts to CAS, but these appeals can only go so far before the verdicts become final and unappealable.⁴⁰

UFC athlete and light heavyweight champion Jon Jones tested positive for two illicit substances in 2016 and was given a one year ban from

30. James Carter & Alexander Chaize, *Caster Semenya Ruling and the Pros and Cons of the Court of Arbitration for Sport*, DLA PIPER (Sept. 6, 2019), <https://www.dlapiper.com/en/uk/insights/publications/2019/09/sport-now/caster-semenya-ruling-and-the-pros-and-cons-of-the-court-of-arbitration-for-sport/>.

31. *Id.* at 1.

32. *Id.*

33. Lucien Valloni & Thilo Pachmann, *Landmark Matuzalem has Major Consequences for FIFA Regulations*, LEXOLOGY (May 10, 2012), <https://www.lexology.com/commentary/tech-data-telecoms-media/switzerland/froriep-renggli/landmark-matuzalem-ruling-has-major-consequences-for-fifa-regulations>.

34. *Id.* at 2.

35. *Id.*

36. *Id.* at 3-4.

37. USADA, *supra* note 19, at art. 1.

38. *Id.* at 12.

39. *UFC Arbitration Rules*, USADA (Jan. 1, 2022), <https://www.ufc.usada.org/wp-content/uploads/UFC-arbitration-rules-EN.pdf>.

40. USADA, *supra* note 19, at art. 8.

competing.⁴¹ Upon his return in 2017, he tested positive again — but this time for the smallest microgram possible of an illicit substance which may have been a false positive.⁴² The positive test was especially hard on Jones because the athlete had seemingly done everything possible to avoid a positive result. For every supplement he took, Jones had run the supplement by WADA, UFC officials, and other authority figures.⁴³ Jones testified that he never took anything else.⁴⁴ WADA, the UFC, nor Jones could ever identify the source of what caused the positive test.⁴⁵

However, the CAS punishment was immediate and harsh. CAS did not care that the source could not be found.⁴⁶ The presence of the chemical was enough.⁴⁷ They stripped him of the title he had just won and fined him \$205,000, which Jones was to pay back to the UFC.⁴⁸ Finally, CAS banned Jones from competition for 48 months.⁴⁹ This was good news for the UFC, which could host another title bout and quickly get the division moving again. But it was devastating news to Jon Jones, who was competing in a sport where the careers are extremely short.

Jones appealed the verdict.⁵⁰ Based on the lack of a source and the small amount found, the panel dropped the ban from 48 months to 18.⁵¹ But that was as far as they would consider going. CAS made it clear that there were no more avenues of appeal and that the verdict was final.⁵² Even though Jones did all he could, he still had to give his belt back, pay the UFC over \$200,000, and miss over three years of the prime of his career.

CAS had jurisdiction over Jones because Jones had signed a CAS arbitration agreement as part of the UFC's anti-doping program.⁵³ One could argue that CAS cared more about the UFC continuing competitions rather than discovering the truth and potentially saving the career of Jones. But, according to their charter, CAS and WADA had done their

41. *MGSS Arbitration Panel Imposes One-Year Sanction on UFC Athlete, Jones, for Anti-Doping Policy Violation*, USADA (Nov. 7, 2016), <https://www.ufc.usada.org/jon-jones-receives-doping-sanction/> [hereinafter *Jones Doping Sanction*].

42. *Jones v. USADA*, McLaren Glob. Sports Sols., Certified Award, at 27 (Sept. 18, 2018), <https://www.ufc.usada.org/wp-content/uploads/FINAL-Award-Jones-and-USADA.pdf>.

43. *Id.* at 11.

44. *Id.*

45. *Id.* at 20-21.

46. *Id.* at 19.

47. *Id.*

48. *Jones*, McLaren Glob. Sports Sols. at 7.

49. *Id.* at 4.

50. *Id.* at 26.

51. *Id.* at 34.

52. *Id.* at 36.

53. *Id.*

jobs. They tested an athlete, found traces of illicit substances in the sample, investigated, and rendered a verdict.

