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ANATOMY OF THE FIRST PUBLIC INTERNATIONAL SPORTS ARBITRATION AND THE FUTURE OF PUBLIC ARBITRATION AFTER USADA V. FLOYD LANDIS

by

Maureen A. Weston

I. INTRODUCTION

On July 23, 2006, Floyd Landis rode triumphantly on to the Avenue des Champs-Elysées in Paris as the ostensible winner of the 2006 Tour de France, only the third American in history to win cycling’s most prestigious race. Landis’ win was celebrated as a spectacular victory. Landis had seemingly collapsed in the mountainous Stage Sixteen and fell more than eight minutes off the lead to eleventh place. Yet the very next day, in Stage Seventeen of the twenty-two stage Tour, Landis and his Team Phonak attacked early. Landis forged ahead in what

* Associate Dean for Research & Professor of Law, Pepperdine University School of Law. The author gratefully acknowledges Pepperdine law student Anthony Greco for his helpful research assistance, and thanks the parties, legal counsel, and arbitral panel in USADA v. Landis, for providing the public an insight into the anti-doping arbitration process through the public hearings held at Pepperdine University School of Law in May 2007. The author, who had substantial involvement in coordinating the hearing at Pepperdine, would like to thank Dean Ken Starr for his support in Pepperdine’s hosting of the Landis arbitration, as well as Rian Schoeffling and Carlton Oliver, for their untiring administrative and technical support, and Pepperdine law students, including Bryan Lang and Kirk Pearson, who served ably in support of the parties, press, and process.


2 Associated Press/ESPN.com, supra note 1 (“So astounding was the turnaround that race director Jean-Marie Leblanc, who has overseen this event 18 years, called it ‘the best performance in the modern history of the Tour.’”).

3 Associated Press/ESPN.com, supra note 1.

some then considered one of the greatest single rides in Tour de France history, placing Landis thirty seconds behind the race leader Oscar Pereiro in the overall standings.\(^5\) In the final stages, Landis went on to take the lead over Pereiro by fifty-seven seconds, winning the overall Tour and donning the Yellow Jersey.\(^6\) Four days later, however, Landis’ world was turned upside down. The International Cycling Union (UCI), the governing body for the sport of cycling, announced that an “unidentified” Tour rider had tested positive for an abnormal testosterone-to-epitestosterone (T/E) ratio in violation of the anti-doping rules.\(^7\) The rider was later confirmed to be Landis, and the sample, taken after his epic Stage Seventeen ride.\(^8\) Landis learned of the testing result and of his termination from the Phonak team while still in Europe. In the midst of an international press frenzy, Landis floundered to offer a possible explanation of the testing result, but he vehemently denied doping.\(^9\) Meanwhile, the public debate, in both the on and off-line world, regarding his innocence was vociferous.\(^10\) Even Dick Pound, then...
President of the World Anti-Doping Agency (WADA), publicly weighed in on Landis.\textsuperscript{11}

In September 2006, the United States Anti-Doping Agency (USADA), which is responsible for the management of anti-doping testing and adjudication of enforcement actions under the World Anti-Doping Code (WADC), initiated an anti-doping charge against Landis.\textsuperscript{12} Facing the loss of his title to the Tour, endorsement opportunities, a ban from cycling, and worse, being branded a cheater,\textsuperscript{13} Landis decided to fight the charge and USADA, which as of then had never lost a doping case to an athlete.\textsuperscript{14}

Landis’ challenge to the USADA enforcement action had to be brought in arbitration, as required for all athletes who participate in the Olympic Movement.

\textsuperscript{11} Michael Sokolove, \textit{The Scold}, N.Y. TIMES MAGAZINE, (Jan. 1, 2007), available at http://www.nytimes.com/2007/01/07/magazine/07Antidoping.t.html?ex=1325826000&en=519f8fd43e9274c7&ei=5088&partner=rssnyt&emc=rss. (Sokolove reported that WADA Chairman Pounds said, in reference to Landis, “I mean it was 11 to 1! You’d think he’d be violating every virgin within 100 miles. How does he even get on his bicycle?”).

\textsuperscript{12} United States Anti-Doping Agency v. Landis, Case No. 30 190 00847 06 (AAA 2007) at 4-5 (September 20, 2007) [hereinafter “Landis AAA Award”], available at http://www.usantidoping.org/files/active/arbitration_rulings/landis%20final%20(20-09-07)%20(3).pdf. Under UCI regulations, USA Cycling is responsible for testing management and hearings for doping allegations. \textit{Id.} at 4. UCI, by contract, has delegated this function to USADA. \textit{Id.} See also, WORLD ANTI-DOPING AGENCY CODE [Hereinafter “WADC"], art. 8 (Nov. 2009), available at http://www.wada-ama.org/recontent/document/code_v3.pdf. (“Each Anti-Doping Organization with responsibility for results management shall provide a hearing process for any Person who is asserted to have committed an anti-doping violation.”).

