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## The Decisions Rendered by the CAS Ad Hoc Division at the Turin Winter Olympic Games 2006

Antonio RIGOZZI\*

For the sixth time in the history of the Olympics, and for the third time in the history of the Winter Games, the Court of Arbitration for Sports (CAS) established an ad hoc division to resolve all disputes in connection with the XX Olympic Winter Games held in Turin, Italy, February 10 to 26, 2006 (the “Ad Hoc Division”). The importance of the role of the CAS ad hoc divisions for the Olympics has become evident through the work of the earliest ad hoc divisions, which earned a solid reputation for their expertise, fairness and expeditious decision-making.<sup>1</sup> The Swiss Supreme Court explicitly emphasized this in the well-known *Lazutina* decision of May 27, 2003:

In competitive sport, particularly the Olympic Games, it is vital both for athletes and for the smooth running of events, that disputes are resolved quickly, simply, flexibly and inexpensively by experts familiar with both legal and sports-related issues.... Thanks in particular to the creation of ad hoc divisions, [the CAS] enables the parties concerned to obtain a decision quickly, following a hearing conducted by persons with legal training and recognized expertise in the field of sport, whilst protecting their right to a fair hearing.<sup>2</sup>

Seven publicly available awards have been handed down in Turin.<sup>3</sup> Considering the increase in the number of participants and in the number of competitions,<sup>4</sup> this constitutes a slight decrease<sup>5</sup> in the caseload over Nagano (six awards)<sup>6</sup> and Salt Lake City

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<sup>1</sup> For a comprehensive review and analysis of the CAS Ad Hoc Division for the Olympic Games, see GABRIELLE KAUFMANN-KOHLER, *ARBITRATION AT THE OLYMPICS: ISSUES OF FAST-TRACK DISPUTE RESOLUTION AND SPORTS LAW* (2001). For more limited studies of the Ad Hoc Division and of its case law, see Gerry Tucker & Antonio Rigozzi, *Sports Arbitration for the 2008 Beijing Olympic Games*, 69 *ARB.* 184–99 (2003); Michael J. Beloff, *The CAS Ad Hoc Division at the Sydney Olympic Games*, 2 *INT'L SPORTS L. REV.* 105–18 (2001); Dirk-Reiner Martens & Frank Oschütz, *Die Entscheidungen des TAS in Sydney*, *SPURT* 4–8 (2001); Richard McLaren, *CAS Ad Hoc Division: An Olympic Experience!*, *SCHIEDSVZ* 187–90 (2004); Richard McLaren, *Arbitration for Sport: the Ad Hoc Division at the Olympic Games*, 11 *MARQ. SPORTS L. REV.* 515 (2001); Domenico Di Pietro, *The Ad Hoc Division of the Court of Arbitration for Sport at the Athens 2004 Olympic Games: An Overview*, in *THE COURT OF ARBITRATION FOR SPORT 1984–2004* 34–159 (Robert Sieckmann et al. eds., 2006).

<sup>2</sup> Larissa Lazutina & Olga Danilova v. CIO, FIS & CAS, Swiss Federal Tribunal, May 27, 2003, 29 *Y. B. COM. ARB.* 206, 219 (2004). The complete text of the original French text is reported in *BULL. ASSOC. SUISSE ARB.* 601 (2003). On the bearing of this decision for the question of whether the CAS Ad Hoc Division qualifies as a “true arbitral tribunal,” see ANTONIO RIGOZZI, *L'ARBITRAGE INTERNATIONAL EN MATIÈRE DE SPORT* 301 (2005).

<sup>3</sup> See *infra*.

<sup>4</sup> At the Turin Winter Games, a record number of 2,508 athletes (960 women, 1,548 men) from eighty National Olympic Committees (NOCs) competed, and eighty-four events were staged, setting yet another record.

<sup>5</sup> This calculation is based on the cases on the CAS website, available at <www.tas-cas.org>.

<sup>6</sup> For an account of the activities of the CAS Ad Hoc Division in Nagano, see KAUFMANN-KOHLER, *supra* note 1, at 95–104.

(seven awards)<sup>7</sup> cases. It is most likely that this is the consequence of the previous case law of the Ad Hoc Division, which has encouraged the International Olympic Committee (IOC) and the International Federations (IFs) as well as the National Olympic Committees (NOCs) to enhance their regulations and practice in order to avoid disputes arising.

The purpose of this article is twofold. First, it gives an account of the activities of the Ad Hoc Division in Turin. Secondly, it provides thoughts on two issues that have arisen in Turin, namely, the jurisdiction of the Ad Hoc Division and the review by the panels of the decisions regarding athletes' selection.

#### I. THE STRUCTURE OF THE CAS AD HOC DIVISION AND THE LEGAL FRAMEWORK

The structure of the Ad Hoc Division in Turin does not need to be discussed in detail because it has not materially changed vis-à-vis the well-known structure set up in earlier versions. Unlike in Salt Lake City and Athens, the Turin Ad Hoc Division was composed of *two* Presidents (Judge Raghunandan Pathak, former Chief Justice of India, and Dr. Robert Briner, former President of the ICC Court of Arbitration). The number of arbitrators (nine) remained unchanged since the previous Winter Olympic Games.