III. HIDING THE BALL: ANALYSIS OF THE CLOSED-LOOP SYSTEM OF CAS AND WHETHER THERE IS STRUCTURAL INDEPENDENCE FROM THE SGBS THAT ARE INVOLVED

This part of the article will examine what structural independence means in the context of arbitration. That meaning will then be applied to the current structure of CAS to determine whether CAS does in fact have structural independence from SGBs like the IOC and FIFA. Due to the closed-loop structural system of CAS and ICAS, the conclusion of this examination is that CAS does not have structural independence with its current format and needs to take more effort to remove the structural and organizational influence of prominent SGBs, such as the IOC and FIFA. Because of this lack of structural independence, the impartial tribunal nature of CAS has been called into question by critics.

A. What is Structural Independence in International Sports Arbitration?

What does having structural independence in this context mean? It means that the court is a legitimate arbitration tribunal because it has no incentive other than to render a fair and just ruling, and neither party can exert undue influence over the decision-making of the court.⁵⁴ A court that did not have structural independence would be inundated with jurists and arbitrators that bore allegiance to the SGBs that are parties to the arbitration.⁵⁵ The court and its judges would likely have conflicts of interest and not be able to detach from those connections. A court without structural independence would be one that was made up of only those who were interested in the rights of the governing bodies, not the rights of the athletes, or vice versa.⁵⁶

According to the European Convention on Human Rights, Article 6, Section 1, everyone is entitled to an “independent and impartial tribunal.”⁵⁷ Courts may use Article 6, Section 1, as a standard requirement for

54. Suela Dervishi, *How Independent is the Court of Arbitration for Sport?*, ARBITRAS (June 19, 2020), <https://www.mlstudentprojects.squarespace.com/blog/2020/6/19/how-independent-is-the-court-of-arbitration-for-sport>.

55. *Id.* at 2.

56. *Id.*

57. *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb)*, Eur. Ct. H.R. 1 (2021), https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf [hereinafter *Guide on Article 6*].

an arbitration to be binding.⁵⁸ A court of arbitration that did have structural independence would be made up of a representative group of those that could be bound by the decisions of those courts, both the governing bodies and the athletes. Therefore, the composition of the arbitrators and the International Council for the Arbitration of Sports (ICAS) will be a good signal as to whether CAS is able to truly be impartial, or if it is bound by the allegiances of its members. The secretive and closed-loop structure of CAS has led to many critics stating that CAS and ICAS do not have structural independence from the SGBs.⁵⁹ However, CAS has publicly reiterated its commitment to impartiality and independence, stating that it can successfully be structurally independent from the SGBs involved in the arbitrations.⁶⁰

In March 2020, William Wallace, leader of the Trinidad and Tobago Football Association (TTFA), was suddenly removed by FIFA and replaced with a normalisation committee to deal with growing debt.⁶¹ Wallace, along with three other removed executives, tried to appeal this action by FIFA to CAS.⁶² Wallace and his attorney publicly decried the subsequent handling of the case by CAS, highlighting “irregularities,” such as CAS requiring three arbitrators rather than the usual one, and requiring TTFA to pay the full cost of the arbitration rather than splitting payment with FIFA.⁶³ The ousted officials complained that they were not receiving fair treatment from CAS, and that CAS was attempting to prohibitively raise the costs to dissuade them from continuing the action against FIFA.⁶⁴

CAS vehemently denied this allegation. According to Dr. Elisabeth Steiner, deputy president of CAS’s appeal division, its independence “has already been confirmed by several national and international tribunals” and that CAS is “independent and impartial from all parties.”⁶⁵ But what is the structural relationship between massive, influential organizations like the IOC and FIFA, and the Court overseeing them? Is there enough of a separation that the participants in arbitration feel that both sides are

58. Daniel Meagher, *The Advantages and Disadvantages of Arbitration Within the Sporting Context*, LEXIS NEXIS UK, <https://www.lexisnexis.co.uk/legal/guidance/the-advantages-disadvantages-of-arbitration-within-the-sporting-context> (last visited Apr. 1, 2022).

59. McLaren, *supra* note 2, at 383.

60. *Id.*

61. *Court of Arbitration for Sport Defends Independence Amid TTFA Allegations of Bias*, STABROEK NEWS (June 4, 2020), <https://www.stabroeknews.com/2020/06/04/sports/court-of-arbitration-for-sport-defends-independence-amid-ttfa-allegations-of-bias/>.