\textsuperscript{13} See, Kamran Chaudri, \textit{Confirmed Test Results: A New Uphill Battle for American Cyclist Floyd Landis}, ILL. BUS. L. J., available at http://www.law.uiuc.edu/bljournal/post/2006/10/02/Confirmed-test-results-A-new-uphill-battle-for-American-cyclist-Floyd-Landis.aspx (describing the potential financial loss and damage to Landis’ reputation, including forfeiture of the € 450,000 prize money (approximately $575,000 USD) and endorsement opportunities).

and sanctioned international sports.\footnote{Olympic Charter, Rule 59, available at http://multimedia.olympic.org/pdf/en_report_122.pdf (rule fifty nine is the last rule listed in the charter). For information on the Olympic Movement, the interplay between national and international sporting organizations, as well as the mandatory nature of arbitration in the sports doping process, see, Maureen A. Weston, \textit{Doping Control, Mandatory Arbitration, and Process Dangers for Accused Athletes in International Sports}, 10 \textit{PEPP. DISP. RESOL. L.J.} 5, 12 (2009).} Discontent with what he and many in the international sporting community considered a closed and biased process, Landis requested that his arbitration hearings be public,\footnote{In his book, Landis writes, “[t]he international doping system is broken . . . . Start with the ridiculously unfair USADA legal process: USADA wrote its own rules, it enforces them, it acts as prosecutor in legal cases, and it picks which judges hear each case.” \textsc{Floyd Landis, Positively False: The Real Story of How I Won the Tour de France} 225 (2007). When later discussing his line of thinking when he decided to make the arbitration public, he says “USADA has a little known rule that an athlete can request a public hearing, and although no athlete had ever done so before, I couldn’t think of a better way to tell my side of the story.” \textit{Id.} at 244.} a first for an athlete accused of a doping offense.\footnote{Gwen Knapp, \textit{Landis Hearing Video Access}, SFGATE, http://www.sfgate.com/cgi-bin/blogs/sgreen/author?blogid=40&auth=174&o=20 (May 21, 2007). SFGate is the San Francisco Chronicle’s online news portal.} In a press conference, Landis commented that:

Since the first day of this case, I have been concerned about my ability to get a fair hearing…. Thanks to the public nature of these proceedings, the sports world will be watching, the taxpayers and legislators that fund USADA will be watching, and the Panel’s colleagues in the legal and arbitration profession will be looking to see their commitment to handing down a fair decision based on the facts and on the science as provided by both sides, all of which demonstrates that I won the Tour fairly and cleanly...
In May 2007, Landis and USADA entered into an unprecedented nine-day public arbitration hearing at Pepperdine School of Law, located in Landis’ home state of California. The first of its kind to be held in a public setting, it was stream-cast live over the Internet, and observed first-hand by over sixty media outlets from around the world. The hearing involved first-rate lawyering, high profile witnesses including international cyclists, scientists, experts, and complicated and controversial scientific evidence and arbitral rulings.

Although the hearing testimony centered mostly on the science and procedure of doping tests, a number of very unscientific events and surprising legal and practical questions arose in the course of this very public arbitration. Among these issues was simply, what does it mean to have a public arbitration? Other questions regarding the preliminary discovery rulings, strict timeline of the hearings, problems with an interpreter, the power or lack thereof of the arbitration panel to compel a witness to testify, the role of the panel expert, and the timeframe in which the arbitration panel has to render a decision also emerged.

This article reflects upon the public arbitration process as it unfolded in the Landis hearing. Part II briefly sets forth the regulatory framework in international and Olympic competition and the prescribed process for challenging and enforcing anti-doping violations. Focusing upon the Landis public arbitration specifically, Parts III and IV provide an “anatomy” of the public arbitration process therein and chronicle key procedural and strategic matters that arose before, during, and after

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21 See infra, Part III (discussing the logistics of allowing the public to view the arbitration).
22 See infra, Parts II-III.
the public arbitration. Part IV in particular focuses on the hearing itself, examining the parties’ respective case strategies and presentations and then the arbitral award and dissenting opinion regarding the charge against Landis. Part V examines the subsequent procedural measures Landis pursued, both in public and private, in the ill-fated attempt to retain his title and contemplates what lessons can be learned from the Landis experience. By examining the arbitration’s events and some of the unique issues that arose during it, this article hopes to provide insight for athletes, lawyers, and the public into the doping arbitration process, as well as to stimulate discussion on the benefits, potential risks, and future uses of public arbitration in sports and other contexts.

II. REGULATORY FRAMEWORK AND ARBITRATION PROCESS FOR CONTESTING SPORTS SANCTION

A. Jurisdictional Basis for the Public Arbitration

Athletes who participate in the Olympic Movement and in sanctioned international sport competition are contractually bound to comply with the procedural and conduct rules of their respective international federation, national governing body, and national Olympic committee. Each of the governing bodies within the Olympic Movement has adopted the World Anti-Doping Code (WADC) and incorporated the Code into its respective anti-doping rules. The WADC

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23 Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 77 (2008). The USOC is the National Olympic Committee (NOC) for the United States, as recognized by the International Olympic Committee (IOC). *Id.* at 76-77. The IOC is the governing authority for the Olympic Movement and recognizes NOCs and International Sports Federations (IFs), which administer specific sports. *Id.* at 76 (“The IOC, an international private non-profit organization domiciled in Lausanne, Switzerland, is the ‘supreme authority’ of the Olympic Movement”). NOCs and IFs, in turn, recognize National Governing Bodies (NGBs) “to administer and govern a particular sport” within that country.” Weston, *Doping Control, supra* note 15, at 12.
24 Mitten & Davis, *supra* note 23, at 77 (“Among the more important eligibility requirements an athlete must satisfy are to abide by the Olympic Charter and the relevant
sets forth specific anti-doping rules, control procedures, prohibited substances and methods, burdens of proof, and sanctions, which athletes must accept as a condition of participation in sanctioned international sports. International federation (IF) rules charge member national governing bodies (NGBs) with responsibility for doping control and enforcement under the Code; however, both WADA and the IF retain the right to appeal decisions made at the national level to the Court of Arbitration for Sport (CAS).