The members of the Ad Hoc Division were selected by the International Council of Arbitration for Sport (ICAS)—under the aegis of which the CAS operates—taking into account independence, qualification and experience in sports and arbitration law, as well as geographical distribution. The arbitrators in Turin came from nine different countries representing four continents.<sup>8</sup>

The proceedings before the Ad Hoc Division were governed by the CAS Arbitration Rules for the Games of the XX Olympiad in Turin ("CAS Ad Hoc Rules"),<sup>9</sup> which were issued by ICAS under the powers conferred in Article S6.8 of the Code of Sports-related Arbitration ("CAS Code").<sup>10</sup> As explicitly recorded in all the awards rendered in Turin, the proceedings "are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (PIL Act). The PIL Act applies to th[e] arbitration as the result of the location of the seat of the CAS ad hoc Division in Lausanne Switzerland, pursuant to Article 7 of the CAS Ad Hoc Rules."<sup>11</sup>

Much has been written on the importance of the applicability of Swiss arbitration law, in particular to make sure that "the Games move around, but the legal framework is

<sup>7</sup> For an account of the activities of the CAS Ad Hoc Division in Salt Lake City, see Peter Leaver, *The CAS Ad Hoc Division at the Salt Lake City Winter Olympic Games 2002*, 3 INT'L SPORTS L. REV. 45–52 (2002); Dirk-Reiner Martens & Frank Oschütz, *Die Entscheidungen des CAS in Salt Lake City*, SPURT 89–93 (2002).

<sup>8</sup> The nine members were Dirk-Reiner Martens (FR.G.), Massimo Coccia (Italy), Hans Nater (Switz.), Kaj Hober (Swed.), and Peter Leaver (U.K.) from Europe; Maidie Oliveau (U.S.) and Richard McLaren (Can.) from North America; Malcolm Holms from Austl.; and Akira Kotera (Japan) from Asia.

<sup>9</sup> CAS Arbitration Rules for the Games of the XX Olympiad in Turin, October 14, 2003 (on file with author).

<sup>10</sup> Available at <www.tas-cas.org>.

<sup>11</sup> Some awards also mentioned the fact that "the PIL Act applies because of the choice of law clause contained in art. 17 of the CAS Ad Hoc Rules." This addition is redundant and should be avoided because it could give the incorrect impression that the parties could elect to apply another *lex arbitri* than the PIL Act.

stable.”<sup>12</sup> With specific regard to the Turin Games, the applicability of the PIL Act was particularly important because under the local arbitration law, the panels would not have had the authority to order preliminary relief.<sup>13</sup>

## II. THE CASES DECIDED IN TURIN

The cases referred to the Ad Hoc Division in Turin involved issues of selection and eligibility, doping disputes, “field of play decisions” and “start prohibition,” the latter being an issue addressed by the Ad Hoc Division for the first time.

### A. WADA v. ZACHERY LUND, USADA AND OTHERS<sup>14</sup>

The first doping case concerned Zachary Lund, a U.S. bobsledder who has openly been using medication containing Finasteride since 1999 to treat male pattern baldness. Following a doping control test conducted on November 10, 2005, Mr. Lund tested positive for Finasteride, an alphareductase inhibitor included on the World Anti Doping Agency (WADA) Prohibited List since January 1, 2005 as a masking agent. While he had disclosed on the Doping Control Form that he had taken Proscar, a medication which contains Finasteride, Mr. Lund did not have, and had not applied for, a Therapeutic Use Exemption (TUE) for the use of Finasteride.

As a consequence of the notification of the positive result, Mr. Lund’s medical practitioner signed a TUE application, which was purportedly issued by the United States Bobsled & Skeleton Federation (USBSF) on December 21, 2005 and purportedly covered the period between October 31, 2005 and October 31, 2006. On January 16, 2006, the USBSF selected Mr. Lund to compete in the XX Olympic Winter Games in Turin. On January 22, 2006, Mr. Lund acknowledged that he had committed a doping violation in breach of the applicable doping rules and accepted the sanction imposed by the United States Doping Agency (USADA), consisting of: (i) a public warning; and (ii) disqualification of his results in the competition at the occasion of which he tested positive. On February 2, 2006, WADA filed an appeal requesting a two-year period of ineligibility sanction against Mr. Lund in accordance with Article 10.2 of the applicable FIBT Doping Control Regulations, which incorporate the World Anti-Doping Code.

As a preliminary matter, the panel rejected the athlete’s submission that Finasteride should not have been on the Prohibited List at all, and refused to allow cross-examination of WADA’s witnesses about the reason for the inclusion of Finasteride on the Prohibited

<sup>12</sup> Gabrielle Kaufmann-Kohler, *Identifying and Applying the Law Governing the Arbitration Procedure: The Role of the Law of the Place of Arbitration*, ICCA CONGRESS SERIES NO. 9, 348 (A.J. van den Berg ed., 1998). Also quoted in Raguz v. Sullivan & others [2000] NSW 240, s. 99, BULL. ASSOC. SUISSE ARB. 335, 349 (2001).

<sup>13</sup> See Antonio Rigozzi, *Preliminary Relief in CAS Arbitration*, in THE COURT OF ARBITRATION FOR SPORT 1984–2004 216–34 (Robert Sieckmann et al. eds., 2006).

<sup>14</sup> World Anti Doping Agency (WADA) v. Zachery Lund, United States Anti-Doping Agency (USADA), United States Bobsled & Skeleton Federation (USBSF) & Fédération Internationale de Bobsleigh et de Tobogganing (FIBT), Case No. CAS OG[-TUR] 06/001, February 10, 2006, available at <www.tas-cas.org/en/pdf/Lund.pdf>.

List. The panel confirmed<sup>15</sup> the principle according to which the composition of the Prohibited List is not within the jurisdiction of the CAS.