62. *Id.* at 2.

63. *Id.* at 3.

64. *Id.*

65. *Id.* at 2.

being equally heard? In the above case, Wallace did not feel like CAS was truly prepared to listen to his and his associates' claims against FIFA, and further, that the costs were not being equally shared. But CAS states that, in fact, that is exactly what they are set up to do, and they were going about it as swiftly and as inexpensively as possible.⁶⁶ CAS stated that the three-judge panel was needed for the complexity of the case, and the cost was a modest deposit of around \$1000.⁶⁷

B. *The Gundel Reforms and the Road to the Current Structure of CAS*

CAS has an interesting two-tiered structure which attempts to insulate those making decisions from the influence of the governing bodies who fund and support the court.⁶⁸ However, it was not always this way. CAS has adapted over the years since its inculcation in 1984. The first issues over CAS's impartiality arose in 1992. The *Gundel* case led to major reform, including the creation of the ICAS and taking several measures to formally separate itself from the IOC.⁶⁹ *Gundel v. La Fédération Equestre Internationale* was a CAS case that was appealed to the Federal Supreme Court of Switzerland.⁷⁰ The Swiss court decided that, although CAS was a legitimate arbitration tribunal, it could not be completely neutral when the IOC was a party to the lawsuit due to the organizational and financial links with the IOC.⁷¹

Juan Antonio Samaranch, the president of the IOC in 1984, had the idea to create a court that could specifically handle disputes that arose during and out of the Olympics.⁷² This idea became CAS, which was actually part of the IOC until the reforms that came about as the aftermath of the *Gundel* case.⁷³ The reforms focused on minimizing the structural and financial ties that CAS had with the IOC, in an effort to create a truly independent arbitration tribunal for sport-related disputes that could feature any party, including the IOC, in which all participants would feel that they have been treated fairly.⁷⁴

By far, the most significant reform to come about in 1993 was the creation of the International Council of Arbitration for Sport (ICAS). This

66. *Id.* at 3.

67. STARBROEK NEWS, *supra* note 61.

68. *History of the CAS*, *supra* note 11.

69. *Id.*

70. *Id.*

71. Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 PEPP. DISP. RESOL. L.J. 51, 52 (2009).

72. *History of the CAS*, *supra* note 11.

73. *Id.*

74. Mitten, *supra* note 71, at 52.

council was charged with safeguarding the independence of CAS financially and structurally.⁷⁵ Further, ICAS was also responsible for appointing the CAS arbitrators, usually for periods of four years.⁷⁶

C. Skating on Thin Ice: the Composition of ICAS and the Effect on its Ability to Safeguard the Impartiality of the Court

ICAS is composed of twenty jurists who are appointed by different sports organizations.⁷⁷ Four members are appointed by the IOC; four members are appointed by the International Federations (IFs) - three from the Summer Olympics Association and one from the Winter Olympics Association.⁷⁸ Then, another four members are appointed by National Olympic Committees (NOCs).⁷⁹ Finally, four more are decided by these original twelve, and then the last four are appointed by all sixteen previous members.⁸⁰ However, if one was to keep track, that means that twelve of the twenty members of ICAS are related directly to the IOC; they are either from the IOC directly, or on the International or National level of Olympics organization. Further, those twelve members vote on all twenty members of ICAS.⁸¹

The composition of ICAS is important because ICAS appoints arbitrators who are brought to the attention of ICAS by the International Olympics Committee (IOC), the International Federations (IFs), the National Olympics Committees (NOC), and by the athletes' commissions of the IOC, IFs, and NOCs.⁸² CAS argues that it is impartial because the selected arbitrators match the composition of the involved parties in the arbitration and are not as slanted towards the SGBs as ICAS.⁸³ However, the largest portion of members of ICAS and CAS are representative of SGBs, not athletes. Critics claim that this causes undue influence on the composition of ICAS, and therefore on the composition of CAS arbitrators.⁸⁴ These links are sufficient to call into question the structural independence of CAS in the event that an SGB is a party to the arbitration.

75. *History of the CAS*, *supra* note 11.