The NGB for cycling in the United States is USA Cycling, which is a member of both the United States Olympic Committee (USOC) and the Union
Cycliste Internationale (UCI). The USOC and member NGBs have contractually delegated anti-doping enforcement responsibility exclusively to USADA. USADA was created in 2000 to respond to Congressional concerns about doping in sports and requests for an independent anti-doping organization. Considered an “[i]ndependent non-governmental legal entity,” USADA is authorized to test and adjudicate alleged doping violations of any athlete who is a member of NGB or who participates in USOC-sanctioned international competitions. USADA therefore conducts the drug testing, results management,
and adjudication of disputes for participants in the Olympic movement within the United States.\textsuperscript{34}

\textbf{B. Testing and Arbitration Process for Contesting Results}

1. The Testing Process

Although drug testing of Olympic athletes was introduced in 1968,\textsuperscript{35} the rules and standards, if any, of what constituted doping varied by sport and national governments.\textsuperscript{36} Effective January 1, 2004, the World Anti-Doping Code (WADC) became the core standard which formalized and harmonized anti-doping rules “\textit{[w]ithin international sports organizations and among public authorities.}”\textsuperscript{37} All international sporting federations have adopted the WADC into their respective regulations and are formally responsible for enforcement of anti-doping rules.\textsuperscript{38} The federations typically contract with national anti-doping agencies to conduct doping control and testing of athletes.

\textsuperscript{34} USADA PROTOCOL, supra note 26, ¶ 1. USADA was created “as a result of recommendations set forth by the USOC’s Select Task Force on Externalization.” American Arbitration Association, Online Library, at 3, available at http://www.adr.org/si.asp?id=4700 (noting that “USADA began operations in October 2000 with full authority for drug testing, education, research, and adjudication for U.S. Olympic, Pan American, and Paralympic athletes.”). \textit{Id.}


\textsuperscript{37} \textit{Id.}

The testing process under the WADC typically involves athletes providing a urine sample, which is divided into A and B sample for laboratory testing. When the laboratory result of an A sample indicates a positive (adverse analytical) result for a banned substance, the anti-doping organization conducts an initial review for any departure from international standards for drug testing, as well as to determine if there is “an applicable therapeutic use exemption.” If neither is found, then the athlete or his team is to be “promptly informed” of the positive result. The athlete may request the B sample be tested, as well as to be present himself, or to have a representative appear in his stead while the test is performed. If testing of the B sample is negative, no further action is generally taken. If the B sample confirms the positive result, then the athlete either accepts the consequences or may challenge it pursuant to the rules of the anti-doping organization.

2. Arbitration of Doping Disputes

In the case of American athletes, the anti-doping organization is USADA. The USADA Protocol provides that hearings regarding doping disputes take place in the United States before the American Arbitration Association (AAA) using the AAA Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes (AAA Supplementary Procedures).
Alternatively, athletes have the option of bypassing the domestic arbitration process and proceeding directly to the Court of Arbitration for Sport for final review.47

Arbitration is generally a private, informal, extrajudicial process whereby parties agree to have their disputes finally decided by a neutral third party or panel of arbitrators.48 Proponents of arbitration tout it as a method to reach binding determinations through a more efficient and less expensive means with experts as the adjudicators.49 However, arbitration trades off these benefits with some of the more time consuming, albeit fact-gathering, procedures in litigation, such as pre-trial discovery and the formalities of evidentiary rules.50 For U.S. athletes, the AAA procedural rules provide only that material to be used as exhibits and witness lists must be exchanged five days before the commencement of the proceeding; it does not require the parties to make available other information or to disclose specific, even exculpatory, evidence.51 Further, conformity with legal rules of evidence is unnecessary.52 With no formal rules, the kind of evidence accepted and heard is at the arbitrators’ discretion.53 Accused athletes have the right to be represented by legal counsel at the athlete’s own expense.54 Sports doping disputes may be heard by one arbitrator, however, either party may request a panel of three arbitrators.

http://www.adr.org/sp.asp?id=28627 (The AAA hearings involving doping disputes are governed by commercial arbitration rules, as modified by the “Supplementary Procedures.”).

47 See, Weston, supra note 27 at 107.
49 Carbonneau, supra note 48, at 5.
50 Carbonneau, supra note 48, at 11.
51 AAA Supplementary Procedures, supra note 46, at Rule 18(b).
52 AAA Supplementary Procedures, supra note 46, at Rule 18(b).
53 AAA Supplementary Procedures, supra note 46, at Rule 23 (“An exchange of information may occur at the request of any party or at the discretion of the arbitrator. Consistent with the expedited nature of arbitration, the arbitrator may direct the production of documents and other information and the identification of any witnesses to be called.”).
54 See, Weston, Doping Control, supra note 15 at 45 (citing WADC 2009, at art. 8).
arbitrators. In such case, USADA and the athlete each select an arbitrator from a pre-approved roster. The panel or AAA selects the third arbitrator.