The existence of a doping offence being outside debate, the only issue was the applicable sanction. Under the FIBT Doping Control Regulations, the only way for Mr. Lund to avoid the so-called two-year “automatic sanction” requested by WADA, was to either establish that he bore “no fault or negligence” (in which case the period of ineligibility should be eliminated) or “no significant fault or negligence” (in which case the period of ineligibility could be reduced).<sup>16</sup> The panel recalled that “[a]s CAS panels have frequently stated and the WADA Code, the FIBT Doping Control Regulations, and Annex A to the USADA Protocol expressly provide, it is each athlete’s personal duty to ensure that no Prohibited Substance enters his or her body.”<sup>17</sup>

Following the athlete’s candid admission that he “failed to check [the FIBT website] in 2005,” which clearly indicated that Finasteride had been added to the list of Prohibited Substances, “no fault or negligence” was clearly out of consideration:

it cannot seriously be argued that an athlete who realized (and has been told by his national federation) that he had to check the Prohibited List each year and who failed to look at the list at all for over a year had exercised the utmost caution, albeit that for several years previously he had scrutinised the list with care. It is his failure to continue to monitor the Prohibited List, in accordance with his duty as an athlete, that has placed Mr. Lund in his present predicament.<sup>18</sup>

Hence, the only open question was whether Mr. Lund could obtain a reduction of the sanction for “no significant fault or negligence.” In one single sentence, the panel found “that Mr Lund has satisfied it that in all of the circumstances he bears no significant fault or negligence, and, therefore, reduces the period of ineligibility from two years to one year,”<sup>19</sup> i.e., to the minimum allowed by the applicable rules. One can only speculate on the exact reasons which led the panel to this conclusion. When considering the text of the award in its entirety, it seems that the decisive circumstances were the following:

- (i) that the panel found Mr. Lund to be an honest athlete, who was open and frank about his failures; and, more importantly,
- (ii) that Mr. Lund “was badly served by the anti-doping organisations,”<sup>20</sup> which failed to take preventive action before the positive test despite the fact that he openly disclosed that he was taking medication that was known to contain a prohibited substance.

<sup>15</sup> Quoting FINA v. Kreuzmann German Swimming Federation CAS 2005/A/921 (unreported), in which the panel held: “Once a substance has been put on the List, it is the fact that such a substance has been detected in the athlete’s body which is deciding. The List and the agreed procedure for its elaboration and enforcement leaves no room for a counter-analysis to determine whether a substance was effectively used as a masking agent or not.”

<sup>16</sup> On these provisions, see Antonio Rigozzi, Gabrielle Kaufmann-Kohler & Giorgio Malinverni, *Doping and Fundamental Rights of Athletes: Comments in the Wake of the Adoption of the World Anti-Doping Code*, 4 INT’L SPORTS L. REP. 39–67 (2003).

<sup>17</sup> WADA v. Zachery Lund, USADA and others, CAS OG[-TUR] 06/001, para. 4.11.

<sup>18</sup> *Id.* para. 4.13.

<sup>19</sup> *Id.* para. 4.17.

<sup>20</sup> *Id.* para. 4.16.

The panel further noted that it arrived at its decision to exclude “no fault or negligence” with “a heavy heart as it means that Mr. Lund will miss the XX Olympic Winter Games.”<sup>21</sup> However, the mere fact of missing a specific competition, albeit the Olympics, should not be a relevant circumstance in assessing the duration of the reduction of the suspension.<sup>22</sup>

#### B. AUSTRALIAN OLYMPIC COMMITTEE (AOC) v. FIBT AND OTHERS<sup>23</sup>

The second doping related case the Ad Hoc Division heard in Turin concerned an application by the Australian Olympic Committee (AOC) against the International Bobsleigh and Skeleton Federation (FIBT),<sup>24</sup> as respondent, and the Brazilian Bobsleigh Association, as interested party.<sup>25</sup>

According to the applicable FIBT qualifying rules, “the first two pilots in the four-man standings of the North American Challenge Cup of the Olympic season”<sup>26</sup> qualify for the Olympics. At the qualifying race, which was held on January 22, 2006, the Brazilian and the New Zealand four-man bobsleigh teams qualified for the Olympic Winter Games by finishing first and second respectively. Australia, by finishing third in the Challenge Cup, did not qualify.

Following the announcement in the press that one of the members of the Brazilian four-man bobsleigh team which won the qualification race, Armando Dos Santos, had tested positive in an out-of-competition doping test conducted in Brazil on January 4, 2006, the AOC filed an application asking for “an order to declare the Brazilian four-man bobsleigh team ineligible to compete in the Olympic Winter Games and to declare instead the Australian four-man bobsleigh team eligible to compete in the same Games.”<sup>27</sup> This case potentially raised the very delicate issue of the consequences of the disqualification of a team member vis-à-vis the results of the team. However, the case could easily be resolved since the sole “adverse analytical finding” resulting from the positive test did not constitute in and of itself an “anti-doping rule violation.” As noted by the panel:

An adverse analytical finding is simply a report by the Anti-Doping Laboratory that a sample is positive for a prohibited substance. Thereafter, the applicable Anti-Doping Regulations (FIBT Regulations in this case) provide for an extensive process, including the athlete’s rights: to ask for a B sample test, be present at the testing of the B sample, and to have a hearing to contest the

<sup>21</sup> *Id.* at para. 4.15.

<sup>22</sup> Antonio Rigozzi, *Les nouvelles compétences du Tribunal Arbitral du Sport en matière de dopage: premiers commentaires sur le nouveau système de résolution des litiges aux Etats-Unis*, *JUSLETTER*, April 15, 2002, para. 11, available at <[www.weblaw.ch/jusletter/Artikel.jsp?ArticleNr=1633](http://www.weblaw.ch/jusletter/Artikel.jsp?ArticleNr=1633)>.

<sup>23</sup> Australian Olympic Committee (AOC) v. Fédération Internationale de Bobsleigh et de Tobogganing (FIBT) and others, Case No. CAS-JO[-TUR] 06/010, February 20, 2006, available at <[www.tas-cas.org/en/pdf/OG010.pdf](http://www.tas-cas.org/en/pdf/OG010.pdf)>.