76. *Id.*

77. *Id.*

78. *Code: ICAS Statutes*, CAS, <https://www.tas-cas.org/en/icas/code-icas-statutes.html> (last visited Apr. 24, 2022). [hereinafter *ICAS Statutes*].

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *History of the CAS*, *supra* note 11.

84. *Dervishi*, *supra* note 54.

Claudia Pechstein, an internationally-renowned speed skater, was highly critical of CAS and claimed that CAS was not an impartial tribunal due to a lack of structural independence from SGBs in the methodology of appointing arbitrators and for lack of public transparency by having only closed-door hearings.⁸⁵ In 2009, the International Skating Union banned Pechstein from competition for two years for failing a blood doping test.⁸⁶ Pechstein appealed the decision to CAS, who upheld the International Skating Union's ban.⁸⁷ Pechstein appealed again to the Federal Supreme Court of Switzerland, who again upheld the ban.⁸⁸ Finally, Pechstein appealed her case to the European Court of Human Rights, citing complaints that CAS was not independent, not impartial, and that the president of CAS was serving only the large SGBs and did not care about the justice to the individual athlete.⁸⁹

Although the European Court of Human Rights upheld CAS's ruling, Judge Keller and Judge Serghides dissented with the majority opinion and criticized the lack of structural independence in CAS.⁹⁰ The Judges cited Article 6 (1) of the Human Rights Convention to argue that CAS does not meet the standard of independence and impartiality that is required to be a true tribunal.⁹¹ Under European Court of Human Rights case law, "it is not sufficient for the arbitrators to be impartial on an individual basis if the organization's general structure has no appearance of independence and impartiality."⁹²

To the dissenting Judges, the first issue is that the IOC, the IFs, and the NOCs appoint the arbitrators, and they all represent one party in the arbitration. Therefore, the Judges state the European Court of Human Rights must "regard to the manner of the appointment of [CAS's] members and the duration of their term of office ... the existence of guarantees against outside pressures ... and the question of whether the body presents an appearance of independence..."⁹³ To the Judges, CAS and ICAS did not present an appearance of independence due to the structure of how arbitrators and members were appointed and sourced. Because of that, no matter the individual basis of the arbitrators, the lack of structural

85. *Id.*

86. Mutu and Pechstein v. Switz., Apps. Nos. 40575/10 & 67474/10, ¶ 1 (Oct. 2, 2018), <https://www.hudoc.echr.coe.int/eng?i=001-186828>.

87. *Id.* ¶ 58.

88. *Id.* ¶ 16.

89. *Id.* ¶ 1.

90. *Id.* ¶ 5.

91. *Id.*

92. *Id.* ¶ 7.

93. Mutu and Pechstein v. Switz., *supra* note 86, ¶ 37.

independence in appearance in the larger organization of CAS and ICAS calls into question CAS's ability to be independent and impartial.

The structural independence of CAS and the ability of ICAS to remain impartial continues to have critics. In an article by *Play the Game*, the former Advocate General at the European Court of Justice Miguel Maduro was doubtful of the due process and fairness of CAS and the ways that ICAS governed.⁹⁴ Maduro stated that CAS has “the jurisdiction and the authority over a global order like a court has,” but that CAS “does not meet the criteria you would expect” from an actual court.⁹⁵ Maduro is critical of the oversight of ICAS and the structure of the court. First, Maduro points out, a majority of the 20 members of ICAS are appointed by either the IOC or other SGBs, who then are given a closed list of arbitrators to appoint.⁹⁶ The “closed book” refers to the pool of arbitrators from which ICAS can choose. This pool is decided by ICAS. Maduro claims that this closed-book process “amounts to domination by sports officials over the composition of CAS and its jurisprudence.”⁹⁷ Critics of ICAS claim that this structure impinges on the independence of the court and causes a flaw in the impartiality of the arbitrations because the SGBs have undue influence over the decisions.⁹⁸

