International Sports and the Law

Citizenship and the Olympics

Resolving Disputes in Olympic and International Sports

Doping and International Sports

ALSO IN THIS ISSUE:
Learning Gateways
Teaching Legal Docs
Perspectives
Law Review
Profile
Citizenship and the Olympics: Do Our Athletes Need to Come from Home?

by Peter Spiro

Rule 41 of the Olympic Charter mandates that all Olympic competitors be citizens of the country that they are representing during the competition. It seems like a standard rule, but in today’s elite competitions and mobile world, athletes are increasingly changing passports.

Resolving Disputes in Olympic and International Sports

by Matthew J. Mitten

The Court of Arbitration for Sport resolves disputes in the international sports community in a way that traditional courts in the United States and other nations would simply be ill-equipped to replicate.

Doping and International Sports

by John Hoberman

The use of performance-enhancing substances in sports is not new, but recent protocols to detect and combat their use are. They are helping to define the “doping problem” and raising questions about just what the problem is.

Learning Gateways

Free Agency Olympics?

This discussion activity uses the example of American basketball player Becky Hammon, who, in 2008 and 2012, played for Russia in the Olympic Games to debate the “national” requirement in Rule 41 of the Olympic Charter.

Understanding Arbitration

Consider inviting a lawyer or arbitrator into the classroom to lead this activity, which discusses the differences between arbitration and trial as means for resolving civil disputes.

Whereabouts Rules and Doping

Students analyze a photo and consider the privacy implications of recent protocols to combat doping in international sports.

DEPARTMENTS

Director’s Note

Teaching Legal Docs: The Olympic Charter

Often considered the constitution of international sports, the Olympic Charter provides a framework for every Olympic Games, as well as structure and governance of the entire Olympic Movement.

Perspectives: Should Countries with Questionable Human Rights Records Host International Sports Competitions?

Three experts weigh in on one of the most provocative questions in the sports world.

Law Review: Playing Between the Lines: Are College Athletes Employees?

The media frenzy that emerged last year following a case involving Northwestern University athletes was by no means a resolution to this increasingly asked question.

Profile: Hon. Robert Torres Jr.

From the bench of the Guam Supreme Court to soccer fields around the world, the Honorable Robert Torres talks about the importance of ethical sporting.

What’s Online?

Insights on Law & Society is published three times each year by the American Bar Association Division for Public Education. The mission of the Division is to educate the public about law and its role in society. Insights helps high school teachers of civics, government, history, and law; law-related education program developers; and others working with the public to teach about law and legal issues. Funding for this issue has been provided by the American Bar Association Fund for Justice and Education. We are grateful for this support.

The views expressed in this document are those of the authors and have not been approved by the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association, the Fund for Justice and Education, or the Standing Committee on Public Education. This publication may be reproduced for educational activities but may not be sold.

A one-year subscription to Insights on Law & Society costs $34 and includes three issues of the print magazine and access to online resources. For subscription information, visit www.insightsmagazine.org or contact the American Bar Association Division for Public Education, 321 N. Clark St., Chicago, IL 60654; 312-988-5735; www.americanbar.org/publiced.


The American Bar Association is a not-for-profit corporation. All rights reserved. Printed in the United States of America. Printed on recycled paper.

Design and production by Zaccarine Design, Inc.

Copyright by Creative Services Association, Inc.

Printing by VISOgraphic, Inc./3E Marketing Communications

ISSN 1531-2461
This summer, the 2016 Summer Olympics will take place in Rio de Janeiro, and the world’s most talented and dedicated athletes will compete on a world stage. I know I’ll be watching, but so will the accountant in London, the nurse in South Korea, the taxi driver in Paris, the architect in Dubai, and the teacher in Ghana. International sports competitions, like the Olympic Games and the World Cup, have a way of unifying the world in ways that nothing else can replicate. It was with this in mind that we focus this issue of Insights on international sports and the law. Much as international sports competitions might provide so many in the world with entertainment and opportunities to achieve dreams, they are also highly political and provide opportunities for dialogue, diplomacy, and examinations of the rule of law. World leaders, national governments, the United Nations—they, too, are watching.

The issue opens with an article from Peter Spiro, of Temple University Beasley School of Law. He discusses what he has identified as “one of [his] favorite topics:” citizenship and the Olympics. Under Rule 41 of the Olympic Charter, athletes must be “nationals” of the country for which they are competing. This raises big questions about the meaning of “citizenship” in today’s ultra-competitive and mobile world. Next, Matthew Mitten, a professor at Marquette University Law School, introduces us to the Court of Arbitration for Sport, the international judicial body charged with resolving disputes in the international sports world. The author is among the pool of arbitrators, drawn from around the world, who decide cases for the Court, sometimes in just 24 hours if a competition is underway. The final article by John Hoberman, a historian at the University of Texas at Austin, traces the history of the use of performance-enhancing drugs, or “doping,” among international athletes, and assesses the effectiveness of contemporary measures to regulate it.

To help you share this rich content with your students, our Learning Gateways provide activities and discussion questions designed to spark informed and engaging classroom conversations. Teaching Legal Docs takes a look at the Olympic Charter, which is more fluid in its history than what it is today. For Perspectives, we asked experts to share their thoughts on whether or not countries with questionable human rights records should host international sports competitions. Lawyer Michelle Piasecki focuses the Law Review on recent court cases related to student athletes unionizing as employees. To close the issue, Profile features Robert Torres, chief justice of the Guam Supreme Court and renowned international sports governance professional.

Do visit www.insightsmagazine.org for additional resources, materials, and useful links to help you bring this and other law-related topics to your classroom. There you will find articles, links to primary source documents, and ready-to-use handouts, PowerPoints, and other instructional supports. If your school year has already ended, use these resources to build on the excitement of the Games to jump-start your year in the fall. As always, let us know how you used the issue!

Have a wonderful summer,

Mabel McKinney-Browning
Mabel.MckinneyBrowning@americanbar.org

Stay Connected!
Become a fan of the ABA Division for Public Education on Facebook and follow us on Twitter! Just click on the Facebook and Twitter icons at www.insightsmagazine.org.
If gymnasts Kylie Dickson and Alaina Kwan compete in the upcoming Olympics in Rio de Janeiro, they will march behind the flag of Belarus, not their native United States. Dickson and Kwan have no Belarusian family connection. They have never even visited the country. But they do have the one thing that counts for competition in Olympic gymnastics: Belarusian citizenship. Dickson and Kwan are top gymnasts, but not quite good enough to make the talent-rich U.S. team. Belarus has a proud gymnastics tradition (Olga Korbut was from Belarus) but has struggled to compete internationally in the post-Soviet era; Dickson and Kwan may be the country’s admission ticket to the team competition in the 2016 Games.

This kind of story has become increasingly common with each Olympic cycle. As we approach this summer’s competition, there will be other reports of athletes competing for countries with which they have tenuous ties. For some observers, it’s sporting treason. But for spectators and the athletes themselves, it would be better to allow more, not less, Olympic mobility. If Dickson and Kwan deserve on their individual merits to be on the balance beam at Rio, they shouldn’t be eliminated because they are Americans. We don’t require our professional athletes to hail from the cities on whose teams they play. Why should it be any different at the global level? In any case, it will be increasingly difficult to police against nationality transfers for purposes of Olympic and other international sporting competitions. The Olympics reflects the changing nature of citizenship in the face of globalization: it is less a jealous institution than it once was. But that doesn’t mean we’ll stop rooting for the home team.

Olympic Citizenship Rules
On the one hand, the Olympic system is hardly characterized by global free agency. On the other, it can be easily gamed. Under Rule 41 of the Olympic Charter, athletes must be nationals of the country for which they compete. This bright-line rule takes some countries off the table for purposes of Olympic affiliation. No accounts of anomalous Olympic citizenship are going to involve teams from Japan, China, or India, where citizenship is notoriously difficult to acquire after birth. The ordinary naturalization process (usually including residency and language requirements) would pose a formidable barrier in others.

But an increasing number of countries fast-track naturalization where an individual is deemed to present exceptional benefits to the state. Dickson and Kwan didn’t have to reside in Belarus to acquire its citizenship, much less learn the language. Russia is another state that instantly extends citizenship to Olympic-grade athletes, as it did with Becky Hammon and J.R. Holden.
national team coach Jürgen Klinsmann has recruited seven dual citizens to his squad who qualify under the FIFA standard notwithstanding tenuous ties to the United States. Icelander Aron Jóhannsson was born to Icelandic parents while they were students in Mobile, Alabama; that entitled him to U.S. citizenship, but he hasn’t lived in the U.S. since he was three years old. Five of his teammates are the offspring of German mothers and U.S. service members who were stationed in Germany. So the Olympic nationality requirement is not much of a barrier for countries that have flexible citizenship rules.

Where an athlete looks to transfer “sporting nationality” from one country to another after having competed at the international level, the Olympic Charter sets down a three-year “cooling off” period during which an athlete cannot represent his new country. But the cooling-off period is routinely waived by the country from which the athlete is seeking to transfer (with some exceptions—Cuba, for example, is famously unwilling to waive the three-year ineligibility for athletes who have defected to the United States).

In some sports, international governing bodies require additional ties between athlete and the country for which he or she would compete. For example, Fédération Internationale de Football Association (FIFA) regulations governing international soccer competition provide that a dual national can opt for one country or the other only where the athlete, her parent or grandparent, was born in the territory of the state for which she seeks to compete, failing which she must establish continuous residence of at least two years in the country. Although the residency requirement is upped to five years where an athlete has already competed for another country at the international level, the birth-or-ancestry exception also applies. In other words, you can make the switch immediately if you, a parent, or grandparent was born in the country that would have you on its team.

That eliminates for soccer the unrestricted instant citizenship option that worked for Dickson and Kwan in gymnastics. But it won’t eliminate other kinds of citizenship gaming. U.S. soccer national team coach Jürgen Klinsmann has recruited seven dual citizens to his squad who qualify under the FIFA standard notwithstanding tenuous ties to the United States. Icelander Aron Jóhannsson was born to Icelandic parents while they were students in Mobile, Alabama; that entitled him to U.S. citizenship, but he hasn’t lived in the U.S. since he was three years old. Five of his teammates are the offspring of German mothers and U.S. service members who were stationed in Germany. John Brooks has lived his whole life in Germany and Germany for its basketball team at Beijing and with South Korean-born Viktor Ahn (née Ahn Hyun-soo) for short track speed skating at Sochi. So the Olympic nationality requirement is not much of a barrier for countries that have flexible citizenship rules.

Where an athlete looks to transfer “sporting nationality” from one country to another after having competed at the international level, the Olympic Charter sets down a three-year “cooling off” period during which an athlete cannot represent his new country. But the cooling-off period is routinely waived by the country from which the athlete is seeking to transfer (with some exceptions—Cuba, for example, is famously unwilling to waive the three-year ineligibility for athletes who have defected to the United States).