<sup>24</sup> As with other international sports federations referred to in this article, the FIBT is commonly known by the acronym formed from its French name.

<sup>25</sup> The IOC participated in this proceeding as an “observer,” although participation in such capacity is not provided for in the CAS Ad Hoc Rules.

<sup>26</sup> FIBT, International Rules, October 1, 2005, R. 1.2.2.1 available at <[www.bobsleigh.com](http://www.bobsleigh.com)>.

<sup>27</sup> Australian Olympic Committee (AOC) v. FIBT and others, CAS-JO[-TUR] 06/010, para. 1.8.

adverse analytical finding. Only after that process has been completed and the adverse analytical finding is confirmed is an anti-doping rule violation found.<sup>28</sup>

In the present case, there was no decision by any authority either (i) declaring that Mr. Dos Santos committed an anti-doping rule violation or (ii) provisionally suspending him. Accordingly, since the Brazilian NOC had chosen to remove Mr. Dos Santos from the Olympic team based on its internal policies, the panel had no other choice but to deny the Australian application.

### C. EVI SACHENBACHER-STEHLÉ V. FIS<sup>29</sup>

The case involving the German cross-country skier Evi Sachenbacher should be clearly distinguished from the doping cases. On February 9, 2006, the athlete was subjected to a blood screening/testing as a part of a full field testing by the International Ski Federation (FIS), which revealed a first haemoglobin value reading for Hb of 16.5 mg/ml and a second reading of 16.4 mg/ml.

Under the applicable guidelines,<sup>30</sup> the maximum tolerated values for female athletes was a haemoglobin blood reading of less than 16.0 Hb mg/ml.<sup>31</sup> This rule further provided that if an athlete showed values equalling or exceeding this maximum, she would “not [be] allowed to start any competition for five consecutive days.”<sup>32</sup> Accordingly, on February 9, 2006, Ms. Sachenbacher was notified with a five-day “start prohibition.” The effect of that prohibition was to preclude her from competing in an event on February 12, 2006.

Accordingly, together with the German Ski Federation, she filed an application on February 10, 2006. Ms. Sachenbacher submitted in substance that she should receive a dispensation for the duration of the Olympic Games since she allegedly has a naturally high elevated level of Hb.

The panel noted that since 2003, requests have been made each year on behalf of Ms. Sachenbacher to issue a dispensation but that all of them have been unsuccessful in persuading the FIS that she has a naturally high elevated level of Hb. Although it heard evidence from both the German team physician and the Chairman of the FIS “Doping” Medical Committee, the panel refused “to substitute its views for those of the experts who have declined to grant the dispensation to this athlete for a naturally high elevated

<sup>28</sup> *Id.* para. 4.3.

<sup>29</sup> Deutscher Skiverband (German Ski Association) & Evi Sachenbacher-Stehle v. International Ski Federation (FIS), Case No. CAS-JO[-TUR] 06/004, February 12, 2006, available at <[www.tas-cas.org/en/pdf/Sachenbacher.pdf](http://www.tas-cas.org/en/pdf/Sachenbacher.pdf)>.

<sup>30</sup> FIS Procedural Guidelines to the FIS Anti-Doping Rules 2005–2006, November 8, 2005, available at <[www.fis-ski.com](http://www.fis-ski.com)>.

<sup>31</sup> *Id.* R.B.4.2.

<sup>32</sup> Although part of the FIS Anti-Doping Rules, this prohibition from participating in competition “is not a sanction [following a doping offence], but is considered a protection of the health of the Athlete.” *Id.* R.B.4.3. This kind of prohibitions are well known in cycling, where the athletes controlled with haematocrit above fifty per cent (with hemoglobin above 17 g/dl) are prohibited to compete for a period of at least fifteen days.

level of Hb over the past three years.”<sup>33</sup> The panel implicitly considered that it would have been prepared to allow such an exception only if the rules providing for the start prohibition had been arbitrary. In the case at hand, the panel found that the limits established by the FIS could not be considered as arbitrary. The only reason mentioned in support of that conclusion was that they were established in cooperation with WADA. It is submitted that, knowing the existing criticism with respect to CAS decisions applying the WADA Code, this sort of bold statement should have been avoided.<sup>34</sup>

#### D. SAMIR AZZIMANI v. MOROCCAN NOC<sup>35</sup>

The first selection case involved Samir Azzamini, a Moroccan skier affiliated to the Moroccan Ski Federation (Fédération Royale Marocaine de Ski et Montagne). The Moroccan Ski Federation decided not to select Mr. Azzamini for health reasons. By application dated February 8, 2006, Mr. Azzamini requested to: (i) be admitted in the events of Slalom and Giant Slalom (for which he fulfilled the selection requirements set by the International Ski Federation pursuant to the Olympic Charter); (ii) participate to the opening ceremony; and (iii) benefit from all the facilities accorded to the athletes during the Games.

In substance, Mr. Azzimani contended that his eviction from the Games based on a criterion not provided for by the Olympic Charter was discriminatory and violated (i) the non-discrimination principle,<sup>36</sup> as well as (ii) the fundamental “human right” to practise sport,<sup>37</sup> both of which are explicitly recognized by the Olympic Charter. The Moroccan NOC did not make any submission but forwarded two medical certificates dated January 24 and 29, 2006, which prescribed Mr. Azzimani to observe a period of medical rest of, respectively, eight to ten weeks and three months.

For the first time in the history of the Ad Hoc Division, the President of the Ad Hoc Division appointed a single arbitrator under Article 11(2) of the Ad Hoc Rules.<sup>38</sup> The sole arbitrator decided to rule on a document only basis and not to hold a hearing pursuant to Article 15(c) of the CAS Ad Hoc Rules,<sup>39</sup> another first for the Ad Hoc Division.