A closer look at the composition and usage of the pool of jurists leaves more questions than answers. There are 418 current arbitrators.⁹⁹ Only 13% are women.¹⁰⁰ More than 200 “hold other positions with sport governing bodies on various disciplinary commissions.”¹⁰¹ Further, according to CAS, 35% of arbitrators are not appointed to any panels per year, while there are also particular arbitrators that are appointed to many cases per year.¹⁰² CAS argues that this is due to the sought-after and specific expertise of certain arbitrators that apply to many of the proceedings before the court.¹⁰³ Critics, however, argue that this practice allows CAS

94. GRIT HARTMANN, TIPPING THE SCALES OF JUSTICE – THE SPORT AND ITS “SUPREME COURT” 87 (2021), <https://www.playthegame.org/media/10851569/Tipping-the-scales-of-justice-%E2%80%93-the-sport-and-its-supreme-court.pdf> [hereinafter TIPPING THE SCALES OF JUSTICE].

95. *Id.* at 8.

96. *Id.* at 6.

97. Grit Hartmann, *The Secretive Life of the Court of Arbitration for Sport*, PLAY THE GAME (Nov. 11, 2021), https://www.playthegame.org/news/news-articles/2021/0676_the-secretive-life-of-the-court-of-arbitration-for-sport/ [hereinafter *The Secretive Life*].

98. *Id.* at 27.

99. TIPPING THE SCALES OF JUSTICE, *supra* note 94 at 24.

100. *Id.* at 18.

101. *Id.* at 23.

102. *Id.* at 27.

103. *Id.* at 17.

to hand-pick arbitrators that are beneficial to the sport governing bodies, and not pick arbitrators that may favor athlete's individual rights.¹⁰⁴

In conclusion, critics have strong arguments that CAS does not have the structural independence required to meet the standard of an impartial tribunal. The closed-loop system of appointing ICAS members, who then appoint the closed book pool of arbitrators, who are then hand-picked by the ICAS members does not rise to the level of transparency and independence expected of courts in the modern era.

IV. THE FUNDING OF THE COURT

This area of the article will examine the funding of CAS and whether CAS is able to be independent as a non-profit tribunal. Critics of CAS complain about the financing of CAS. CAS is a non-profit agency, but a portion of CAS is funded by organizations that are often party to a dispute that CAS is presiding over.¹⁰⁵

The funding for CAS has been the subject of several reforms over the years. At its inception, CAS was fully funded by the IOC, because CAS was part of the IOC.¹⁰⁶ As a result of the *Gundel* reforms and the signing of the *Paris Agreement* in 1993, the funding contribution of the IOC to CAS was reduced to one-third of CAS's operating budget.¹⁰⁷ The remaining two-thirds was to be financed from outside sources and all of CAS was to be managed by the ICAS.¹⁰⁸

A. Budgets and Contributions

The data available claims that the current budget for CAS is CHF 16,000,000.¹⁰⁹ Of that total budget, CHF (Swiss Francs) 7,500,000 was funded by the IOC and related Olympic federations. FIFA contributes a disclosed amount of CHF 1,500,000.¹¹⁰ CAS does not disclose the source of its funding outside of these numbers. It is clear that CAS cannot operate without a budget of any kind; the court needs some funding from somewhere in order to operate and adjudicate. It needs a physical location, it needs judges, but it does have certain overhead. CAS cannot likely

104. McLaren, *supra* note 2, at 381-82.

105. Guila Palermo & Anna Sokolovskaya, *Independence of CAS vis-à-vis its Funders and Repeat Users of its Services*, KLUWER ARB. BLOG (May 25, 2018), <http://www.arbitrationblog.kluwerarbitration.com/2018/05/25/independence-cas-vis-vis-funders-repeat-users-services/>.

106. *Id.* at 1.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

be self-sufficient, because other than its funding from outside sources, the court makes its money through modest filing fees. It would be prohibitively expensive for the participants if that were the case, and one of the key goals of CAS is to be inexpensive. CAS needs to be adjudically independent, while still being financially dependent.