In some sports, international governing bodies require additional ties between athlete and the country for which he or she would compete. For example, Fédération Internationale de Football Association (FIFA) regulations governing international soccer competition provide that a dual national can opt for one country or the other only where the athlete, her parent or grandparent, was born in the territory of the state for which she seeks to compete, failing which she must establish continuous residence of at least two years in the country. Although the residency requirement is upped to five years where an athlete has already competed for another country at the international level, the birth-or-ancestry exception also applies. In other words, you can make the switch immediately if you, a parent, or grandparent was born in the country that would have you on its team.

That eliminates for soccer the unrestricted instant citizenship option that worked for Dickson and Kwan in gymnastics. But it won’t eliminate other kinds of citizenship gaming. U.S. soccer national team coach Jürgen Klinsmann has recruited seven dual citizens to his squad who qualify under the FIFA standard notwithstanding tenuous ties to the United States. Icelander Aron Jóhannsson was born to Icelandic parents while they were students in Mobile, Alabama; that entitled him to U.S. citizenship, but he hasn’t lived in the U.S. since he was three years old. Five of his teammates are the offspring of German mothers and U.S. service members who were stationed in Germany. John Brooks has lived his whole life in Germany and Germany for its basketball team at Beijing and with South Korean-born Viktor Ahn (née Ahn Hyun-soo) for short track speed skating at Sochi. So the Olympic nationality requirement is not much of a barrier for countries that have flexible citizenship rules.

Where an athlete looks to transfer “sporting nationality” from one country to another after having competed at the international level, the Olympic Charter sets down a three-year “cooling off” period during which an athlete cannot represent his new country. But the cooling-off period is routinely waived by the country from which the athlete is seeking to transfer (with some exceptions—Cuba, for example, is famously unwilling to waive the three-year ineligibility for athletes who have defected to the United States).

In some sports, international governing bodies require additional ties between athlete and the country for which he or she would compete. For example, Fédération Internationale de Football Association (FIFA) regulations governing international soccer competition provide that a dual national can opt for one country or the other only where the athlete, her parent or grandparent, was born in the territory of the state for which she seeks to compete, failing which she must establish continuous residence of at least two years in the country. Although the residency requirement is upped to five years where an athlete has already competed for another country at the international level, the birth-or-ancestry exception also applies. In other words, you can make the switch immediately if you, a parent, or grandparent was born in the country that would have you on its team.

That eliminates for soccer the unrestricted instant citizenship option that worked for Dickson and Kwan in gymnastics. But it won’t eliminate other kinds of citizenship gaming. U.S. soccer national team coach Jürgen Klinsmann has recruited seven dual citizens to his squad who qualify under the FIFA standard notwithstanding tenuous ties to the United States. Icelander Aron Jóhannsson was born to Icelandic parents while they were students in Mobile, Alabama; that entitled him to U.S. citizenship, but he hasn’t lived in the U.S. since he was three years old. Five of his teammates are the offspring of German mothers and U.S. service members who were stationed in Germany. John Brooks has lived his whole life in Germany and Germany for its basketball team at Beijing and with South Korean-born Viktor Ahn (née Ahn Hyun-soo) for short track speed skating at Sochi. So the Olympic nationality requirement is not much of a barrier for countries that have flexible citizenship rules.

Where an athlete looks to transfer “sporting nationality” from one country to another after having competed at the international level, the Olympic Charter sets down a three-year “cooling off” period during which an athlete cannot represent his new country. But the cooling-off period is routinely waived by the country from which the athlete is seeking to transfer (with some exceptions—Cuba, for example, is famously unwilling to waive the three-year ineligibility for athletes who have defected to the United States).

In some sports, international governing bodies require additional ties between athlete and the country for which he or she would compete. For example, Fédération Internationale de Football Association (FIFA) regulations governing international soccer competition provide that a dual national can opt for one country or the other only where the athlete, her parent or grandparent, was born in the territory of the state for which she seeks to compete, failing which she must establish continuous residence of at least two years in the country. Although the residency requirement is upped to five years where an athlete has already competed for another country at the international level, the birth-or-ancestry exception also applies. In other words, you can make the switch immediately if you, a parent, or grandparent was born in the country that would have you on its team.

That eliminates for soccer the unrestricted instant citizenship option that worked for Dickson and Kwan in gymnastics. But it won’t eliminate other kinds of citizenship gaming. U.S. soccer national team coach Jürgen Klinsmann has recruited seven dual citizens to his squad who qualify under the FIFA standard notwithstanding tenuous ties to the United States. Icelander Aron Jóhannsson was born to Icelandic parents while they were students in Mobile, Alabama; that entitled him to U.S. citizenship, but he hasn’t lived in the U.S. since he was three years old. Five of his teammates are the offspring of German mothers and U.S. service members who were stationed in Germany. John Brooks has lived his whole life in Germany and Germany for its basketball team at Beijing and with South Korean-born Viktor Ahn (née Ahn Hyun-soo) for short track speed skating at Sochi. So the Olympic nationality requirement is not much of a barrier for countries that have flexible citizenship rules.
life in Berlin, but he satisfies the FIFA eligibility requirement through his U.S. citizen father. Likewise for Frankfurt born-and-bred Timothy Chandler, who speaks only halting English.

More often, the flow has been in the other direction. As a nation of immigrants, Americans are more likely to have the sort of ancestral connections that make them eligible for other nationalities and exempt them from otherwise-applicable residency requirements. Haley Nemra, for example, had never visited her father’s native Marshall Islands when she competed for the island nation in the 2008 Beijing Games, but she did make it there before carrying the Marshallese flag at the opening ceremony in London in 2012.

Unfair to Athletes—and to Fans

Not all qualified athletes will be lucky enough to have a grandparent whose homeland is happy to welcome them to an Olympic delegation. Should Olympic eligibility depend on the happenstance of birth?

Citizenship eligibility rules are compounded by national quotas under which the number of competitors a country can send to the Olympics is capped regardless of competitor quality. For the singles competition in table tennis, for example, each state can send only two entrants. That includes China, even though it has four of the top five players in the world. Pity the poor Xu Xin. As of January 2016, he was ranked third in the world in table tennis. But because he is also ranked third in China, he won’t be playing singles in Rio, assuming China fills its quota with its number one and two players. That’s unfair to a top competitor who warrants a chance at an Olympic medal.

Rules limiting nationality transfers add to the unfairness. Where the three-year “cooling off” period isn’t waived, an athlete can miss international contests at a competitive peak. Worse, sports such as soccer and basketball allow only one change of nationality during an athlete’s lifetime. Even were an athlete subsequently to relocate other aspects of his life to another country (say, after a marriage), he would be precluded from reassigning his sporting identity. The result is a kind of sporting peonage.

The system is also unfair to spectators. To the extent that nationality rules keep athletes off the field who rate a place on the basis of talent, it lowers the quality of competition. A number of Americans played basketball for other teams at the Beijing Games, some enabled by ancestral ties (like Chris Kaman, who was eligible for German citizenship by virtue of a German great-grandparent), others by the fiat of an interested state (as was the case with...
Hammon and Holden playing for Russia, extended citizenship with no prior connection of any description). That’s not enough of a redistribution of American talent to make it a fair fight. If NBA stars were allowed to play for any team that would have them, it would make for a more interesting tournament.

**The Games Will (Basically) Stay the Same**

Some observers condemn the strategic use of citizenship for purposes of Olympic eligibility. It is one thing to take advantage of a grandparent’s country of eligibility, another to sign up with a country you never heard of. (Kwan and Dickson almost certainly couldn’t have located Belarus on the map before they agreed to join its national team.) These objections fall into three categories: that strategic citizenship is unethical or immoral, that it results in “muscle drain” for developing countries, and that it fuels mercenarism that will undermine the character of the Games.

The charge that strategic citizenship acquisition is unethical works from the premise that citizenship should represent a near-sacred tie between the individual and the state. In this view, Olympic nationality transfers reduce citizenship to a commodity. They make citizenship an institution look bad. At one level, that is clearly true. Fifty years ago it would have been almost impossible to conceive of this sort of activity.

Today, it is the tip of the iceberg. None of this would work without the newly widespread acceptance of dual citizenship. In the past, the likes of Dickson and Kwan would never have considered acquiring citizenship in another country (especially one they’d never visited) because it would have meant forfeiting their American citizenship. The fact that dual citizenship is now commonplace says a lot about the changed nature of citizenship. There are many contexts in which people acquire citizenship for instrumental reasons. This happens to be a visible one, but that doesn’t make it unethical.

The “muscle drain” objection highlights cases in which athletes have transferred their nationality in poorer countries to richer ones. For example, there have been a number of cases of Kenyan runners who have been lured to compete for Persian Gulf states with signing bonuses and generous stipends. The concern is that the country of origin invests in the athlete without reaping the reward. But of course the athlete benefits from the possibility of mobility. Developing countries may lack the kind of training facilities necessary to Olympic-level success, so it won’t always be the case that the medal would have been won for the country of origin. Even if it doesn’t get credit in the medal tallies, moreover, the home country will bask in reflected glory. If anything, the payday will incentivize others in the country of origin to excel, to the ultimate benefit of the home country program.

A variant on the “muscle drain” theme stresses the local athletes who are squeezed out when better competitors are brought in from elsewhere. Kwan and Dickson’s addition to the Belarus team means that two native Belarusian athletes will miss the cut. As with most forms of transnational exchange, there may be some losers as a result of greater athletic mobility. But there will also be winners. If Dickson and Kwan boost Belarus into the team finals in Rio, their Belarus-born teammates will be glad to have them on board. The whole point of the exercise is to raise the program’s profile internationally and (presumably) within Belarus. That will broadly benefit existing and prospective Belarusian gymnasts. In any case, that is Belarus’s call to make.

Finally, there is the claim that this activity will undermine the integrity of the Games. The fear is that athletes will rent themselves out to the highest bidder, with Olympic free agency the result. The Olympic spirit is brought down to the level of the unsentimental market.

This objection starts from the wrong premise. The Olympic Charter itself states that the Olympic Games “are competitions between athletes in individual or team events and not between countries.” In any case, even if there were unobstructed athletic mobility, it wouldn’t lead to wholesale reshuffling of the Olympic deck. Sentimental national loyalties still count for something, especially in the Olympic context. All things being equal, an athlete will prefer to play for the home team. The top athletes make their money elsewhere. They see the Olympics as an opportunity for brand enhancement, which points decisively to staying put.

There is no way that a Michael Phelps is going to swim for Bahrain, no matter how much money is on the table.

(Continued on page 9)
Learning Gateways

Free Agency Olympics?

This activity stages a discussion of Rule 41 of the Olympic Charter, which specifies that athletes must be citizens of the country for which they are competing. Students then look at the example of American basketball player Becky Hammon, who, after failing to secure a position on the United States’ Olympic team in 2008, was naturalized by Russia in order to compete on that country’s team. Download a corresponding PowerPoint at www.insightsmagazine.org.