The arbitration of sports doping cases is typically conducted in private. However, USADA rules also provide that “the athlete . . . shall have the sole right to request that the hearing be open to the public subject to such limitations as may be imposed by the arbitrator(s).” It is under this provision that Landis, although charged of an anti-doping violation while in France, was able to challenge these charges in the United States and in a public setting.

III. THE DECISION TO CHALLENGE USADA PUBLICLY AND PRE-HEARING PREPARATION, TACTICAL CHOICES, AND PROCEDURAL ORDERS

The foregoing background describes the jurisdictional basis for the public arbitration. Surprisingly, public arbitration under these rules had not been used until Landis and his legal team made such a request. Next, the issues, parties, and arguments presented in the course of the actual public arbitration process are described. Notably, issues and strategic considerations that took place before the hearing proved pivotal, if not haunting, as the live hearing process ensued.

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55 AAA Supplementary Procedures, supra note 46 at Rule 12.
56 AAA Supplementary Procedures, supra note 46 at Rule 12.
57 AAA Supplementary Procedures, supra note 46 at Rule 12. The USADA rules providing for public and first-instance national arbitration of doping charges reflect the command of the U.S. Amateur Sports Act (ASA), which requires the USOC “to establish and maintain provisions for the swift and equitable resolution of disputes” involving athletes to participate in the Olympic Games or sanctioned competitions. 36 U.S.C. §§ 220503, 220509(a). It also mandates NGBs to agree to binding arbitration of any disputes involving athletes. Id. at § 220502(a)(4) The Act designates that these hearings are to be conducted in accordance with the Commercial Rules of the American Arbitration Association. Id. at § 220502(a)(4). Although calling for arbitration, a typically private process, the ASA also states that the hearings “[s]hall be open to the public.” Id. at § 220529(b)(2)(C).
58 See, Landis AAA Award, Case No. 30 190 00847 06 (AAA 2007) at 5 (September 20, 2007), available at http://www.usantidoping.org/files/active/arbitration_rulings/landis%20final%20(20-09-07)%20(3).pdf. See also, AAA Supplementary Procedures, supra note 46, at R1 (noting application for arbitrations which arise out of the USADA Protocol).
A. The Decision to Challenge USADA

As the report of Landis’ positive test was made public, USADA provided him with the report of his sanction and informed him of his right to contest the sanction via a request for arbitration. The preliminary measures to challenge the sanction involved several key decisions by Landis.

1. Hiring Legal Counsel and Financing a Defense

Athletes in Landis’s position facing disciplinary charges are entitled to be represented by counsel, at their own expense. Landis hired well-known athlete attorney, Howard Jacobs, to represent him against the USADA doping charge. Because of the scientific complexity of the case and the need for the resources of a sophisticated law firm to match USADA’s formidable legal team, Maurice Suh, an

59 With Landis, team Phonak was informed of his positive result, and in turn reported it to him. United State Anti-Doping Agency v. Landis, Case NO. 30 190 00847 (AAA 2007)(North American Court of Arbitration for Sport Panel) Transcript of Proceedings, 1099 [hereinafter “Transcript”] (May 2007). Landis’ testimony continues, 1) describing how he learned the positive A test result had become public, id. at 1101; and 2) explaining that he learned the results of the B test on the internet via a UCI press release announcement, id at 1105. See also, Landis, supra note 16 at 218-19 (stating that “[Landis] received the document package on August 31, 2006, more than a month after news broke about [his] Stage 17 urine test. It was 370 pages long. All in French.”). Leaks about the result caused Landis to address the matter publicly before he believed he was able to understand the details, and, feeling he was “being steamrolled by the system,” he “decided to fight back.” Id. at 234.

60 USADA PROTOCOL, supra note 26, at R26. See also, Weston, Doping Control, supra note 15, at 45.

61 Juliet Macur, Landis Hires Lawyer Versed in Sports Doping Cases, NEW YORK TIMES (Aug. 3, 2006), http://www.nytimes.com/2006/08/03/sports/othersports/03landis.html See also, Landis, supra note 16 at 200; Dick Patrick, Athletes Accused of Cheating Find Perfect Advocate, USA TODAY 3C (Sept. 2006) (profiling career and noteworthy clients of athlete attorney, Howard Jacobs). Jacobs also defended Tyler Hamilton who rode for Phonak, the same team as Landis, prior to being suspended for doping. Id.
experienced litigation attorney of Gibson, Dunn & Crutcher, was hired as co-counsel.  

To pay for these costs, Landis used his own finances that came from endorsement deals, his racing salary and previous prizes, as well as money that he obtained through the Floyd Fairness Fund started on his behalf.  

It also included a traveling town-hall style campaign where Landis went from city to city in order to present his defense and story to communities and ask for money to combat the allegations against him. The Fund brought in around $600,000, but Landis remained personally responsible for the substantial remainder of the legal costs.