The problem of financial independence arises because, when the percentage of cases in which an Olympic Federation or FIFA is one of the involved parties examined, it becomes obvious that a majority of the proceedings in front of CAS involve its own disclosed source of financing. For instance, FIFA finances a large part of CAS, and FIFA is often the defendant in cases that CAS hears.¹¹¹ According to Kluwer Arbitration, “approximately 32% of CAS’s cases involved FIFA.”¹¹²

B. Setting the Gold Medal Standard: Attempting to Shield the Pursuit of Impartiality Against the Inevitability of Funding

Critics of CAS have raised the issue of FIFA and other SGBs using this funding arrangement to impose undue influence on the decisions of the court. In a recent case, a Belgian football club brought an appeal against a FIFA decision in CAS.¹¹³ CAS ruled in favor of FIFA.¹¹⁴ The club then appealed CAS’s decision to the Swiss Federal Court, stating that CAS’s decision was issued by an improperly constituted arbitral tribunal, and that “the mere prospect of losing this important client [FIFA] would be likely to influence the awards to the detriment of the parties opposed [in future proceedings] to FIFA.”¹¹⁵ The football club contrasted CAS arbitrators against state judges, showing how unlike state judges, arbitrators and those involved in CAS would see their own assets diminished if FIFA chose to no longer continue its funding relationship with CAS.¹¹⁶

FIFA argued that this is not the case. According to FIFA, CAS’s independence was resolute and settled as of Swiss law, and that CAS did not need to do anything to “please” FIFA.¹¹⁷ The Swiss Federal Tribunal court in the *Lazutina* case agreed with FIFA’s argument, stating CAS was not “the vassal” of the IOC or FIFA and was “sufficiently independent” of them.¹¹⁸

111. Palermo & Sokolovskaya, *supra* note 105.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Palermo & Sokolovskaya, *supra* note 105.

118. *Id.*

The *Lazutina* court introduced the “no viable alternative” counterargument to those that would question the current funding system of CAS.¹¹⁹ Although critics may state it does not make sense that the most common defendants are also the biggest funders of the court, proponents of CAS would state that this arrangement actually makes sense; arguing that parties who use the court the most should have to pay the most, and there is no viable alternative to that system.¹²⁰ The court signals that CAS, as it is currently funded, is well equipped to “resolve international sports-related disputes quickly and inexpensively,” and has not shown any undue favoritism to the parties that provide its funding.¹²¹

C. Does a Viable Alternative Exist in National Government?

One viable alternative that has been derived from the analysis of this article is a framework of international funding from the countries that participate in international sports. CAS does not require a large budget but provides a vital service that is used all over the world.¹²² If some of the major countries that participated in international sport set up a proportional funding scheme, CAS could be publicly funded by contributions from national governments, rather than supported by IOC, FIFA, and other private contributions. However, critics of CAS would argue that CAS would not be favorable to this plan as it would mean CAS would need to be much more transparent about their spending and activities. Further, the SGBs would likely not agree with this plan, as it limits their power as private entities and increases national power.

Despite the murkiness of CAS’s financials, two conclusions can be drawn about the financial independence of CAS in its current state. First, CAS does not have the means to be self-sufficient. It needs outside funding of some kind, and at the moment, there are no viable alternatives other than international governmental support. Second, the Swiss Federal Tribunal courts have affirmed and reaffirmed that CAS has demonstrated impartiality even when one of the parties is a financial contributor. Taken together, this shows that although CAS is far from perfect, it has been able to demonstrate financial independence as an arbitration tribunal and can render impartial judgements against all parties, even the ones that help fund the court.

119. *Id.*

120. *Id.*

121. *Id.*

122. *History of the CAS, supra* note 11.

V. SOVEREIGNTY AND THE ATHLETE: BALANCING THE FREEDOM OF THE INDIVIDUAL BODY WITH THE FREEDOM OF THE GOVERNING BODY IN THE WORLD OF INTERNATIONAL SPORT LAW

Supporters of CAS list many benefits to all participants in sports, from the SGBs down to the athletes and fans. One key argument in support of CAS is the need for an international court for disputes in the sports world. Otherwise, huge problems would likely arise when what constitutes a rule violation for one sport differed between various jurisdictions. Critics often claim that CAS is biased against athletes, imposes harsh draconian policies on athletes, and offers extremely limited appeal processes for athletes to dispute judgements. Although all agree that the purpose of CAS is beneficial and necessary, detractors of the court often claim that the court benefits the larger sporting bodies, but not the athlete and their body.¹²³ The court is beneficial to making sure the competition goes on, but not so beneficial for the individual rights and freedoms of the athlete. Supporters of the court demonstrate examples of ways that CAS has helped both individual athletes and the SGBs. Critics claim that CAS serves football and not the footballer.¹²⁴ CAS argues that it serves neither, and is there to help both the sport, the player, and the fan enjoy international fair play.