1. Ask students about their Olympic-watching habits and preferences:
   - Do you plan to watch the 2016 Olympics in Rio?
   - Did you watch the last Olympic Games?
   - Which teams did you watch? Did you watch countries other than the United States?
   - Did you pay attention to individual athletes, regardless of which country they represented?

2. Ask students about their knowledge of Olympic rules:
   - Why do you think Olympic teams are organized by country? How is this different from other sports models that you are aware of?
   - Do you think everyone on an Olympic team should be “from” that country—i.e., a citizen?

3. Introduce Rule 41 of the Olympic Charter to students:
   **Any competitor in the Olympic Games must be a national of the country of the National Olympic Committee which is entering such competitor.**
   Explain to students that “National Olympic Committee” is the official term for a national Olympic “team”; and that the meaning of “national” is very close to “citizen,” and includes both those who are citizens by birth or heritage based on the laws in the competing country and naturalized citizens. Some countries offer expedited naturalization procedures for athletes wishing to compete on an Olympic team.

4. Discuss Rule 41 with students:
   - How do you think Rule 41 influences the selection of athletes for a country’s Olympic team?
   - How does Rule 41 influence athletes that might want to compete for Olympic teams? What happens if an athlete wants to change their Olympic team?

5. Explain to students that many Olympic athletes do change Olympic teams or national affiliations for purposes of competition, and see if they are aware of any of these athletes.
   **The corresponding PowerPoint includes examples as well as a chart of “Countries with the highest numbers of foreign-born athletes.”**

6. Introduce the example of American basketball player Becky Hammon who is now an assistant coach for the San Antonio Spurs basketball team. Explain that during the 2008 Olympics, she joined Russia’s Olympic basketball team after she was unable to compete on the United States’ team. Explain that she became a Russian citizen, and there was quite a bit of discussion in the U.S. press and on social media reacting to her decision.

7. Display for students the Becky Hammon quote of April 8, 2008:
   **The jersey that I wear has never made me who I was. It has nothing to do with what’s written on my heart. Will I be playing for Russia? Yes. But I’m absolutely 100 percent still an American. I love our country. I love what we stand for. This is an opportunity to fulfill my dream of playing in the Olympics.**

8. Discuss the quote with students:
   - What do you think she meant by “100 percent still an American?”
   - Why do you think she felt like she needed to say this?

9. Display for students, examples of the tweets that appeared during the Olympic Games:

   **Becky Hammon gave up her allegiance to the U.S. and pledged it to Russia for basketball? I have a sincere problem with that. @Nicole Rice, October 25, 2015**

   **Why is Becky Hammon playing for Russia? She isn’t even Russian! @DentonEvan, July 30, 2012**

   **I don’t usually cheer for Russia, but when I do it’s because Becky Hammon is playing for their women’s basketball team. @Nicole Cousins, July 30, 2012**
Increased mobility will play out where we are seeing it play out today—in the second rank. That will give noncelebrity athletes a better chance to train and compete. It will also give lower-profile programs a better chance to move up the Olympic ladder.

The best way to increase mobility would be to scrap the citizenship requirement altogether. There is something unseemly about athletes swearing allegiance to states to which they have no other tie. As Becky Hammon reminded her fans when she signed on the Russian team—and necessarily also to Russia—"I’m absolutely still 100 percent an American." One wonders what she’s done with her Russian passport since her return to the U.S. and a job as an assistant coach with the San Antonio Spurs. It doesn’t make any sense to require athletes to acquire citizenship that is ephemeral in every way.

**We Can Still Root for the Home Team—even if They’re from Away**

Perhaps the best explanation for the discomfort with nationality switches is that they will detract from the viewer experience. How can fans fervently root for a team that isn’t composed of compatriots? The answer is simple: they already do it all the time. Never mind that major league baseball players rarely come from the cities they compete for. Over a quarter of major leaguers were foreign born, and many remain noncitizens. Most U.S. hockey teams have a majority of foreign players in their starting lineups.

True, Olympic competition will never have the sort of intensity that it did during the Cold War days, when international sports amounted to a kind of surrogate warfare. There is unlikely ever to be a moment like the 1980 U.S. hockey victory over the Soviet Union. But no eligibility rule is going to recapture that mentality, and that’s something we should be grateful for.

(Continued from page 7)
The Olympic Charter

In the world of international sports competitions and international sports law, one document stands out as a “constitution,” providing a blueprint for organizational structure and governing all aspects of play. The Olympic Charter is the compilation of fundamental principles, rules, and bylaws that establish and regulate the International Olympic Committee (IOC), its subordinate International Sports Federations, and the National Olympic Committees; as well as each Olympic Games and individual athletes competing in the Games. Collectively, everything governed by the Olympic Charter is known as the Olympic Movement. From how many members shall comprise the IOC, to the opening and closing ceremonies of the Olympic Games, to whether Olympic athletes may display political memorabilia on their uniforms, the Olympic Charter covers it. Here, Teaching Legal Docs will explore the Olympic Charter’s history and composition as a primary source document.

A Dynamic History

What is now known as the Olympic Charter was first codified in 1908, fourteen years after the modern Olympic Games it governs were first established in Paris on June 23, 1894. According to the IOC, it was written by then IOC president and founder of the modern Olympic Movement and French aristocrat, Pierre de Coubertin, who may have written a version as early as 1898. When it was first published, the Charter was titled the “Annuaire du Comité International Olympique,” or “International Olympic Committee Yearbook.” A yearbook? In fact, what is now recognized as the Olympic Charter was published, updated, altered, and reissued frequently (not annually, but often, and generally prior to an Olympiad) throughout the twentieth century. At times it served as a yearbook, documenting the Olympic Movement’s history and Coubertin’s legacy, including his photo, as much as it organized and governed the Games.

The formal title of “Olympic Charter” was adopted in 1978. In calling the Olympic Charter a “charter,” the IOC acknowledged a distinctive aspect of its origins: a “charter” is a grant from a legislative power that creates and defines an institution. The Olympic Charter is conferred from the Swiss Federal Council, the executive legislative body of the government of Switzerland. Lausanne, Switzerland, has served as the home of the IOC since 1915.

The Olympic Charter Document

The current Olympic Charter, in force since 2015, is 110 pages long. It includes a Preamble and seven Fundamental Principles, and the main body of the document is organized into six chapters. This particular format and organization has been used since 2011.

The Preamble

The history of the Olympic Movement and Coubertin’s legacy that was a main component of earlier Olympic Charters is now contained in the Charter’s Preamble. The Preamble was adopted in 2001. It is one paragraph, and it differs from the typical design of a preamble, as it emphasizes origins, rather than articulating general or abstract goals: Modern Olympism was conceived by Pierre de Coubertin, on whose initiative the International Athletic Congress of Paris was held in June 1894. The International Olympic Committee (IOC) constituted itself on 23 June 1894. The first Olympic Games (Games of the Olympiad) of modern times were celebrated in Athens, Greece, in 1896. In 1914, the Olympic flag presented by Pierre de Coubertin at the Paris Congress was adopted. It includes the five interlaced rings, which represent the union of the five continents and the meeting of athletes from throughout the world at the Olympic Games. The first Olympic Winter Games were celebrated in Chamonix, France, in 1924.

Fundamental Principles of Olympism

The seven Fundamental Principles of Olympism are not rules for playing any particular Olympic game, but define the spirit and philosophy that are meant to be behind the entire Olympic Movement. The number of Fundamental Principles has fluctuated from Charter to Charter. There have been seven Principles since 2011. At times in the Charter’s history, there were as few as six Fundamental Principles, and as many as nine. The Fundamental Principles place sports in the broader context of culture, community, and humanity, and even declare participation in sports a human right. The Fundamental Principles of Olympism are:

1. Olympism is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will, and mind. Blending sports with culture and education, Olympism seeks to create a way of life based on the joy of...
effort, the educational value of good example, social responsibility, and respect for universal fundamental ethical principles.

2. The goal of Olympism is to place sports at the service of the harmonious development of humankind, with a view to promoting a peaceful society concerned with the preservation of human dignity.

3. The Olympic Movement is the concerted, organized, universal, and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympism. It covers the five continents. It reaches its peak with the bringing together of the world's athletes at the great sports festival, the Olympic Games. Its symbol is five interlaced rings.

4. The practice of sports is a human right. Every individual must have the possibility of practicing sports, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity, and fair play.

5. Recognising that sports occurs within the framework of society, sports organisations within the Olympic Movement shall have the rights and obligations of autonomy, which include freely establishing and controlling the rules of sports, determining the structure and governance of their organizations, enjoying the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance be applied.

6. The enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, color, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, or other status.

7. Belonging to the Olympic Movement requires compliance with the Olympic Charter and recognition by the IOC.

The Fundamental Principles are often cited in the media, particularly in stories that involve activists protesting activities in an Olympics host country. Principle 6, for example, was cited often leading up to the 2014 Winter Games in Sochi, Russia, to protest anti-gay legislation that was in effect in the host country.

Rules and Bylaws

The bulk of the Olympic Charter is the body of rules and bylaws contained in six chapters. Each chapter discusses one aspect of the Olympic Movement:

(1) The Olympic Movement
(2) International Olympic Committee
(3) International Sports Federations
(4) National Olympic Committees
(5) The Olympic Games
(6) Sanctions, Disciplinary Procedures, and Dispute Resolution

Each chapter is separated into rules, for a total of sixty-one rules in the document. Particular rules might have subsequent bylaws, and they are printed immediately following the rules. The rules are individually numbered across all six chapters, so that readers might easily reference an exact regulation.

The Olympic Charter rules are cited to answer just about any question that someone—athlete, coach, or organizer—might have about the Movement, particularly the Games. Certain rules tend to be cited in the media quite often. Rule 41, for example, the “citizenship requirement rule,” states that athletes competing in the Olympics must be a “national” of the country they represent in the competition. Rule 50 states that “no kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues, or other areas,” and is often cited in discussions about whether athletes may protest or make certain statements during competitions.

Governing the Games

Beyond the format, organization, and content of the Olympic Charter, it is important to consider the legal status of the document. The Olympic Charter has been recognized as “the supreme corpus of rules” that governs the Olympic Movement. The recognition comes formally from the Court of Arbitration for Sport, the body that resolves international sports-related disputes, but also informally among governmental and legal entities around the world. As a result, organizations such as the United Nations work closely with the IOC to enforce the Olympic rules and share the Fundamental Principles of Olympism with developing countries in the hope that sports, as a human right, will contribute to the development of a larger rule of law culture.
Global sports events such as the Olympic Games, Paralympic Games, and Fédération Internationale de Football Association (FIFA) World Cup are an essential part of the world’s culture, which bring together thousands of participating athletes and hundreds of millions of worldwide spectators and viewers. Multinational sports competition also regularly occurs at the continental level. The Pan American Games are held every four years the summer before the Olympic Games among the nations of the Americas, and the Confederation of North, Central American and Caribbean Association Football (CONCACAF) Gold Cup is a biennial soccer competition among men’s national teams that determines the champion of North America, Central America, and the Caribbean. These competitions provide a forum for elite athletic competition in accordance with uniform rules, judging and scoring procedures, and determinations of results, which fosters increased goodwill, respect, and understanding among people from diverse cultures and societies.