<sup>33</sup> *Evi Sachenbacher-Stehle v. FIS*, CAS-JO[-TUR] 06/004, para. 4.11. This solution is consistent with the one adopted by CAS with respect to the review of decisions concerning Therapeutic Use Exemption (TUE). The CAS held that only on the basis of compelling evidence (“*éléments très probants*”) in the TUE file would it be prepared to consider that a TUE was wrongly denied (*Franck Bouyer v. UCI & WADA*, Case No. TAS 2004/A/769, March 18, 2005, available at <[www.wada-ama.org/rtecontent/document/CASELAW\\_Bouyer.pdf](http://www.wada-ama.org/rtecontent/document/CASELAW_Bouyer.pdf)>).

<sup>34</sup> See, e.g., Cédric AGUET, *Un an après l'entrée en vigueur du code de l'agence mondiale antidopage : bilan du point de vue des athlètes*, JUSLETTER, February 20, 2006, available at <[www.weblaw.ch/jusletter/Artikel.asp?ArticleNr=4576](http://www.weblaw.ch/jusletter/Artikel.asp?ArticleNr=4576)>.

<sup>35</sup> *Samir Azzimani v. Comité National Olympique Marocain*, Case No. TAS-OG[-TUR] 06/003, February 10, 2006, available at <[www.tas-cas.org/fr/pdf/Azzimani.PDF](http://www.tas-cas.org/fr/pdf/Azzimani.PDF)>.

<sup>36</sup> “Any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement.” Olympic Charter, September 1, 2004, available at <[www.olympic.org](http://www.olympic.org)>.

<sup>37</sup> In relevant part, the fourth fundamental principle of Olympism reads as follows: “The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind.” *Id.*

<sup>38</sup> This possibility was first introduced in the Ad Hoc Rules for the Sydney Olympics. KAUFMANN-KOHLER, *supra* note 1, at 8. Art. 11(2) reads as follows: “In the event that it appears appropriate under the circumstances, the President of the Ad Hoc Division may, in his or her discretion, appoint a sole arbitrator.”

<sup>39</sup> In relevant part, this provision reads as follows: “*Except where it considers another form of procedure more appropriate*, the Panel shall summon the parties to a hearing on very short notice immediately upon receipt of the application” (emphasis added).

The sole arbitrator recalled the award rendered by the Ad Hoc Division at the Salt Lake City Olympics in the *Bassani-Antivari* case, where the panel held that it did “not have the discretion ... to overrule the NOC and to enter a competitor on an individual basis.”<sup>40</sup> Surprisingly, the sole arbitrator added that the medical certificates in the record constituted a valid reason not to select Mr. Azzimani, and therefore that the decision in this respect was not arbitrary. In fact, despite citing the *Bassani-Antivari* award, the sole arbitrator did not follow the solution adopted by that panel, which explicitly noted that:

As is well known, there is ample case law in the jurisdiction of many countries with respect to whether or not a competitor has an enforceable right to have his/her NOC enter him/her in the Olympic Games. The national courts of a given country or other designated competent authority constitute the appropriate forum to rule on this question. There has been a significant number of cases where competitors have in fact succeeded in their national fora with such requests.<sup>41</sup>

The departure from the *Bassani-Antivari* principle is confirmed by the two other selection disputes which arose in connection with the participation in snowboarding events. In both cases, the Ad Hoc Division heard the athletes’ application against their NOC.

#### E. ANDREA SCHULER V. SWISS OLYMPIC AND OTHERS<sup>42</sup>

The second selection case concerned Andrea Schuler, a Swiss professional snowboarder in the half-pipe discipline, who was not selected for the Games. The selection process for the Swiss snowboarding team was governed by several documents,<sup>43</sup> which restated the selection criteria, indicated the competitions to be taken into account for selection, and specified the date for the final determination.<sup>44</sup> It is undisputed that the relevant selection criteria were those set out by section 3.4 of the Snowboard Selection Guidelines (*Leistungsanforderungen*), which, in the panel’s translation, read as follows:

##### 3.4 Performance Requirements

Athletes acquiring their selection through 1 × Top 4 (men), 1 × Top 3 (women) must achieve these performance confirmations as of December 05. The demonstration of the performance trend is mandatory in January.

<sup>40</sup> Gaia Bassani-Antivari v. International Olympic Committee (IOC), Case No. TAS OG-SLC 02/003, February 12, 2002, CAS Digest III, at 585, 130 J. DROIT INT’L (CLUNET) 286 (2003), Casenote Hascher, available at <[www.tas-cas.org/fr/pdf/juris3.pdf](http://www.tas-cas.org/fr/pdf/juris3.pdf)>.

<sup>41</sup> *Id.*

<sup>42</sup> Andrea Schuler v. Swiss Olympic & Swiss Ski, Case No. CAS-JO[-TUR] 06/002, February 12, 2006, available at <[www.tas-cas.org/en/pdf/schuler.pdf](http://www.tas-cas.org/en/pdf/schuler.pdf)>.

<sup>43</sup> Swiss Olympic, Achievement Guidelines, November 5, 2004 (outlining the general principles to be adopted by each national federation in its sport disciplines), the Snowboard Selection Guidelines jointly adopted by Swiss Olympic and Swiss Ski, February 5, 2005 (specifying the relevant selection criteria and period) and the Selection Criteria for the Olympic Winter Games of Turin 2006. Sports Discipline: Snowboard, October 31, 2005 (the Selection Criteria).