A. CAS Helps the Player Play the Game

Supporters claim that CAS provides more opportunities for athletes to be heard by expert judges.¹²⁵ CAS offers a much speedier resolution process, which is desperately needed due to the fast nature of the sports world.¹²⁶ For instance, there are deadlines for Olympic registration; CAS is often needed to settle disputes before these deadlines expire, or worse, the event begins. Next, the flexibility of CAS provides an ad hoc court just for IOC disputes, and other specific panels for various sports.¹²⁷ Many CAS arbitrators are specially trained and can have more expertise in specific sport law than a circuit judge.¹²⁸ The cost of litigating a case in CAS is also presumably much lower than if an athlete tried to go through a national court. Lastly, CAS decisions are public and CAS is transparent about its decision process and funding.¹²⁹

123. TIPPING THE SCALES OF JUSTICE, *supra* note 94, at 30.

124. *Id.* at 30.

125. Foster, *supra* note 1, at 3.

126. Reilly, *supra* note 7, at 71.

127. *Id.*

128. *Frequently Asked Questions*, *supra* note 15.

129. Carter & Chaize, *supra* note 30, at 3.

The case of the 2016 Russian Federation doping bans is a good example of the speed and expertise CAS offers to the sports world.¹³⁰ In late 2015, WADA discovered irregularities in many of the Russian track and field athletes.¹³¹ Following these findings, in early 2016, the IAAF banned all Russian athletes from competing in any track and field events.¹³² However, with the registration for the 2016 Rio Olympics rapidly approaching, a group of Russian athletes appealed the ban to CAS arbitration.¹³³ Within three weeks, CAS had appointed a panel of judges, held a hearing, and delivered a verdict.¹³⁴ Unfortunately for the Russians, they were still banned. But it demonstrated how effective having a global arbitrator of sport disputes was; issues could be handled quickly and judged by experts in the field, allowing major international sporting events like the Olympics to happen on time and without a cloud of legal disputes hanging over them.

B. Favoring Governing Bodies, Not Human Bodies: Shortcomings in the Structure and Appeal Process of CAS

Critics of CAS have seen shortcomings in the structure, financing, and appeal process of CAS, and argue that it limits the freedom of individual athletes.¹³⁵ Although they do not argue that CAS is not beneficial, critics would change a few aspects of how CAS is run in order to make it more transparent and allow athletes more chances to interact with the arbitration process and have more avenues to appeal verdicts.¹³⁶

First, the structure of CAS can be seen as controversial and detrimental to the individual athlete because of how the governing body of CAS is laid out. The members of CAS are not proportional nor representative of the athlete.¹³⁷ The CAS can have a body of 150-300 members at any time.¹³⁸ These members are predominately part of SGBs: national clubs, federations, leagues, and large organizations.¹³⁹ Very few members are individual athletes, and critics argue that these members do not have the individual athlete's best intentions in mind because the members are

130. *Id.* at 5.

131. *Id.* at 3.

132. *Id.*

133. *Id.*

134. *Id.*

135. Carter & Chaize, *supra* note 30, at 5.

136. *Id.* at 11.

137. *Id.* at 2.

138. *Id.*

139. *Id.* at 4.

largely from these big organizations like FIFA and the IOC.¹⁴⁰ Further, many critics point out that the ICAS appoints the CAS arbitrators, which may lead to a conflict of interest if the case relates to one of the organizations of which an ICAS member is a party. Critics argue that ICAS members are more likely to appoint arbitrators that are more favorable to the organization and less favorable to the individual athletes.¹⁴¹