The governance of Olympic and international sports competition is based on the European model of sports, which establishes a hierarchy for both “amateur” and “professional” competition in each sport, with a worldwide regulatory authority at its apex. The International Olympic Committee (IOC) is the “supreme authority” of the Olympic Movement, which includes the International Federations that govern each sport worldwide, the National Olympic Committees that govern Olympic sports in their respective countries, National Governing Bodies that govern each sport nationally, and athletes. Controversy and disagreements on issues such as athlete eligibility requirements, anti-doping rule violations and sanctions, team selection procedures, and competition results are an inevitable part of Olympic and international sports competition. Thus, a universally respected and uniform system is necessary to resolve disputes (particularly those in different countries), in a fair, inexpensive, and swift manner that ensures rules compliance, protects the integrity of competition, and respects the parties’ procedural and substantive rights.

Court of Arbitration for Sport

In 1983, the IOC established the Court of Arbitration for Sport (CAS), which is based in Lausanne, Switzerland, and subject to Swiss law. Despite its designation as a “court,” the CAS is an international arbitral tribunal that was formed to resolve Olympic and international sports legal disputes by arbitration before an independent and impartial body. The CAS “provides a forum for the world’s athletes and sports federations to resolve their disputes through a
dispute from being litigated in a national court. The CAS has broad authority to resolve any sports-related dispute, and it is recognized as the world’s “supreme court for sport.” CAS arbitrations are less formal than judicial proceedings, and the parties generally are represented by counsel (but this is not a requirement).

The Olympic Charter, which codifies the IOC’s fundamental principles, rules, and bylaws and establishes rules for the production and operation of the
Olympic Games, states that “any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively” to the CAS. Therefore, as a condition of participating in the 2016 Rio Summer Olympic Games, all athletes and their National Olympic Committees, as well as the International Federations for each sport on the Olympic program, are required to submit any disputes in connection therewith to the CAS for final resolution.

At the Games and Beyond
At the site of each Summer or Winter Olympic Games, there is a CAS ad hoc Division that consists of a pool of 9–15 CAS arbitrators who provide expedited resolution of all disputes arising during the Games or within a period of ten days preceding the Opening Ceremony. Disputes are resolved by a panel of three arbitrators (or sometimes, one arbitrator). As a general rule, the panel must render a written arbitration award with reasons for its decision within 24 hours of the filing of a request for CAS adjudication, which ensures fast, fair, and free resolution of all disputes during the Olympic Games. Among the disputes that commonly arise during the Olympic Games are the eligibility of an individual athlete to participate for a particular country, fairness of disciplinary sanctions for rules violations and/or misconduct, and validity of competition results.

For example, in National Olympic Committee of Sweden and Aram Abrahhamian v. IOC, the CAS upheld the IOC’s decision to strip a Greco-Roman wrestler of his bronze medal, which he rejected during the medal ceremony to protest his disqualification during a semifinal bout at the 2008 Beijing Summer Olympics that allegedly denied him his right to a fair competition. The CAS panel explained, “The Athlete chose to reject his medal. That is a course of conduct, the consequence of which he should, and must, live with and is not to be disturbed by action of this Panel. The manner by which he rejected his medal caused him to violate the Olympic Charter. His own actions preclude making a determination that the sanction was not proportional to his conduct. The IOC’s decision did nothing more than affirm the state of affairs created by the Athlete himself.”

An interesting case involving a U.S. athlete arose during the 2004 Athens Olympics when Paul Hamm came from twelfth place to win the gold medal in the men’s all-around gymnastics competition when he earned scores of 9.837 in both the parallel bar (the penultimate event) and the high bar (the final event). Judges incorrectly deducted one-tenth of a point from the start value of South Korean gymnast Yang Tae-Young’s parallel bars routine. Because of this error, Yang received a lower score for his routine. He took the bronze medal, while his teammate, Kim Dae-Eun, took silver, and Hamm took gold. The Korean Olympic Committee protested the start
value attributed to Yang's parallel bars routine. Acknowledging the error, the International Gymnastics Federation suspended the three judges responsible for incorrectly determining the start value of Yang's routine.

The IOC refused to issue duplicate gold medals to both Hamm and Yang, and the gymnastics federation refused to change the competition results. The federation determined that Yang had not made a timely protest of his starting score, and should have notified the appropriate official in charge of the competition's judging before the start of the competition. Yang and the Korean Olympic Committee then petitioned the CAS to correct the judging error and to rule that Yang should be awarded the gold medal in the men's all-around gymnastics competition.

In Yang Tae-Young v. International Gymnastics Federation, the CAS ad hoc Division rejected this appeal, and agreed with the federation. It stated: “We have no means of knowing how Yang would have reacted had he concluded the competition in this apparatus as the points leader rather than in third place. He might have risen to the occasion; he might have frozen (his marks on the high bar were in fact below expectation and speculation is inappropriate.) So it needs to be clearly stated that while the error may have cost Yang a gold medal, it did not necessarily do so.” Observing that courts and arbitration panels generally do not interfere with a sports competition official's discretionary decisions, the CAS panel explained “any contract that the player has made in entering into a competition is that he or she should have the benefit of honest 'field of play' decisions, not necessarily correct ones.”

For disputes occurring outside of the Olympic Games, the CAS appeals arbitration procedure is used to resolve appeals from a final decision of an International Federation that affects an athlete (e.g., eligibility to participate in an athletic event, competition results), administrative official (e.g., FIFA disciplinary sanctions imposed on Sepp Blatter, its former president), coach, referee, NOC, or others that have agreed to submit the dispute to CAS arbitration. All disputes arising out of the application, interpretation, or enforcement of the World Anti-Doping Code involving international-level athlete doping violations and sanctions also generally are resolved by CAS arbitration. These proceedings usually are conducted before a three-person panel with each party choosing one arbitrator from the list of CAS arbitrators, and the ICAS member serving as the president or deputy president of the CAS appeals arbitration procedure appointing the third arbitrator who serves as the panel's chair. The Code requires the CAS panel to issue a written reasoned award that resolves the parties' dispute within three months after receiving the case file, which generally is published on the CAS website unless the parties agree it should be confidential.

The CAS ordinary arbitration procedure is used to resolve disputes relating to legal relations between the parties such as sports-related sponsorship contracts, television rights to a sports event, and contracts between athletes and their agents. These proceedings are conducted before a single arbitrator or a panel of three arbitrators, usually are confidential and private, and do not result in publication of a written award by the CAS unless all parties consent.

The Arbitration Award
Regardless of the geographical location in which it is held, the “seat” of all CAS arbitration proceedings is always Lausanne, Switzerland. It also determines the national court system (i.e., Switzerland) with jurisdiction to judicially review CAS arbitration awards. This ensures uniform procedural rules for all CAS arbitrations. The system provides a stable legal framework and facilitates efficient dispute resolution in locations throughout the world convenient for the parties. In CAS ad hoc Division, appeals arbitration, and ordinary arbitration proceedings, the arbitration panel provides broad de novo review in resolving the merits of the parties' dispute, which means it is authorized to start fresh: determine the underlying material facts and applicable law necessary for its resolution without providing any deference to prior fact determinations, choice of law, or decisions by other dispute resolution bodies.

A CAS arbitration award resolves the subject dispute, orders appropriate relief, and is final and binding on the parties. CAS panels frequently cite and rely on prior awards to “obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel.” CAS arbitration awards are creating a uniform body of Olympic and international sports law, a so-called lex sportiva, which is consistently and fairly applied worldwide.

All CAS awards are subject to very narrow judicial review by the Swiss Federal Tribunal (SFT), Switzerland's highest court. There are very limited procedural and substantive grounds for judicially challenging a CAS award before the SFT, which has vacated
Learning Gateways
Understanding Arbitration

This activity discusses the differences between arbitration and trial as means for resolving civil disputes. Students create a chart organizing the differences between arbitration and trial and then consider whether arbitration should be mandated for certain civil disputes. A press release about a 2016 proposal from the U.S. Consumer Financial Protection Bureau to ban mandatory arbitration clauses from certain consumer contracts serves as a primary source document and the basis for discussion. Consider inviting a local lawyer, or arbitrator, if possible, into the classroom to lead the discussion with students. Download a corresponding PowerPoint at www.insightsmagazine.org.

1. Ask students to list ways that people might resolve civil disputes. Allow students to brainstorm, and many ideas will most likely center around “going to court.” If necessary, clarify that the discussion will focus on resolving civil disputes, as opposed to criminal matters.

2. Explain to students that trials are often discussed in the media and depicted on television and in movies, but few civil disputes ever make it to trial. Explain that some disputes do not even make it to the courthouse and are resolved outside the court, through arbitration. Offer an explanation of “arbitration” if necessary:

   **Arbitration is a procedure in which a dispute is submitted, by agreement of all of the parties involved, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court. Students may be familiar with mediation as a method for resolving disputes. Arbitration is similar to mediation in that one person, not a judge, resolves the dispute, and parties may agree to the process. Mediation is different, however, in that the mediator may facilitate negotiation between the parties, rather than issuing a decision. Mediators are not required to have formal training, and the mediation procedure may not replace a formal court proceeding the same way that an arbitration proceeding might.**

3. Share with students the chart illustrating some of the differences between a trial and arbitration.

<table>
<thead>
<tr>
<th>Courtroom</th>
<th>Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Meets at a courthouse.</td>
<td>Meets at a designated location.</td>
</tr>
<tr>
<td>Parties may have lawyers.</td>
<td>Parties may have lawyers.</td>
</tr>
<tr>
<td>One party in the case files a lawsuit against another party in the case. The party being sued may not agree that the issue needs to be resolved in court.</td>
<td>Both parties agree to resolve the issue through arbitration.</td>
</tr>
<tr>
<td>A judge issues a decision in the case, and a jury might be involved in the decision-making.</td>
<td>An arbitrator issues the decision in the case.</td>
</tr>
<tr>
<td>Parties who are unsatisfied with a judge’s decision may appeal the decision to a higher court.</td>
<td>Generally, parties may not appeal the decision. Both parties agree to accept, or not accept, the decision.</td>
</tr>
<tr>
<td>Parties may not select the judge that hears their case.</td>
<td>Parties may select the arbitrator to hear their case.</td>
</tr>
<tr>
<td>Generally open to the public.</td>
<td>Not open to the public.</td>
</tr>
<tr>
<td>Usually slower than arbitration.</td>
<td>Usually faster than a trial.</td>
</tr>
<tr>
<td>Sometimes costs more than arbitration.</td>
<td>Sometimes costs less than a trial.</td>
</tr>
</tbody>
</table>

4. Ask students to consider the chart; then discuss the following questions:
   - Why might someone want to resolve their civil dispute through arbitration? The courts?
   - In selecting arbitration, what rights do you waive, or retain, compared to court?
   - Do you think arbitration should be required for certain civil disputes? Which ones? Why?