<sup>44</sup> January 27, 2006. It should be noted that on November 21, 2005, Swiss Olympic sent out a document entitled *Additional Selection Concept Snowboard/Internal Selections (the Additional Selection Concept)*, intended mainly to regulate the internal selection process in case the results obtained in international competitions might not definitively identify the snowboarders qualifying to make the Swiss Olympic team. The panel noted that that the Additional Selection Concept (i) quotes or restates the previous (unchallenged) procedure; and (ii) was mainly meant to specify the details for internal trials (which could not be applied in the present case since the number of places available included both male and female athletes). In any event, as the athlete was challenging the Additional Selection Concept, the panel decided to disregard it “in the applicant’s favour.”

Athletes acquiring their selection through two performance confirmations (2 x Top 10 (men), 2 x Top 6 (women)), must achieve one of these performance confirmations in Dec 05/Jan 06.

If the performance requirements are fulfilled by more athletes than there are starting places, the selection is made according to the World Cup results with top results towards the end of the selection period being given more weight. If the performance trend cannot be interpreted clearly on the basis of the results, the selection of the athletes concerned can be made on the basis of an internal selection.<sup>45</sup>

In the case at hand, six half-pipe snowboarders had met the performance requirements set forth in the first two paragraphs of section 3.4. Because only five places were available for Switzerland, one athlete had to be excluded by resorting to the other criteria set out by the Snowboard Selection Guidelines.

The panel considered that the “first evaluation step,” i.e., the one based on the first and second paragraphs, was purely objective. By contrast, the panel held that the next evaluation step, i.e., the one based on the third paragraph, “requires the assessment of the World Cup results not simply as objective criteria but assessed in relation to the performance trend towards the end of the selection period.”<sup>46</sup> According to the panel, this is (i) clearly indicated by the language of section 3.4, third paragraph, and (ii) confirmed by section 3.3, which lends itself to an essentially subjective assessment by the coach. Hence, the panel held that, since the coach could consider also out-of-competition performances (i.e., practice sessions) to determine whether an athlete is reaching her peak level or whether she is performing in a declining trend, the concept of performance trend did not constitute an objective criterion. The panel was reinforced in that conclusion by the fact that, upon a specific question by the panel, Ms. Schuler was unable to single out the athlete who was to be excluded. The panel finally stated the principle that:

unless selection rules set forth completely objective criteria (e.g., ranking or points in a given competition), a selection process must always rely in some fashion or other on the subjective judgment of the persons who select the athletes.<sup>47</sup>

Because there was no submission that: (i) Swiss Olympic acted arbitrarily; or (ii) the selection process was otherwise unfair, the panel concluded that Swiss Olympic “exercised its discretion in a reasonable, fair and non-discriminatory manner, and in accordance with the rules.”<sup>48</sup> Accordingly, it dismissed Ms. Schuler’s application.

#### F. ISABELLA DAL BALCON V. CONI AND OTHERS<sup>49</sup>

The third selection case also arose in connection with participation in a snowboarding event, the Parallel Giant Slalom. It opposed Isabella Dal Balcon, a twenty-eight-year-old

<sup>45</sup> Andrea Schuler v. Swiss Olympic and others, CAS-JO[-TUR] 06/002, para. 5.7. The Snowboard Selection Guidelines also set out the following warning: “Achieving the performance requirements does not entail an automatic selection for the OG Turin 2006.” Moreover, sec. 3.3 of the Snowboard Selection Guidelines provides for the following: “Additional criteria: coach’s judgment (performance trend, health).”

<sup>46</sup> Andrea Schuler v. Swiss Olympic and others, CAS-JO[-TUR] 06/002, para. 5.15.

<sup>47</sup> *Id.* para. 5.16.

<sup>48</sup> *Id.* para. 5.19.

<sup>49</sup> Isabella Dal Balcon v. Comitato Olimpico Nazionale Italiano (CONI) & Federazione Italiana Sport Invernali (FISI) and others, Case No. CAS-JO[-TUR] 06/008, February 18–19, 2006, available at <[www.tas-cas.org/en/pdf/OG008.pdf](http://www.tas-cas.org/en/pdf/OG008.pdf)>.

Italian snowboarder, to the Italian National Olympic Committee (CONI) and the Italian Ski Federation (FISI). Only four spots were available for female snowboarders in parallel slalom.

FISI was the entity responsible for proposing the members of the snowboarding team to be selected by CONI. In their relevant part, the applicable criteria for selection provided that qualification for the Games would be based on the results obtained in World Cup competitions from September 14, 2005, applying an escalating coefficient to the three races prior to the Games. It was clearly stated that the selection criteria should be “as objective as possible” and that FISI maintained discretion to determine the selections. The document setting out these criteria was never provided to the athletes. The selection criteria were communicated to the athletes orally at pre-race meetings by Andrea Grisa, trainer of the Italian snowboarding team.

On January 13, 2006, Mr. Grisa decided that the selection would be based only on the two best results (the two-best rule) instead of the results initially provided for. The new criteria were only communicated orally to the team members—excluding Ms. Dal Balcon, who was absent—the day before the final competition to be used for selection. According to the declarations of CONI and FISI at the hearing, the amendment in favour of the two-best rule was adopted “because it was in their view unfair to apply the October 2005 criteria to some athletes who missed World Cup competitions due to injuries or because of athletes’ substitutions by the coach in certain events.”<sup>50</sup> The application of the new criteria resulted in the selection of Marion Posch, Carmen Ranigler, Corinna Baccaccini and Lidia Trettel; Ms. Dal Balcon was not selected for the team.<sup>51</sup> It was understood, however, that on the basis of the October 2005 criteria, Ms. Dal Balcon would have been selected because she was in fourth place.

On February 1, 2006, the FISI advised Ms. Dal Balcon that she was not selected to be a member of the Italian team. That decision was subsequently confirmed by the FISI and the CONI, both pointing out that that the selection was “completely discretionary.”<sup>52</sup>

On February 17, 2006, Ms. Dal Balcon applied to the Ad Hoc Division requesting, *inter alia*, the following relief:

1. Annulment of the Decision of CONI and FISI of February 1, 2006...
2. Order to the effect that Applicant is entitled to participate in the Italian team for snowboard in Olympic Winter Games 2006 (Parallel G Slalom).