2. Landis Mounts the Wiki Defense

The Floyd Fairness Fund was not the only very public means by which Landis attempted to combat the doping allegations. Landis also embarked upon a highly public and unprecedented means of defense, which was later dubbed the Wiki Defense.  

The term is in reference to the popular open-source and open-access Web page Wikipedia. The concept is to post information online and make it available so that the public can access and comment on it.  

In this effort to make public his claim of innocence as well as to solicit outside (and free) advice,

62 Loren Mooney, Floyd vs. The Man, BICYCLING, available at http://www.bicycling.com/article/0,6610,s-3-3-9-15983-100.html (last visited Apr. 30, 2010). The recommendation came from Paul Scott, who at one time was the number two person at the UCLA antidoping lab. He told Landis that he would need “the resources of a big law firm, or I’d get steamrolled… because the process doesn't give the athlete a lot of information and is designed to move fast.”


66 Hughes, supra note 65, at 20.
Landis posted the 370 page “Document Package” and later thousands of more pages of test documents concerning his case.67

Arnie Baker, a doctor who trained Landis early in his cycling career and who offered to look at the document package given Landis with his test results, commented that “[b]y posting Landis’s case publicly, we were able to rapidly send out to the public details of the flaws in the report as well as receive from the public comments that helped us learn more about the lab’s errors.”68 According to Dr. Baker, the Landis team decided early that they would fight against the “closed system" of WADA by going against what most attorneys do in legal fights and post everything they could online.69 This strategy was pursued to coincide with the decision to request an open arbitration so that the public could have as much access to the hearing and defense materials as possible.70 Dr. Baker later wrote an extensive book entitled “The Wiki Defense,” in which he provides his own detailed assessment and analysis of the laboratory reports and scientific testimony corroborating Landis’ theory of the case.71

Landis’ cause was also the focus, and seeming obsession, of many in the online world. For example, the blog “Trust But Verify” was started by a group of private individuals who followed news about the case and then started a highly sophisticated website which closely tracked and debated issues and parties in the case.72 The site provided access to links to scientific and arbitration documents in

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67 Hughes, supra note 65, at 20.
68 Hughes, supra note 65, at 20.
69 Hughes, supra note 65, at 8. See also, Arnie Baker, MD, Landis’s Legacy: Exposing a Flawed Anti-Doping System, 29-30 (Dec. 30, 2008), available at http://trustbut.blogspot.com/2008/12/winnowing-arnie-baker.html (noting his pro bono review of Landis’s document package and his determination that the lab (1) botched the test; (2) never identified testosterone properly; and (3) the authorities “lied.”).
70 Hughes, supra note 65, at 8.
71 Baker, THE WIKI DEFENSE, supra note 65.
72 The site was expressly biased in favor of Landis, but also purports to be fair to both sides of the issue and to search for the truth. See, Trust But Verify, http://trustbut.blogspot.com/search/label/legal (last visited Feb. 4, 2009). The site has been closed since all things having to do with Landis are now over (even his suspension). Co-
Landis’ case. Numerous other cycling blogs also closely tracked the Landis proceedings.73

Whether his campaign to take his complaints against the anti-doping system was successful, or a source of consternation by USADA and disdain by the arbitral panel, is open to debate. Landis’ use of the Wiki Defense has been called a creative and effective way to bring the issues faced by accused dopers like Landis to the attention of the broader public.74 Others, however, contend it degrades the institutions that are trying to protect the integrity of sport and causes more difficulties in the process of punishing those found to have doped.75 The public profile of his case was undeniable, however, as Landis proceeded to take his challenge public in an arbitration against USADA.76

B. Preliminary Steps to the Public Arbitration

Eight months elapsed from the time USADA filed the enforcement action against Landis in September 2006 to the commencement of the arbitration hearing in May 2007.77 Although no depositions were taken, numerous preliminary issues and motions occupied the time of the panel, lawyers, experts, and witnesses involved. The following chronicles critical steps in that process.


74 See, Plymire, supra note 65, at 311.

75 Plymire, supra note 65, at 311.


1. Selection of the Arbitral Panel

Before any decisions could be made as to how to handle this unprecedented public arbitration, the three-person arbitral panel needed to be convened. The potential arbitrators were provided from a pool of candidates named by the North American Arbitration for Sport (CAS) also listed with the AAA.\(^{78}\) According to AAA procedures, the first two of these were to be selected by Landis and USADA, respectively. Should these two party-appointed arbitrators be unable to agree on a third arbitrator to serve as chair of the panel, the AAA would select.\(^{79}\)

On October 12, 2006, USADA nominated Richard H. McLaren, a barrister, author, and professor from London, Ontario Canada.\(^{80}\) McLaren’s sports resume included working as a salary arbitrator for the National Hockey League, as well as serving on panels involving doping charges against professional tennis players brought by the ATP.\(^{81}\) He was also a member of the CAS panels “that upheld convictions against British slalom skier Alain Baxter, Spanish cross-country skier Johann Muehlegg and Costa Rican swimmer Claudia Poll.”\(^{82}\)

Landis nominated attorney Christopher L. Campbell.\(^{83}\) Campbell was a former Olympic wrestler who missed his opportunity to participate in the 1980 Olympics due to the United States’ boycott of the Moscow games, and subsequently retired. He was considered “sympathetic to athletes and had dissented

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\(^{78}\) AAA Supplementary Procedures, supra note 46, at R-3. This rule was amended, effective May 1, 2009, to limit the pool of arbitrators to AAA arbitrators from the U.S.