5. Explain to students that many consumer contracts (i.e., credit card, bank, employment) contain clauses stating that if the customer signing the contract has a dispute, it will be resolved through arbitration. **Share example contracts if possible. There are several in the PowerPoint presentation online.**
6. Ask students to discuss the consumer contracts:
• What do you think this clause means for you if you have a dispute with the company? What kinds of disputes might you have with a company?
• Why do you think a company might want to resolve disputes with customers through arbitration, as opposed to courts? Do you think it is appropriate for the company to require, or mandate, customers to resolve disputes this way?
• What if a large number of customers have the same dispute? Why might customers want to resolve a dispute in a large group, as opposed to individually? Could customers do this under the terms of the company contract? Explain “class action” suits, if necessary.
• Do you think customers should decide not to sign a company’s contract? What might happen if they make this decision?

7. Explain to students that the U.S. Consumer Financial Protection Bureau has proposed prohibiting mandatory arbitration clauses in certain consumer contracts. Share with students an excerpt from one of the Bureau’s press releases:

Many consumer financial products like credit cards and bank accounts have contract gotchas that generally prevent consumers from joining together to sue their bank or financial company for wrongdoing.

These widely used clauses leave consumers with no choice but to seek relief on their own—usually over small amounts. ... “Signing up for a credit card or opening a bank account can often mean signing away your right to take the company to court if things go wrong,” said CFPB Director Richard Cordray. “Many banks and financial companies avoid accountability by putting arbitration clauses in their contracts that block groups of their customers from suing them. Our proposal seeks comment on whether to ban this contract gotcha that effectively denies groups of consumers the right to seek justice and relief for wrongdoing.”

8. Ask students to discuss the excerpt:
• What do you think is meant by “contract gotcha?” Why do you think the Bureau describes the arbitration clauses in this way?
• How would the Bureau’s proposed ban change certain consumer contracts? What would the proposed change mean for companies? Consumers?

9. Wrap up by asking students what they think about the Bureau’s proposed ban, and whether court or arbitration is most appropriate to resolve consumer disputes. Students might write op-eds advocating in favor of or against the Bureau’s ban. Try to follow the CFPB in coming months to see what happens with the proposed ban.

American Athletes and the American Arbitration Association

In the United States, purely domestic Olympic and international sports disputes generally are resolved in arbitration proceedings before the American Arbitration Association (AAA) rather than the CAS. The United States Olympic Committee must comply with the Ted Stevens Olympic and Amateur Sports Act, a federal law that establishes a legal framework for protecting the opportunities of U.S. athletes to participate in the Olympic, Paralympic, Pan American Games, and world championship competitions. Pursuant to the Act, an athlete who is not selected as a member of the U.S. team for the Rio Olympics or Paralympics has the right to submit the dispute to final and binding arbitration before a AAA sports arbitrator.

The arbitration proceeding between an athlete (who usually is represented by counsel) and his or her National Governing Body is held in person or telephonically before a single arbitrator selected by the parties from a closed list of sports arbitrators appointed by the AAA. The arbitrator is required to render a timely written and reasoned award, usually on an extremely expedited basis, which is published on
the U.S. Olympic Committee’s website. For example, the author has heard and resolved within less than one week two separate arbitration proceedings arising out of Olympic or Paralympic team selection disputes. The first one involved a challenge to the procedures for selecting the three push athletes for the U.S. four-man bobsled team that ultimately won the gold medal in the 2010 Vancouver Winter Olympics. The second one involved the selection procedures for the Paralympic track and field team that competed in the 2012 London Summer Olympic Games.

If challenged by one of the parties, an arbitration award is subject to very limited judicial review by a U.S. court on the same basis as any arbitration award under the Federal Arbitration Act or state law. The award will be judicially confirmed and enforced if the arbitrator had jurisdiction and authority to resolve the issues therein and rendered an impartial and unbiased award. The reviewing court will not vacate the arbitration award simply because it disagrees with the merits of the arbitrator’s decision.

There is a specialized AAA arbitration procedure for resolving anti-doping rule violation charges against an athlete (and others such as coaches) by the United States Anti-doping Agency (USADA), an independent private anti-doping agency for Olympic sports. USADA is the U.S. counterpart to the World Anti-doping Agency (WADA), whose mission is “to lead a collaborative worldwide movement for doping-free sport.” An athlete who chooses to challenge USADAs doping allegations and/or proposed sanctions may request a hearing before a three-person AAA panel (whose members are also U.S. CAS arbitrators), which is a right provided by the ASA because a doping sanction may adversely affect an athlete’s ability to participate in a protected competition. In a AAA doping arbitration proceeding, USADA and the athlete are adverse parties. After hearing the parties’ evidence, the AAA panel issues a written arbitration award with reasons for its decision, which is published on USADA’s website.

The athlete or USADA may appeal this award to a three-person CAS appeals arbitration panel, which exercises de novo review and renders a final and binding award. For example, in *Landis v. USADA*, after conducting another arbitration proceeding, a 2008 CAS panel determined that Floyd Landis committed an anti-doping rule violation while cycling in the Tour de France, invalidated his race results, and sanctioned him with a two-year period of ineligibility—the same determination made by a 2007 AAA arbitration panel. Similar to any other CAS award, a CAS appeals arbitration award resolving a doping dispute is subject to very limited judicial review.

**Critical to Modern Sport**

As Michael Lenard, a 1984 Olympian, ICAS member, and president of the CAS ad hoc Divisions for the 2014 Sochi Winter Olympic Games and 2016 Rio Summer Olympic Games, has stated: “Sports arbitration systems are critical to modern sport and are the only viable, practical means for resolving Olympic and international sports disputes.” The CAS and AAA sports arbitration tribunals resolve these disputes in a fair, fast, and impartial manner that results in consistent and predictable outcomes. CAS and AAA arbitration awards generally are accepted by the parties, well-respected by members of the Olympic Movement (including those in the United States), and, even if challenged in subsequent litigation, are recognized and enforced by courts. Without these international and national systems of sports arbitration, the need to resolve Olympic and international sports disputes consistent with these objectives would be extremely difficult to achieve. Courts lack the necessary specialized expertise and experience to resolve the disputes as consistently, effectively, and predictably as the CAS and AAA.

---

Working to keep the Olympic Games from abetting brutality and repression is a worthy goal. The Games buy host countries spectacular levels of international approbation—enough sometimes to have measurable effects on international politics. For this reason, members of the international community have an interest in pressuring the International Olympic Committee (IOC) to award the Games to host countries that broadly abide by international norms.

But formalizing human rights standards in any explicit way would backfire. Adopting human rights criteria in judging potential hosts would mean either that the IOC requires applicants to meet explicit minimum criteria or that it judges human rights records alongside other elements of a bid. In the first case, articulating minimum standards would be a daunting task in light of the multiplicity of rights and their malleable meanings. How would rights be ranked and interpreted, how would adherence be measured, and how would cut-off points be determined? Making a “good” human rights record a precondition for bidders would inevitably involve judgments that appeared arbitrary and capricious, muddying the moral clarity that human rights standards should bring. And yet if there are no hard standards—if human rights records are merely one fuzzy tool for evaluating a bid application, alongside the quality of swimming pools, the capacity of subways, and the number of three-star hotel rooms—rights are trivialized.

The IOC has of late avoided the kind of corruption scandal currently engulfing soccer’s Federation Internationale de Football Association (FIFA), but both are unelected, undemocratic, unaccountable organizations with scant moral credibility. Their members lack the standing and the expertise to adjudicate on human rights. Asking entertainment organizers to make consequential judgments about one of the most freighted issues of our time would hurt rather than help the cause of human rights.

Barbara Keys is an associate professor of history at the University of Melbourne. She is the author of Reclaiming American Virtue: The Human Rights Revolution of the 1970s (2014) and editor of a forthcoming volume on the moral claims of international sports events.

Two years ago, just after the Sochi Olympics 2014, the International Olympic Committee (IOC) was in a deep confidence crisis. Not unlike FIFA today, it was faced with a wave of popular distrust. People were blaming the organization for the environmental damages and the many human rights violations recorded in Sochi. At first, the IOC tried to downplay its responsibility, insisting that hosts-states are sovereign and that the local committee complied with existing national laws. These excuses are often used by International Sports Governing Bodies (ISGBs) when they are faced with criticisms regarding the human rights violations linked to the events they are organizing. Yet, in practice, ISGBs do not hesitate to require legal changes to national laws when their economic interests are at stake. They do not shy away from making the organization of an event conditional upon specific investments in infrastructure or the introduction of rules protecting their intellectual property rights. The same logic of conditionality should (and could) be applied as far as human rights and environmental sustainability are concerned. At least the private contracts...
and administrative acts engaged into in the context of the organization of an event should abide with minimum standards. For example:

- Enforcement of minimum labor rights (based on ILO standards) for the workers involved on the many building sites tied to a mega event;
- Freedom of speech during the event (at least on the premises);
- Minimum environmental standards applied to the building sites of the event, etc.

These conditions should be enshrined in the host city contracts and the compliance of the local organizer assessed by an independent monitoring body. Appropriate sanctions should be included to deter the local organizers from disregarding their original commitments. In this regard, the recently adopted Agenda 2020 of the IOC goes in the right direction, though its implementation will need to be closely scrutinized. It is the living proof that ISGBs could be a positive force to further human rights through sports, if only they would dare to do so.

Antoine Duval is Senior Researcher in European and International Sports Law at the Asser Institute in The Hague.

Sometimes Boycotting Is the Right Thing

by Ilya Somin

For decades, people of goodwill have debated whether liberal democracies should boycott Olympic Games and other sports events held under the auspices of repressive governments. Apartheid South Africa was the target of a long-standing sports boycott that denied it the right to even participate in most international sports events, much less host them. Sixty-two nations, including the United States, boycotted the 1980 Summer Olympics in Moscow, in protest of the Soviet invasion of Afghanistan. More recently, human rights activists called for a boycott of the 2014 Winter Olympics, held in Sochi, Russia, in protest of the Russian government’s oppression of gays and lesbians.

The purpose of such boycotts is to incentivize oppressive governments to change their ways. Many such regimes care about their image and do not want to be sports pariahs. At least at the margin, boycotts can improve their behavior, as they may have done by contributing to the demise of apartheid.

The standard argument against boycotts is the traditional idea that international sports events should not be kept free of politics. The problem with this theory is that the Olympics and other similar events are virtually always used as propaganda tools by host governments, as happened with Nazi Germany in 1936, the USSR in 1980, and Vladimir Putin’s regime in 2014. For this reason, it is nearly impossible to make them genuinely politically neutral. The only realistic options are either to allow repressive regimes to use the Games to burnish their public image, keep them from hosting in the first place, or forestall their propaganda by means of a boycott that undercuts the Games’ public relations benefits for the hosts.