The panel found that the two-best rule, which constituted a “radical alteration” of the original criteria, “came too late in the selection process to be fair particularly as it was

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<sup>50</sup> *Id.* para. 2.7.

<sup>51</sup> Ms. Trettel did not compete in the first event due to injury and was withdrawn by the coach from the fourth event on January 8, 2006, in favour of a substitute athlete. She therefore had only three competitive results to calculate under the October 2005 criteria. The two-best rule had the effect of favouring Ms. Trettel because she had an excellent result in the final race, which was increased by the highest coefficient.

<sup>52</sup> *Isabella Dal Balcon v. CONI and others, CAS-JO[-TUR] 06/008, para. 1.3.*

not announced in a complete fashion and communicated to the applicant.”<sup>53</sup> Therefore, it held that the application of the new criteria would have been “unfair and unreasonable.”<sup>54</sup> Hence, the panel ordered the FISU and the CONI “to place Ms Isabella Dal Balcon in the Olympic team of Italy”<sup>55</sup> and “to take all immediate steps to enable [her] to participate in the training races starting the morning of 19 February 2006.”<sup>56</sup>

Finally, it should be noted that the panel felt compelled to distinguish the present case from the above-mentioned Swiss case in the following terms:

This decision is consistent with the *Schuler* decision in that this panel has found that there was no discretion used by the FISU in the final selection. FISU accepted the direction of the DA Snowboard albeit on the changed criteria that this panel has found to be arbitrary and unfair and therefore to be disregarded. In contrast the *Schuler* decision was made using discretion that had been properly preserved to the Swiss National Federation. The panel in *Schuler* declined to intervene in the legitimate exercise of discretion by the national federation. There was no discretion used in this case. On this basis the two cases are distinguishable.<sup>57</sup>

#### G. CANADIAN OLYMPIC COMMITTEE (COC) v. ISU AND OTHERS<sup>58</sup>

As in previous Games, the Turin Games had their “field of play dispute.” It arose during the International Skating Union’s (ISU) ladies’ short-track speed skating final event of February 15, 2006, in which the first two finishers of the race, Meng Wang of China and Evgenia Radanova of Bulgaria, crossed the finish line side by side. Anouk Leblanc-Boucher of Canada ranked third.

After the race, the leader of the Canadian short-track team told the head referee for the competition that he wanted to file a protest as the team considered that Ms. Radanova had violated the “kicking out” rules. The head referee replied that this was acceptable, but that if the protest related to a decision on a racing rule such decision was not open to appeal. Although it did not file a formal written protest with the ISU, the COC submitted an application to the Ad Hoc Division requesting, inter alia, the following relief:

Order the ISU to instruct its Referee to review the video of the finish of the ladies’ Short Track Speed Skating finals event, A Final, and determine whether Ms Radanova committed a “kicking out” infraction.<sup>59</sup>

The underlying issue was the interpretation of the applicable ISU Rules.<sup>60</sup> Specifically, the apparent conflict between rule 123 of the General Regulations, which, on its face, permits protests to be made without limitation as to the type of protest, and rule 293 of

<sup>53</sup> *Id.* para. 5.10.

<sup>54</sup> *Id.* para. 5.10.

<sup>55</sup> *Id.* para. 7.3.

<sup>56</sup> *Id.* para. 7.4.

<sup>57</sup> *Id.* para. 5.12.

<sup>58</sup> Canadian Olympic Committee (COC) v. International Skating Union (ISU) and others, Case No. CAS-JO[-TUR] 06/006, February 17–19, 2006, available at <[www.tas-cas.org/en/pdf/006%20COC.pdf](http://www.tas-cas.org/en/pdf/006%20COC.pdf)>.

<sup>59</sup> *Id.* para. 16(c).

<sup>60</sup> International Skating Union, ISU Rules, June 2004.

the Special Regulations, which does not permit protests against breaches of racing rules, was at the heart of this application.

The panel deplored the wording of the ISU Regulations, which could have been more intelligible, but decided that it did not need to decide between the rival contentions as to their true construction. Indeed, the panel noted that the ISU Regulations clearly give the referee discretion to view the instant digital replay if he is in doubt and that in the present case the referee had no doubt. Noting that there was “no allegation that the referee . . . acted in bad faith” and that the referee’s decision was not protested in accordance with the ISU Regulations, the panel held that there was “no reviewable decision for the panel to consider.”<sup>61</sup>

Although the award is not particularly clear on this point, it appears that the panel had wished to restate the principle set in another short-track speed skating case during the Salt Lake City Olympics, according to which the CAS will not review a field of play decision only because it is wrong or one that no sensible person could have reached.

Before a CAS panel will review a field of play decision, there must be evidence, which generally must be “direct evidence, of bad faith. . . . [T]here must be some evidence of preference for, or prejudice against, a particular team or individual . . . e.g., as a consequence of corruption. The panel accepts that this places a high hurdle that must be cleared by any applicant seeking to review a field of play decision. However, if the hurdle were to be lower, the floodgates would be opened and any dissatisfied participant would be able to seek the review of a field of play decision.”<sup>62</sup>

### III. SELECTED ISSUES

#### A. JURISDICTION

The jurisdiction of the Ad Hoc Division generally arises out of the entry form signed by each and every participant in the Olympic Games as well as out of rule 61 of the Olympic Charter. These provisions read as follows, respectively:

I agree that any dispute in connection with the Olympic Games, not resolved after exhaustion of the legal remedies established by my NOC, the International Federation governing my sport, the Organising Committee for the Olympic Games (OCOG) and the IOC, shall be submitted exclusively to the Court of Arbitration for Sport (CAS) for final and binding arbitration in accordance with the Arbitration Rules for the Olympic Games, which form part of the Code of Sports-related Arbitration.<sup>63</sup>

61 Disputes: Arbitration

Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration.<sup>64</sup>

<sup>61</sup> Canadian Olympic Committee (COC) v. ISU and others, CAS-JO[-TUR] 06/006, para. 43.