\(^{79}\) AAA Supplementary Procedures, supra note 46, at R-3


\(^{81}\) Id.


\(^{83}\) DeSimone, supra note 80.
from the majority ruling for conviction in two high-profile cases.\textsuperscript{84} He had previously been critical of USADA’s system for prosecuting athletes, stating that “USADA appeared to be pursuing their goal with the very same self-destructive motivation of an athlete who intentionally dopes, i.e., win at all cost.”\textsuperscript{85}

The party-selected arbitrators were unable to agree on a third to serve as chair; therefore, the AAA default procedure using a neutral ranking system was invoked.\textsuperscript{86} From this process, Montreal lawyer Patrice Brunet, Esq. was eventually confirmed.\textsuperscript{87} Brunet was a member of the USADA panel that handed down a lifetime competition ban to U.S. track cyclist Tammy Thomas.\textsuperscript{88} He had also served on panels that upheld sanctions against Mark Hainline, a U.S. archer, and cyclist James Mortenson, although both those proceedings involved missed performance enhancing drug screenings, rather than alleged doping.\textsuperscript{89}

Part of the delay between the USADA charge and the hearing date was attributed to the selection process of the arbitrators and Landis’ decision to hire Maurice Suh as co-counsel in December of 2006.\textsuperscript{90} As Landis resided in California,\textsuperscript{91} the arbitration could take place in his home state, which meant that

\textsuperscript{84} DeSimone, supra note 80.
\textsuperscript{86} Landis AAA Award, Case No. 30 190 00847 06 (AAA 2007) at 7 (September 20, 2007) [hereinafter “Landis AAA Award”], available at http://www.usantidoping.org/files/active/arbitration_rulings/landisfinal%20(20-09-07)%20(3).pdf.
\textsuperscript{87} Id.
\textsuperscript{88} DeSimone, supra note 80.
\textsuperscript{89} DeSimone, supra note 80.
\textsuperscript{90} Landis AAA Award, Case No. 30 190 00847 06, at 8
\textsuperscript{91} Landis, supra note 16, at 23. Landis was a native of Lancaster, Pennsylvania. At age 20, in 1995, he moved to Southern California to train as a cyclist. http://en.wikipedia.org/wiki/Floyd_Landis See also, Landis AAA Award, Case No. 30 190 00847 06, at 5 (noting USADA Protocol, Art. 10(b) provides that doping dispute hearings take place in the United States).
California arbitration law governed the proceeding.\footnote{Landis AAA Award, Case No. 30 190 00847 06, at 7.} The complex investigation and disclosure requirements regarding potential conflicts of interests for arbitrators imposed by California took considerable time and needed to be done again once Suh was added to the team.\footnote{Id. at 8; Ethic Standards for Arbitrators, Cal. Code Civ. Pro. 1281.85 available at http://www.courtinfo.ca.gov/rules/documents/pdfFiles/ethics_standards_neutral_arbitrators .pdf} As a result, it wasn’t until February of 2007 that the panel was fully formed and able to address the logistical and procedural issues facing the proceeding.\footnote{Landis AAA Award, Case No. 30 190 00847 06, at 8.} 

2 Procedural Orders Regarding Hearing Logistics

The Panel issued a total of five procedural orders from February to May, 2007. The first procedural order set forth guidance for pre-hearing submissions as well as the terms for the public hearing to include a live television broadcast. Despite the public nature of the arbitration, this order also imposed a “gag” on the parties not “to engage in any public comment on the hearing or the arbitration procedure” and to keep all documents disclosed through the process of discovery confidential.\footnote{Id. (emphasis in original); United State Anti-Doping Agency v. Landis, Case No. 30 190 00847 (AAA 2007), Procedural Order No. 2 [Hereinafter, “Procedural Order No. 2”], modified this requirement by providing that documents were not to become public prior to the first day of the arbitration hearing.} The second order related primarily to the appointment and role of an independent Panel Expert.\footnote{Landis AAA Award, Case No. 30 190 00847 06, at 8; Procedural Order No. 2.} The third procedural order set forth instructions regarding the broadcast and conduct of the media during the arbitration proceeding, directing that only two television cameras and one still camera would be permitted in the hearing room.\footnote{Landis AAA Award, Case No. 30 190 00847 06, at 9.} The Panel’s instructions in this regard were to be carried out by a media consultant retained by the USOC. The fourth order required parties to specify witnesses’ means of testimony and confirmed the
parties’ responsibility for witness attendance. The fifth and final procedural order addressed final logistical details regarding the hearing, including use of a court reporter and interpreter, ordering the final pre-hearing conference to be held three days later, on May 13, 2007.

3. Discovery Rulings

In the same time period the Panel was assessing procedural issues, it was required to rule on three specific and hotly contested discovery motions. Although the AAA rules for doping arbitrations do not provide for specific disclosure exchanges or discovery rights, both parties in the Landis case hired scientific experts and engaged in detailed requests for discovery of technical and scientific testing information.