Moreover, some governments commit serious human rights violations in the very process of preparing for the games themselves. For example, China forcibly displaced some one million people in order to prepare facilities for the 2008 Olympics in Beijing. Brazil displaced many thousands in order to build new stadiums for the 2014 World Cup. Even if it is wrong to boycott in protest of “unrelated” human rights violations, the international sports community should not tolerate abuses that are an integral part of the sports event itself.

Liberal democracies should indeed boycott international sports events held by oppressive governments or involving oppression in the process of holding the events themselves. Better still, they should use their clout in bodies such as the International Olympic Committee to prevent such governments from being designated as hosts in the first place; that way, we can avoid painful trade-offs between defending human rights and giving athletes a chance to compete in events many have spent a lifetime preparing for.

But, in applying such policies, we should strive for consistency. While there was considerable support for boycotting Russia in 2014, few called for a boycott of the 2008 Olympic Games in China, a nation ruled by a regime with an even worse human rights record. Even fewer did so in the case of Brazil in 2014. Our principled opposition to oppression should not vary based on the identities of the oppressor or the oppressed. We should not allow the Olympics to become a propaganda show for brutal regimes of either the right or the left; still less should we tolerate events that involve the forcible displacement of thousands of people in order to build sports stadiums.

What Is Doping?
The concept of “doping” exists because athletes’ ambitions to achieve and perform well can conflict with standards of conduct requiring that these impressive results be achieved in an ethical manner. The word “doping” thus refers to the boosting of human performances by means of drugs or other techniques that are defined as illegitimate strategies for extending human limits. The distinction between what is legitimate and what is illegitimate is determined by rules that are rooted in a system of norms. In the world of high-performance sport, these norms have been established by the World Anti-Doping Agency (WADA), a multinational organization that went into operation on January 1, 2000. Its role in world sport is to formulate a long list of banned drugs and other performance-enhancing techniques and to supervise the implementation of anti-doping measures around the world. The WADA Code says that doping is prohibited because it violates “the spirit of sport,” which is described as “the celebration of the human spirit, body and mind, and is characterized by the following values: ethics, fair play and honesty, health, and excellence in performance.”

The WADA statement is, however, both idealistic and impractical, because the “spirit of sport” can be defined in two contradictory ways. The traditional doctrine of fair play and honorable behavior has proven to be incompatible with the Olympic motto “Citius, altius, fortius” (“Faster, higher, stronger”), which demands that athletes produce better and better performances over time. The doping epidemic that has been gaining force over the past fifty years represents many athletes’ responses to this forced choice between an ideal of self-restraint and the competitive pressures that encourage doping.

The doping concept has proven to be impossible to define in an entirely logical and consistent way. The standard of “strict accountability” makes the athlete responsible for any banned substance that is found in his or her body. But whether an athlete actually intends to acquire an unfair advantage is relevant to the question of whether or not he or she has actually “doped.” A second uncertainty pertains to the “doping” substance that is assumed to enhance performance. For example, WADA has gone back and forth on
whether caffeine should be considered a doping drug. In fact, the efficacy of doping drugs has rarely been confirmed in a scientific manner. If no one knows for sure whether a drug improves athletic performance, should its use count as doping? The problem of defining doping has also been complicated for many by disagreements about deciding what is “natural” and what is “artificial,” what counts as “therapy” as opposed to an “enhancement” that aims at boosting a person’s ability to produce better performances.

Athletic doping should be understood as only one type of human enhancement among others that include cosmetic procedures, such as injections and surgeries, as well as various forms of “workplace doping” that have escaped public scrutiny in a way that sports doping has not. These include amphetamines for long-distance truck drivers and U.S. Air Force pilots who need to stay alert on the road and in the air; mine workers chewing coca leaves high up in the thin air of the Andes; classical musicians using beta blockers to suppress stage fright; steroids for police officers, prison guards, and firefighters; Prozac, Ritalin, or cocaine for energy and self-confidence on the job; the anti-narcoleptic modafinil (Provigil) for students and night-shift workers; and Red Bull and other caffeine-delivery vehicles as omnipresent workplace “tonics.”

Why Do Athletes Dope?
The doping epidemic that has spread throughout high-performance sport since the 1960s is the product of mankind’s encounter with limits to athletic performance that are inherent in the human body. High-performance athletes have become caught between the opposing mandates of traditionally ethical conduct on the one hand and demands for extreme performances on the other. The doping practices of many elite athletes are responses to these irreconcilable demands for both self-restraint and extreme athletic efforts that become literally inhuman when doping techniques are required to produce them.

As the multiplying doping scandals of our own era demonstrate, powerful incentives to dope have been built into the global sports system as the major sports acquired great commercial and political value in the eyes of entrepreneurs and politicians around the world. In this hyper-demanding competitive world, athletes dope to remain competitive in their events for both personal and sometimes financial reasons. Winning a medal in a nonrevenue sport fulfills a personal ambition. Winning matches or games in commercialized sports such as tennis or cycling or soccer can make an athlete wealthy. This is the functional explanation of athletic doping, since it describes doping as a rational response to demanding circumstances in which the athlete wants to succeed.

The alternative explanation for doping attributes doping behaviors to character flaws and moral failure on the part of the athlete. Media discourse on doping focuses almost entirely on the individual malefactor and employs a vocabulary that is both moralizing and at times quasi-religious: one reads about “rehabilitation,” “redemption,” and even “resurrection.” The Vatican critique of doping as a violation of God’s will initiated by Pope Pius XII in 1955 continues to the present day. The word Dopingsündner (doping sinner) has appeared frequently in German media. Even more than they are legal matters, high-profile doping cases are
spectacles of moral transgression in which the accused athlete is the only protagonist under the spotlight. And as transgressors, they are expected to feel guilt.

Some may even imagine that doped athletes may not have consciences at all. In 2010, Dick Pound, who served as the inaugural president of the World Anti-Doping Agency (WADA) from 2000 until 2007, called doping athletes “sociopathic cheats [who] deserve to be dealt with accordingly.” This comment seemed to be based on the mistaken assumption that entire cohorts of athletes, whether cyclists or shot-putters or sprinters or weightlifters, are sociopaths. It is likely that this extreme condemnation of the “cheats” resulted from Pound’s deep frustration at WADA’s inability to stem the endless stream of doping cases that raise doubts about whether organized sport will ever be able to get doping under control.

**How Has Doping Changed?**

Over the past century, athletic doping has advanced from the crude experiments of the 1890s to the use of highly effective drugs that have changed performance levels and world records. During the first half of the twentieth century, no genuinely effective doping drugs were available. This did not, however, prevent many athletes from taking a variety of substances, including phosphates and gland extracts, in the hope they might boost their performances on the running track and elsewhere. What is important is that the ambition to dope existed even in the absence of drugs that worked. The doping ambitions of high-performance athletes have proven over many years to be relentless. Many elite athletes are prepared to try anything that might work, including a wide range of medical drugs. In fact, all of the classic doping drugs that do work—amphetamines, anabolic steroids, erythropoietin, and human growth hormone (hGH)—were created to serve legitimate medical purposes.

In the 1950s, European professional cyclists engaged in rampant abuse of amphetamines that prompted Pope Pius XII to issue in 1955 a public condemnation of this practice. Anabolic steroid use among high-performance athletes began to spread during the 1960s and has since expanded both among elite athletes and into other predominantly male populations such as bodybuilders, along with older men who seek to slow the aging process and restore physical and sexual vigor. Classic blood doping, which involves the extraction and subsequent reinfusion of an athlete’s red blood cells, was invented in Latvia during the 1970s as a heart medication for older patients. It soon became clear that many athletes had erythropoietin (EPO) by cyclists dates from the late 1980s. This is the most common drug, but athletes have taken many others in the belief that they would (or might) enhance their performances. Over time, the sheer number of “doping” drugs used by elite athletes has greatly expanded. The global doping scandal that erupted in March 2016, engulfing the tennis superstar Maria Sharapova and more than a hundred other elite athletes, introduced the world to a drug called meldonium (sold as Mildronate) that was developed in Latvia during the 1970s as a heart medication for older patients. It soon became clear that many athletes had

(Continued on page 25)
Learning Gateways

Whereabouts Rules and Doping

This conversation-starting activity allows students to step into the shoes of a professional athlete who competes nationally and internationally (i.e., member of the U.S. Olympic team) and is subject to the terms of the World Anti-Doping Code. Students consider the “whereabouts rules” currently in place that mandate that athletes provide their whereabouts on a daily basis in order to be available for testing for prohibited substances. The whereabouts rules raise questions about a right to privacy and provide an opportunity to discuss doping, its impact on international sports, and measures to stop it.

1. Display or project the following photo for students.

This photo was taken during the 2006 Tour de France. Download the photo at www.insightsmagazine.org.

2. Ask students to discuss the photo:
   • What do you see in the photo? What do you think is happening?
   • What do you think is the meaning of the sign?
   • What is “doping”?

3. Ask students what they know or have heard or read about doping and its prevalence in sports. Allow them to offer examples of stories that they have seen in the news. Discuss whether doping is a problem in sports.

4. Explain to students that, in 2006, the same year the photo was taken, the World Anti-Doping Agency (WADA) introduced requirements that registered athletes may be tested for illegal drugs or other prohibited performance-enhancing substances, not only during competition, but also outside of formal competition—in effect, anytime. Athletes are required to report their “whereabouts” on a daily basis and make themselves available for testing during one hour of every day. Display or project this screenshot from the United States Anti-Doping Agency for students—note that “there is an app for that” when it comes to athletes reporting their whereabouts.

5. Discuss the whereabouts rules with students:
   • Why do you think WADA instituted whereabouts rules? How might they help to address the doping problem?
   • Do you think the whereabouts rules are fair to athletes? Are they easy to follow?
   • Can you think of situations in which it might be difficult to meet the whereabouts requirements? Do you think it is fair to penalize an athlete if they do not meet the requirements?
   • How would you feel if your school instituted a whereabouts rule?

6. Wrap up the discussion by asking students to consider how a whereabouts rule in their school would affect them. Probe students’ feelings about whether the whereabouts rules violate any right to privacy.

For an extended activity, students might review the Fourth Amendment to the U.S. Constitution and landmark Supreme Court cases dealing with drug testing in schools. See www.insightsmagazine.org for an annotated listing.
I like to do my own thing. I don’t like to tell people where I am, because I’m going to Barbados. … I never thought of it. I’m just going to Barbados for one week. It’s too much. If I want to go on a boat trip or a shopping expedition, just in case a drug tester turns up. I can think of no other profession where a person would be subject to such restrictions. 

Christine Ohuruogo, women’s 400-meter track champion, Britain

I do it as a daily chore, hoping for a clean world of sports. I think it is the results of the efforts put in by the tester to protect the sport. It may be a bit difficult until you get used to it, but once you get used to it, I do not think it is difficult.

Koji Murofushi, men’s hammer thrower, Japan

I understand that it is necessary … because there is no other way in this moment to fight the doping problem. … This is part of my job and professional behavior. It is a price which I’m willing to “pay” for being a top athlete.