<sup>62</sup> Korean Olympic Committee v. International Skating Union (ISU), Case No. CAS JO-SLC 02/007, February 23, 2002, CAS Digest III, para. 17 at 611, 615; 130 J. DROIT INT’L (CLUNET) 303 (2003), Casenote Simon.

<sup>63</sup> Olympic Games Participants’ Entry Form (on file with author).

<sup>64</sup> Olympic Charter, *supra* note 36, art. 61.

While rule 61 of the Olympic Charter is clearly binding on the IOC, the NOC and the International Federation participating in the Games, the adoption of a specific clause in the entry form is necessary in order to avoid any doubt as to whether the athletes are also bound by the arbitration agreement. As explicitly noted by the *Schuler* panel, a problem may arise in cases where the athlete is not selected for the Olympics and, therefore, has not subscribed to the arbitration clause in the entry form. In *Schuler*, the problem did not arise since all Swiss athletes who took part in the Olympic selection process were required to sign a “selection agreement” containing a CAS arbitration clause. In any event, it should be considered that by submitting his/her application, the non-selected athlete acknowledges the CAS jurisdiction. This was implicitly accepted by the *Dal Balcon* panel when noting that “the parties at the hearing confirmed that the CAS Ad Hoc Division had jurisdiction to hear and rule on the dispute.”<sup>65</sup>

The other issue which arises with respect to jurisdiction is whether the dispute should be referred to the regular CAS procedure or whether it may be dealt with by the Ad Hoc Division. Article 1 of the CAS Ad Hoc Rules defines the jurisdiction of the Ad Hoc Division in the following terms:

Article 1: Application of the Present Rules and Jurisdiction of the Court of Arbitration for Sport

The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games. In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective.<sup>66</sup>

As noted by the panel in *Schuler* and *Lund*, there are two preconditions which have to be met for the jurisdiction of the CAS Ad Hoc Division: (i) that the dispute has arisen during the Olympic Games or during the period of ten days preceding the Opening Ceremony (which for the 2006 Olympic Winter Games took place on February 10, 2006); and (ii) that the dispute has arisen “on the occasion of” or “in connection with” the Olympic Games, as required by rule 61 of the Olympic Charter.

Pursuant to the reasoning of the *Schuler* panel, it can be generally considered that all selection and eligibility disputes do arise “in connection with” the Olympic Games. The panel in *Lund* considered that the dispute was “in connection with” the Olympic Games as Mr. Lund has been selected to compete in the U.S. team. In both instances, the fact that the dispute was in fact a pre-Olympic dispute was considered to be irrelevant. In both cases, the panel examined the question even though none of the parties had disputed

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<sup>65</sup> *Isabella Dal Balcon v. CONI and others*, CAS-JO[-TUR] 06/008, para. 3.2.3.

<sup>66</sup> *Supra* note 9.

its jurisdiction. It should not be assumed that the ad hoc panels are required to verify their jurisdiction *ex officio*.<sup>67</sup>

The question of the specific moment in which the dispute arises for the purpose of jurisdiction is less obvious. To assert jurisdiction, the panel in *Schuler* held that the dispute arose when the athlete filed its application and not when Swiss Olympic rendered its decision not to select her.

#### B. OBJECTIVE VERSUS DISCRETIONARY SELECTION CRITERIA

Turning to the merits, the most noteworthy development of the CAS case law has been the clear-cut definition of the power of CAS to review selection disputes. This case law may be summarized as follows:

- (1) If the *selection criteria are exclusively objective*, the CAS will review the selection decision without restrictions.
- (2) If, by way of contrast, the selection criteria *entail a subjective assessment* by the selection body, the CAS will limit its review to whether (i) the selection body has exceeded the limit of that discretion and (ii) whether it has been exercised in a reasonable, fair and non-discriminatory manner.
- (3) The CAS will not substitute its own discretion for that of the selection body and will refer the matter back to the selection body for reconsideration.
- (4) If the selection rules provide for objective criteria and grant discretion to the selection body, but the latter does not exercise that discretion, the CAS will examine the objective criteria with a full power of review (as under (i)).

This case law could lead to a switch (back) from selection based on objective criteria to more subjective process. This would be a regrettable evolution. To reduce the risk of dispute, the selecting bodies should enact objective criteria, which are easily intelligible, make sure that they are communicated to (and understood) by the athletes, and avoid any modification of the “rules of the game” during the selection process. Of course, the only way to avoid any dispute consists in selecting the athletes through a predefined internal trial. This extreme solution is often criticized because it prevents taking into account concepts such as the “performance trend.” On the other hand, it has the advantage of avoiding these kind of concepts being misused to (re)introduce subjective criteria. The future will tell what the legacy of the Turin Ad Hoc Division with respect to selection issues will be.

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<sup>67</sup> See also PIL, art. 86(2) (Switz.). It should be added that the condition of the exhaustion of internal remedies is indeed to be verified by the panel *motu proprio*. However, despite the terminology used in the awards rendered in Turin, this issue does not concern the jurisdiction of the tribunal but rather the admissibility of the claim. See Jan Paulsson, *Jurisdiction and Admissibility*, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION, LIBER AMICORUM IN HONOUR OF ROBERT BRINER 601 (Gerald Asken et al. eds., 2005).

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