First, USADA’s discovery request sought additional testing of Landis’ seven B Samples that were taken (and whose A sample testing had reported negative) from the other stages of the Tour, using a more sophisticated isotope ratio mass spectrometry (IRMS) analysis which checks for the presence of unnatural testosterone, as opposed to the mere T/E ratio method used on the samples originally. The parties presented both written and oral arguments

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98 Id.
99 Id.
100 See, Weston, Doping Control, supra note 15, at Sec. III.A.2 (noting the standard procedure in anti-doping cases is for the anti-doping agency to provide accused athletes with a “Document Package,” which consists of the report of the positive test and basic information on international standards for laboratory testing).
101 Landis AAA Award, Case No. 30 190 00847 06, at 9-10. A gas chromatographer (GC) is a machine that coupled with different instruments can aid in relaying the amount of testosterone occurring in the body. Id. at 20. When coupled with a mass spectrometer (MS), it can help determine the amount of testosterone by comparing it to episterstosterone, creating the ratio that first led to the doping allegations against Landis. Id. at 22-28. When it is used in conjunction with an isotope ratio mass spectrometer (IRMS) it can help an analyst check for the presence of unnatural testosterone Id. at 28. A more in depth discussion of the devices used in doping testing, along with diagrams of Landis’ results, can be found in the AAA panel’s award. Id. at 20-46.
shortly after the arbitral panel convened in February 2007. USADA argued that because Landis alleged that the doping tests were flawed when performed on his Stage Seventeen sample, additional examinations of the remaining B Samples from the other stages would be useful corroborative evidence to demonstrate the effectiveness of testing.

Landis’ team contended that because the original A Samples were no longer available and had never tested positive, USADA had no right to conduct tests on the B Samples. The defense argued that an unbiased result could not be ensured because the tests were not sufficiently “blinded,” and the lab would know it was only testing Landis’ samples specifically for these proceedings. USADA countered by stating that under Landis’ contract, the samples belonged to UCI and the organization “could do as [it] pleased” with them. USADA further asserted that B sample testing is rarely entirely blind because it is usually done only after a positive test. On March 17, 2007, the Panel issued an interlocutory award stating that the B Sample testing would proceed with no further impediments by the defense, but that the tests could not be used for the purpose of establishing

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102 Id. at 10. The first written argument was received from Landis on February 5, 2007, with the USADA reply arriving on February 9, and an additional response from Landis’ team was delivered on February 13. Id. Oral arguments were heard on February 22 and 23. Id.

103 Id.

104 Id.; United States Anti-Doping Agency v. Landis, Case No. 30 190 00847 06 (AAA 2007), Interlocutory Award No. 1 [hereinafter “Interlocutory Award No. 1"] at 4. The A samples were no longer viable because there was no longer enough urine to conduct a viable test, since the samples were already tested once before. Id. at 3.

105 Landis AAA Award, Case No. 30 190 00847 06, at 10. This also resulted in a “Motion to Return the Urine.” Id. at 15.

106 Id. at 10. See also, USADA PROTOCOL, supra note 26, ¶ 19 (“All Samples collected by USADA shall be the property of UCAS, but shall only be used for purposes outlined in this Protocol . . . .”).

107 Landis AAA Award, Case No. 30 190 00847 06, at 10.
additional charges against Landis. The Panel further ruled that the B Sample testing would be conducted in the presence of the Panel’s appointed expert.  

Landis’ discovery request asked that the Panel compel production of additional documentation from the French laboratory, Laboratoire National du Depistage du Dopage (LNDD), which conducted the testing of Landis’ Stage 17 sample. Information sought included technical statistics and information, as well as complete electronic (raw) data files, the lab’s standard operating procedures for the tests performed, and the maintenance logs of the machines used in testing. USADA resisted production of the additional laboratory documentation, arguing that WADA Technical Documents and International Standards for Laboratories (ISL), which require only that testing labs provide the “Laboratory Documentation Package” in support of any adverse analytic finding, preclude arbitrators from ordering the laboratory to produce additional discovery.

The Panel denied Landis’ discovery request, reasoning that the ISL does not require a laboratory to produce any documents beyond those that demonstrate the positive test already released to Landis in his initial document package when the allegations of doping first surfaced. The Panel’s interpretation of the ISL guidelines, as such, effectively put an end to many other discovery requests sought by Landis. However, the Panel did consent to the reprocessing of the original data.

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108 Id. at 4-6, 18; See also, Interlocutory Award No. 1.
109 Interlocutory Award No. 1, at 5. Dr. Francesco Botre was eventually appointed as the Panel’s expert. Landis AAA Award, Case No. 30 190 00847 06, at 15.
110 Landis AAA Award, Case No. 30 190 00847 06, at 11.
111 Id. (specifying six categories of requested items).
113 Procedural Order No. 2, Case No. 30 190 00847 (AAA 2007), at 9-17.
114 Procedural Order No. 2, at 2. (Specifically, the ISL states that a lab shall not be required to produce documents relating to “standard operating procedures, general quality management documents . . . or any other documents not specifically required by the Technical Document.”).
files from the French lab.  Rather than get into a “battle of experts,” it was determined that the Panel should have its own appointed expert.  Upon the Panel’s recommendation and the parties’ consent, Dr. Francesco Botre was confirmed as the Panel expert in April, 2007. Dr. Botre was thus allowed to observe and examine the reprocessing of the data files and continued to serve as the Panel’s neutral expert on technical matters.