Blanka Vlastic, women’s high jump champion, Croatia

It’s too much. If I want to go on vacation to Barbados for one day, I shouldn’t have to say I’m going to Barbados. … I never tell people where I am, because I like to do my own thing.

Serena Williams, women’s tennis champion, United States

(Continued from page 23)

been using this drug to promote oxygen transport during athletic exertion.

Doping has also changed in that it has spread both “vertically” and “horizontally” within the enormous population of recreational athletes: down the age scale to include adolescents, up the age scale to include “masters” (senior) athletes in their sixties and older; and across a sport such as road running to include athletes competing at widely varying levels of ability. The expansion of doping practices across age groups and ability levels can be understood as one aspect of the growing acceptance of procedures that many believe can enhance both mental and physical abilities.

Why Should We Be Concerned About Doping?

There are those who ask why pharmacological aids to athletic performance should be prohibited at all. Advocates of legalizing doping drugs argue that doping athletes under medical supervision is a safe and fair procedure that would create equal opportunity for competitors by giving them equal access to performance-enhancing drugs. This is a naïve argument for several reasons. Medically supervised doping in the former East Germany during the 1970s and 1980s resulted in hundreds of medical casualties, especially among women. International regulation would become even more complicated. Athletes would dope beyond the official limits. Audience cynicism about the performances they were watching would remain or even intensify. Athletes who are conscientious objectors to doping would not have a chance. Many parents, knowing their athletically gifted children were eventually headed for nonmedical hormone treatments, would stop their athletic careers in advance.

Athletic doping violates a traditional ethic of sport that retains some of its prestige even as norms of sportsmanship and fairness are under constant assault by commercial and political pressures that demand extreme performances. Modern high-performance sport as we know it originated in a Victorian athletic culture that cultivated ethical conduct rooted in an ethos of fairness and the virtue of self-restraint. In the course of the past century and a half, the high-performance sports culture that was born in England has shed most of its ethical core while retaining the familiar moral rhetoric about building “character” and promoting “fairness.” In the meantime, sheer ambition has long since replaced the ethos of gentlemanly sportsmanship celebrated in a film such as Chariots of Fire. Sports doping has triumphed as a kind of applied science that is perfectly suited to a technological and performance-based civilization that values productivity and linear progress without apparent limits. As a West German sports scientist pointed out in 1987, over the past century high-performance sport has become a “gigantic biological experiment” bent on finding the limits of the human organism. The result of this experiment has been that some human athletic limits have been found and extended via doping drugs, because limits on performances threaten to diminish the excitement of sports entertainment. Traditional concerns about sports ethics have receded into the background of the global sports entertainment industry.

Sports doping has also subverted medical ethical standards among the many doctors who are attracted to the ambitions and celebrity of elite athletes, a group that includes eager fans as well as those looking for big fees. Medical professionals have participated in the athletic doping culture since the 1920s, and many doctors around the world have continued to aid and abet doping among high-performance athletes, thereby contributing to the illicit enhancement of athletic performances. Medical publications and official medical bodies have long been unanimous...
Can Global Sport Regulate Doping?

The doping of elite athletes is a genuinely global rather than a national phenomenon. International-caliber athletes have often served the nationalistic purposes of sports officials and politicians, but the athletes belong to a global tribe whose members pursue the same performance goals with essentially the same techniques, the same training methods, and the same doping drugs. High-performance sport is a cosmopolitan subculture whose members simply cannot afford to indulge in “national” training methods that would disadvantage them in international competition.

The global doping epidemic has produced demand for global regulation of doping by elite athletes. The 1998 Tour de France doping scandal catalyzed an initiative by the International Olympic Committee (IOC) and a number of national governments that led to an international conference in Lausanne, Switzerland, in February 1999 and the establishment of the World Anti-Doping Agency in January 2000. The IOC had initiated drug testing (for amphetamines) at the 1968 Mexico City Olympic Games. IOC drug testing at the Olympic Games has continued since then and has been spectacularly ineffective, yielding a tiny number of doping positives every four years among the many thousands of athletes who participate in the Summer Games. The Ben Johnson steroid doping scandal that shocked the IOC at the 1988 Seoul Olympic Games improved non-Olympic steroid testing but did not produce anything resembling transformative change. The supervisory role of the WADA that began at the 2000 Sydney Olympic Games has provided better oversight of anti-doping efforts around the world but has not resulted in many more positive drug tests. WADA continues to report a doping prevalence of about two percent based on out-of-competition testing carried out by the international sports federations. This percentage is much lower than the known prevalence of doping in a number of Olympic sports. It has long been clear that many athletes are able to use banned substances and avoid detection.

Today the prospect for achieving global doping control of elite athletes has never looked worse. The revelations of doping use in various athlete populations that have appeared over the past two decades have demonstrated that the prevalence of doping in various sports exceeds previous estimates. Global sports governance itself is in a state of crisis. In recent years, the International Football Federation (FIFA) has been wracked by financial scandals. Unremarked amidst the tumult is the fact that the FIFA Medical Commission has not reported a single doping positive at a World Cup since Diego Maradona tested positive for ephedrine in 1994. The International Track & Field Federation (IAAF) is in disarray. The International Swimming Federation (FINA) is beset by reports of doping, especially in China, and is being investigated by WADA. The International Cycling Union (UCI) collapsed in 2013 under the weight of the Lance Armstrong scandal and elected new leadership. Yet even these reformers have been unable to bring their doping problem under control. In the meantime, the WADA leadership has become pessimistic about ever getting the doping crisis under control. In March 2016, Richard Pound, the first president of WADA (2000–2007) and still its most prominent voice, pointed out that the weakness of global anti-doping lies not in its scientific methods but in the perverse incentives that permeate the global sports entertainment industry. “Where things break down,” he said, “is the people. Lots of people don’t really want the fight against doping to be successful, including a lot of sport leaders. Their objective is to get reelected, and you don’t get reelected if you make waves, or turn over too many rocks.”

Discussion Questions

1. Do you think a “strict accountability” standard, which holds an athlete responsible for substances found in his or her body, regardless of intention to acquire an unfair advantage, is fair? Why? If not, what might be a more appropriate standard?
2. Do you think the attempts to regulate doping have been effective? If not, do you agree with the author that “the prospect for achieving global doping control of elite athletes has never looked worse”?
3. Should doping be regulated at all? Why?

Suggested Resources

- “Should Performance Enhancing Drugs (Such as Steroids) Be Accepted in Sports?” ProCon.org, November 9, 2015. http://sportsanddrugs.procon.org/ 

in condemning doping, including those physicians who practice “medically supervised” doping. The World Medical Association declared in 1981 that “the physician should be aware that the use of doping practices by a physician is a violation of the medical oath” that affirms: “My patient’s health will always be my first consideration.” However, such statements of medical principle have not stopped hundreds of doctors, inside and outside of the former East Germany, from doping athletes, thereby making doping doctors, too, members of the global subculture of high-performance sport.
By the time they lace up their cleats or set foot on the court, most college athletes have heard the National Collegiate Athletic Association's (NCAA) mantra that there are over 450,000 student athletes and just about all of them will go pro in something other than sports. With so few opportunities available to not only compete at the next level but stay there, the height of most student-athletes’ earning potential will come during their college careers.

But at this moment, college athletes are prohibited from profiting off their names, images, and likenesses, essentially limiting their earnings to the cost of an athletics scholarship. In the eyes of many current and former student-athletes, that benefit pales in comparison to the amount of revenue high-profile athletes generate for their school.

When the University of Alabama's football team won the National Championship Trophy in January, the school's athletic department earned a $6 million payout. The players walked away with some new merchandise and lasting memories, but nothing in the way of financial gain. At the conclusion of March Madness this year, athletic departments in the Atlantic Coast Conference were notified that they would split just shy of $40 million over the next six years. That's an extra $400,000 annually per school, none of which will go into the players' pockets.

As the revenue generated by college athletics has skyrocketed in the last two decades, student-athletes have increasingly asserted their right to a piece of the proverbial pie. In recent years, that pushback has resulted in numerous high-profile lawsuits and administrative actions against the NCAA. With most college athletes spending well over 40 hours per week in pursuit of their athletic endeavors, several cases involving the status of college athletes as employees have emerged across the country.

Northwestern Union Case

On January 28, 2014, representatives for the College Athletes Players Association (CAPA) walked into the National Labor Relations Board (NLRB) office in downtown Chicago and filed a petition to unionize the Northwestern University football team. The move sparked a national debate about the status of college athletes as employees that still reverberates today.

CAPA's petition, spearheaded by the team's starting quarterback Kain Colter and supported by nearly all of his teammates, argued that college athletes were primarily employees entitled to protection under the National Labor Relations Act, including the right to unionize. CAPA cited the millions of dollars in revenue generated by the Northwestern football team each year, the amount of time football players dedicated to participating in their sport, and the influence the coaching staff and the school exerted over the players as evidence that the football players were employees of Northwestern. CAPA hoped that unionization would provide a seat at the table with the NCAA to negotiate better physical, academic, and financial protections for college athletes.

On March 26, 2014, in what was viewed as a groundbreaking decision, the regional director for the NLRB granted CAPA's petition, ruling that football players on scholarship at Northwestern were employees of the university. In support of his finding, the regional director noted that the football players performed valuable services for the university (resulting in approximately $235 million in revenue over a ten-year period) for which they were compensated. Although this compensation did not come in the form of a traditional paycheck, athletic scholarships provided by Northwestern paid for the players' tuition, fees, room, board, and books during their four- to five-year playing careers.

The regional director determined that the threat of losing that scholarship, which could be revoked for any number of reasons including a violation of team rules or voluntarily withdrawing from the team, compelled players to cede all manner of control over their athletic lives at Northwestern. Players were routinely required to spend 40 to 50 hours per week on football-related activities during the regular season and an additional 20 hours per week during the off-season. Missing or arriving late to a practice or game could result in discipline or removal from the team.
Northwestern controlled nearly every aspect of the players’ personal lives as well. Players were required to obtain a coach’s permission before they could: “(1) make their living arrangements; (2) apply for outside employment; (3) drive personal vehicles; (4) travel off campus; (5) post items on the Internet; (6) speak to the media; (7) use alcohol and drugs; [or] (8) engage in gambling.”

When taken together, the regional director surmised that these factors supported a finding that the players were employees of Northwestern. The decision allowed the players to choose (through the NLRB’s election process) whether to be represented by CAPA in collective bargaining negotiations with Northwestern.

CAPA’s victory was ultimately short-lived as Northwestern appealed the regional director’s decision to the full NLRB panel. On review, the NLRB declined to assert jurisdiction over the case on the basis that its decision “would not promote stability in labor relations.”

The NLRB noted that the unique nature of college football, wherein there exists a “symbiotic relationship” between the teams, conferences, and the NCAA, makes it difficult, if not impossible, to assert jurisdiction over only one team. Issues impacting the players at Northwestern would also affect the Big Ten Conference, its conference members, the NCAA, and other Division I institutions. For this reason, every previous sports case decided by the NLRB only covered league-wide bargaining arrangements.