Second, the lack of athlete choice in arbitration as well as a lack of an appeal process is another major issue that critics of CAS raise.¹⁴² First, they claim that athletes have no choice and are in fact compelled to CAS arbitration because their contracts with their leagues demand it.¹⁴³ Athletes and clubs may have no choice in CAS arbitration as a condition of competing in their chosen sport. Although this boosts a universality of decisions, it limits an athlete or club's freedom to choose how to play and regulate their chosen sport. And, if an athlete wants to participate in the Olympics, they must agree to CAS arbitration. Further, the arbitrators must be selected from the body of arbitrators who are selected by the ICAS. As mentioned, critics have a problem with the ICAS primarily representing the interests of the large organizations. Critics claim that the body of arbitrators selected by the ICAS may be biased, and because one cannot choose an arbitrator outside this group, the ability of an athlete or club to have a fair trial is severely limited.¹⁴⁴

Finally, the appeal process for CAS verdicts is difficult and limited. The case cannot be appealed on the merits.¹⁴⁵ In limited circumstances, the verdict can be appealed to the Swiss Federation Tribunal. However, that appeal is a lengthy and costly process which is very rarely successful for the individual athlete who is running out of time on their career clock, where missing an Olympics or a few years could be the end of their career.¹⁴⁶ For CAS to be considered a truly impartial tribunal, the appeal process should be reworked to be more available for athletes. Obviously, when time is of issue, this could be difficult. But CAS usually has special committees for high-profile events, and in these cases, enhanced appeal measures should be made available to athletes.¹⁴⁷ Further, athletes should be able to either veto a certain arbitrator or appeal to have the case heard by a different arbitrator. In these ways, CAS can eliminate some of the

140. *Id.* at 4.

141. Carter & Chaize, *supra* note 30, at 4.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 1.

147. *Frequently Asked Questions*, *supra* note 15.

loudest critiques of CAS's adjudicative process and its effect on the rights of the individual athlete.

VI. CONCLUSION: OVERTIME AND THE PURSUIT OF THE GOLDEN GOAL

A sport is an equal playing field. A neutral game where one can compete according to rules, and if one does better than the rest, can win in a fair decision. CAS, at its best, attempts to mimic that neutral playing field of competition. CAS provides a global set of standards that an athlete, club, or SGB can look at and understand what they have to do in order to compete fairly. *Lex Sportiva* allows the transnational sport world to know the limits and edges of sport dispute settlement. However, CAS is far from perfect. CAS needs to find funding from organizations that are not frequently defendants and plaintiffs in the cases it presides over. CAS needs more representation for individual athletes.

But what CAS offers is essential. A crucial part of international sports is a cost effective, accessible, and globally applicable method of resolving sport-related disputes. That is CAS's mission and although they are still evolving, there is nothing that compares in effectiveness and speed.

The aim of this article was to examine the structural and financial independence of CAS in its current state. Structurally, CAS has a way to go before it can be determined to be fully independent. Due to the way in which ICAS is organized, it allows for too much conflict of interest to go unnoticed and unpublicized. The "closed-book" methodology of rendering a pool of arbitrators and then having the members select only from this list is ripe for abuse, whether or not it happens. Finally, the composition of ICAS and the arbitrators is not representative of the parties involved. It relies much too heavily on individuals within the world of SGBs, when CAS should be drawing from other sources. Simply because sport-related disputes are complex and fact-specific, there is no reason to have over half of the selected arbitrators be from SGB related backgrounds. CAS should reform itself to incorporate a structural change that allows it to be fully independent from the influence of SGBs and to better represent the individual athlete in the composition of ICAS.

Financially, CAS is dependent on the funding, but independent on the adjudication. CAS requires outside funding because it derives no income on its own. This is beneficial for the individual athlete because the cost of arbitration would otherwise be prohibitively expensive. However, most of its funding comes from two sources: the IOC and FIFA. These two entities are also involved in a majority of the cases adjudicated by CAS. Critics argue that this prevents CAS from being impartial when its

funding sources are parties in the suit, but CAS and others argue that this funding scheme makes sense exactly because the IOC and FIFA are the largest users of the court, and therefore should contribute the most for its funding. The Swiss Federal Tribunal has reaffirmed that the financial set-up of CAS has not affected its ability to be impartial, and the analysis of this article has not led to any viable claims of bias due to financial support of CAS.

In conclusion, CAS is pursuing a golden goal. But CAS needs to put in new players if it's going to score. The people playing now do not have the skills to navigate the modern era of international sports.