The NLRB also observed that the majority of teams competing in Division I FBS (Football Bowl Subdivision) football were public institutions and therefore exempt from NLRB jurisdiction. Of the more than 125 colleges and universities participating in FBS football, only 17 would be impacted by a decision from the NLRB, and in the Big Ten Conference, a decision would only affect Northwestern. With so little anticipated impact on college athletics as a whole, the NLRB declined to issue a decision in the case.

Although not a primary reason for declining to assert jurisdiction, recent changes in the college athletics landscape made the NLRB’s decision easier. In the months leading up to the NLRB’s ruling, several prominent colleges and universities began offering four-year athletic scholarships, the NCAA approved financial aid up to the full cost of attendance (granting athletes additional funds to cover meals, school supplies, multiple trips home per year, and other miscellaneous expenses), schools were allowed to provide athletes with unlimited meals and snacks, and the NCAA began taking steps to address concussion injuries among college athletes.

In a somewhat thinly veiled threat to the NCAA, the NLRB warned that “subsequent changes in the treatment of scholarship players could outweigh the considerations that motivated its decision to decline jurisdiction in this case.” The NLRB was also careful to note that its decision was limited to the football players at Northwestern and was not an indication of how the NLRB would approach a petition on behalf of all Division I scholarship football players, potentially leaving the door open for CAPA, or some other organization, to renew the case.

**Berger v. Nat’l Collegiate Athletic Ass’n**

Not long after the Northwestern football team filed for unionization, three female track and field athletes from the University of Pennsylvania (Penn) sued the NCAA and more than one hundred of its member institutions for alleged violations of the Fair Labor Standards Act (FLSA). In the complaint, Gillian Berger and her teammates argued that student athletes, by virtue of their participation in athletics, were employees of their respective collegiate institutions. Under the FLSA, that meant that student athletes were entitled to compensation in the form of federal minimum wages.

To support their argument, Berger and her teammates noted the similarities between students participating in Division I athletics and those engaging in work-study programs. Both categories of students perform “non-academic functions for no academic credit at the behest, and for the benefit, of the NCAA Division I Member Schools.” The only exception between the two is that work-study participants are paid while student athletes are not. The failure to pay student athletes as employees, according to Berger and her teammates, creates a “perverse result” wherein some work-study participants are allowed to reap financial benefits off the backs of uncompensated student athletes without whom such work would be unavailable.

The federal district court reviewing the case disagreed. In deciding the
case, the court looked at whether the student athlete or the school derived the primary benefit of the work performed. The court concluded that several factors weighed in favor of finding that a student’s participation in collegiate athletics was primarily for the student’s benefit.

First, the NCAA has developed a “revered tradition of amateurism” that puts student athletes on notice that they will not be compensated for participation in intercollegiate athletics. Students enrolled in Penn in particular could have no expectation that they would be paid for playing a college sport because Penn does not offer academic or athletic scholarships.

Second, the Department of Labor (DOL) has taken no action to apply the FLSA to student athletes, despite the well-known existence of thousands of unpaid college athletes on campuses across the country. In fact, guidance from the DOL explicitly excludes student athletes from coverage under the FLSA. Pursuant to the Department’s Field Operations Handbook, “[a]ctivities of students in [interscholastic athletics] programs, conducted primarily for the benefit of the participants as part of the educational opportunities provided to the students by the school or institution, are not ‘work’ [under the FLSA] and do not result in an employee-employer relationship between the student and the school or institution.”

These factors prompted the court to rule that Berger and her teammates were not employees of Penn and therefore not entitled to compensation under the FLSA.

The court’s decision never addressed the merits of Berger’s case against the NCAA and other Division I schools. Since Berger and her teammates were all enrolled at Penn, the court held they did not have a plausible basis to sue anyone other than Penn. Presumably, athletes from other colleges and universities could join the lawsuit to assert claims against other schools, but none have come forward to do so.

In March 2016, Berger and her teammates appealed the district court’s decision to the Seventh Circuit Court of Appeals. As of the date of publication of this article, that appeal is still pending.

**Conclusion**

The aforementioned cases provide mixed results for student athletes hoping to make a stronger claim to the big money generated by college athletics. Although the two cases demonstrate that, under the right circumstances, college athletes may be considered employees, the momentum surrounding CAPA’s initial victory has faded and no further cases dealing with this issue have emerged.

Student athletes interest in pursuing the topic may have waned as a result of the many beneficial changes adopted in the wake of the Northwestern case. It’s also possible that in the buildup and excitement of the unionization talks, athletes failed to recognize or understand the potential negative consequences that being classified as an employee might bring—labor disputes over playing time, scholarship benefits, and scheduling, reporting scholarships as taxable income, inequities between schools that formed unions and those that remained independent—and began to harbor doubts about pushing for representation.

While this issue may be dead for the time being, with all of the other lawsuits challenging the NCAA and its member institutions, one thing remains certain: Current and former college athletes are going to continue jockeying for a position at the table, and when the dust settles, the college athletics landscape will undoubtedly look much different than it does today.

Michelle Piasecki is a lawyer who specializes in several areas of law, including U.S. collegiate sports. She is a former collegiate athlete and coach and is currently an associate at the law firm of Harris Beach in Albany, New York.
Hon. Robert Torres Jr.

The Honorable Robert J. Torres Jr., born and raised on the Pacific Island of Guam, was sworn in for his second term as chief justice of the Supreme Court of Guam in 2014. Chief Justice Torres is also a designated district court judge for the U.S. District Court of Guam and justice pro tempore for the Supreme Court of the Commonwealth of the Northern Mariana Islands. Outside the courtroom, Chief Justice Torres is renowned for his involvement and positive contributions to football (soccer) as a match official, licensed coach, and a member of numerous committees and judicial bodies for Fédération Internationale de Football Association (FIFA) and the Asian Football Confederation (AFC).

Q: Could you describe the purpose and importance of judicial bodies that oversee sports federations in general? Judicial bodies provide structure and transparency to international sports, so that all who are involved can be confident in the fairness of the competitions, whether they are players or coaches, officials or fans. While the specific procedures may differ depending on the particular sports federation, there are common purposes: investigating allegations of wrongdoing, imposing discipline where warranted, and creating a method to appeal decisions. In the case of FIFA, the Independent Ethics Committee, the Disciplinary Committee, and the Appeals Committee are the three judicial bodies that address these purposes. By ensuring that there is ethical conduct on all levels, judicial bodies protect the integrity of the game and promote the growth and development of sports around the world.

Q: What are some common concerns associated with ethics regulations that sports federations must monitor and manage? From my personal and professional experience, I can say that the ethical concerns faced by sports federations are similar to the concerns faced by judges. For example, there is duty of confidentiality to prevent the disclosure of secret information and a duty of neutrality to ensure that all nations, teams, and organizations receive equal treatment. In addition, those involved in sports federations and judges must avoid situations that might create a conflict of interest, because accepting gifts, commissions, or favors can easily lead to allegations of bribery or corruption. The FIFA Code of Conduct sets out these specific duties and other standards of ethical conduct in order to safeguard the reputation of football worldwide.

Q: How did you become appointed to the FIFA Ethics Committee and what is your role? I was recommended in 2006 by the then-president of the AFC, one of the six confederations recognized by FIFA. I am currently a member of the investigatory chamber of the Ethics Committee, which is responsible for investigating possible violations of the FIFA Code of Ethics. The chamber can close a case if the allegation is not supported or conduct further inquiries. After the investigation, the chamber reports results to the adjudicatory chamber of the Ethics Committee, which is responsible for making the final decision. I also have served as the acting deputy chairman of the Ethics Committee and as the chief of investigation in certain high-profile cases.

Q: How does being a Supreme Court Justice of Guam prepare you for your role with FIFA? How did you become interested in sports governance? My love for football (soccer) came before my position on the Supreme Court of Guam bench, and you might think that watching a World Cup game has nothing to do with wearing a judicial robe. But there is a natural correlation between these two roles—deciding appeals for the Supreme Court and investigating allegations of misconduct for FIFA require impartiality, thoroughness, and dedication to the fair application of governing standards, whether the rule of law or the FIFA Code of Ethics.

I am a longtime participant, supporter, and advocate of football in Guam. I’ve been a player and the captain for the Guam team that played in the South Pacific Games, and I earned the AFC coaches’ B and C licenses. I’m passionate about football! I’ve seen firsthand the positive benefits of football locally in Guam, regionally through the Asian Football Confederation, and globally in how FIFA has “touched the world.” By serving on the FIFA Ethics Committee, I am privileged to contribute to safeguarding the integrity and reputation of football worldwide.

Q: What are some positive reforms that the FIFA Ethics Committee participated in implementing? I’m proud to say that during my time on the Ethics Committee and as a member of the FIFA Ethics Reform Task Force, we were instrumental in reforming how allegations of misconduct were lodged and investigated and in establishing that the Ethics Committee functioned as an independent judicial body. When the Ethics Committee was first created in 2006, complaints originated from the FIFA Executive Committee or general secretary. The reform efforts proposed amendments to the FIFA Code of Ethics, which allowed complaints to be filed directly with the Ethics Committee, and authorized the independence of the Ethics Committee.

Q: In your view, what impact do international sports regulations have on local sports communities around the world? My answer can be summed up in one word: fairness. Whether played in Guam or Zurich, having international standards and regulations gives the assurance that the game will adhere to clear rules, that rules are applied equally, that misconduct will be investigated and if necessary, discipline will be imposed.
WHAT’S ONLINE?

Download Classroom Resources—
There are classroom-ready discussion questions, handouts, and PowerPoint presentations to accompany the teaching ideas in this issue, all at one location. Go get them!

Dive Deeper—
Find articles about the governance of international sports and links to educational materials from the International Olympic Committee and the Court of Arbitration for Sport.

Sports, Diplomacy, and Protest—
International sports competitions thrust people and places onto a world stage and put them under a global microscope. Politics, systems of government, and the rule of law are studied and challenged. Link to resources for exploring these connections to broaden your understanding of law and international sports.

Nominate “Profiles”
Know an innovator in the classroom? A dynamic expert in the field? Please let us know.

Tell Us What You Think!
Propose topics for future issues, share your ideas for the classroom, or tell us your favorite feature of the magazine.

Stay Connected!
For instant updates, become a fan of the ABA Division for Public Education on Facebook and follow us on Twitter! Just click on the Facebook and Twitter icons at www.insightsmagazine.org.

Mark Your Calendar
September 17, 2016 Constitution Day
Find resources to help you teach about the Constitution and commemorate Constitution Day 2016 with your students. www.abaconstitution.org
Coming in the next issue

The U.S. Presidency and the Constitution

As Election Day approaches again in the fall, Insights will examine the relationship between the U.S. Presidency and the Constitution. Recognizing that presidents have changed throughout U.S. history, Insights will discuss how their roles as Chief Executive and Commander in Chief have also changed over time.