Landis’ final discovery request sought to have witnesses deposed before the commencement of the arbitration. Landis’ team asserted that it was necessary to know what witnesses would be testifying to so that they would better be able to specify the kinds of documents they would need, and that “whiteouts” and “erasures” in the lab reports meant that “documents alone [could] not answer” their questions. They contended this justified the deposing of all the laboratory personnel that handled Landis’ sample on the day it was tested. However, by a two to one majority the arbitrators agreed with USADA’s position that, under the applicable procedures governing the Panel’s ability to compel exchanges of information, the Panel “had no power to order depositions.” Denying the defense’s request to interview witnesses before the hearing meant that the first time

115 Landis AAA Award, Case No. 30 190 00847 06, at 14. These were the raw electronic data files of the IRMS testing done on Landis’ positive sample. Id. at 13. Landis’ team wanted to reprocess the files in order to determine whether or not the French lab’s software had arrived at the correct conclusion. Id.
116 Id. at 14.
117 Id. at 15. The parties had proposed other experts for this role but ultimately consented to the Panel’s recommendation. Id. at 14-15.
118 Id. at 15. See also, Michael Hiltzik, Panel Rules Against Landis; Arbitrators Clear Way for Anti-doping Officials to Retest Samples of Tour de France Winner, Which Had Been Ruled Clean, LA Times D3 (April 12, 2007). See also, infra Sec. IV.D.
119 Landis AAA Award, Case No 30 190 00847 06, at 15, 18.
120 Id. at 15.
121 Id.
122 United State Anti-Doping Agency v. Landis, Case No. 30 190 00847 (AAA 2007), Interlocutory Award No. 1, at 8; AAA Supplementary Procedure, supra note 46 at Rule 23 (providing for arbitrator discretion on the parties’ exchange of information and identification of witnesses but silent as to authority to order pre-hearing depositions). See also, Landis AAA Award, Case No. 30 190 00847 06, at 15.
the defense could question the witnesses and learn their testimony would be at the live hearing.123

4. An Ex Parte Ruling on Landis’ Motions in Limine

The degree of tension in the process and outcome of prehearing discovery proved prescient, particularly as to USADA’s Motion for Additional Testing of other B Samples.124 After the period of discovery and days before the hearing, the Panel found itself tasked with ruling on the evidence that could be presented. While certain attempts to limit the kinds of information that could be argued or revealed met with little resistance,125 others were highly controversial, in particular, the Landis team’s motion to exclude the results of the additional B Sample testing. Landis’ attorneys argued that their expert was not allowed to witness “critical parts of the retesting analysis” and, at the direction of USADA’s lawyers, was forced “literally [to sit] outside . . . while further testing and analysis occurred inside the laboratory.”126 A Panel majority rejected Landis’ motion to exclude such reports and ruled that the samples would be admissible during the

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123 In particular, this may have posed problems with the testimony of former Tour de France winner Greg LeMond, whose testimony will be discussed at Part III.B infra.
124 See, Landis AAA Award, Case No. 30 190 00847 06, at 43 (noting that four of the seven additional samples tested contained evidence of exogenous testosterone) (noting reliance upon later testing results of initially negative B samples, as corroborating Stage 17 test positive results and viewing these reports as undermining Landis “isolated event” theory).
125 As an example, USADA sought to exclude any evidence that Landis had a medical condition, which might have resulted in the positive test. Landis AAA Award, Case No. 30 190 00847 06, at 16. Landis’ attorneys responded that they had “no intention” of making such an argument. Id.
126 United States Anti-Doping Agency v. Landis, Case No. 30 190 00847 06 (AAA 2007), Motion in Limine Award: Retesting of B Samples, [hereinafter “B Results Motion in Limine”] (Campbell, dissenting) available at http://www.archive.org/details/Floyd_Landis_Case_Documents_12. Note that because Campbell was not involved in the decision making process on May 1, his dissent was not written until days after the award on May 3. Id. at 5.
This would prove critical as the arbitrators would eventually find these to be corroborative of the positive result in Stage Seventeen.

This interlocutory ruling was also controversial because it was allegedly made upon in the absence of the athlete-appointed arbitrator, Chris Campbell. In a dissent authored on May 3, 2007, Campbell stated that he doubted the arbitrators had taken the time to review USADA’s response because the ruling was made a mere five hours after it was submitted. Campbell further described the actions of the other two arbitrators’ as “violat[ing] the fundamental fairness” guaranteed Landis by the arbitral process. News of the failure of the arbitrators to meet reached the press and headlined in the *Los Angeles Times* days before the hearing was to begin. This was but one of other alleged leaks that appeared to violate the Panel’s procedural orders requiring confidentiality of preliminary matters. Such leaks may serve as examples of the inherent difficulties of taking a typically private dispute mechanism public.

5. Logistical Set Up for the Public Arbitration

Although the USADA Protocol and Amateur Sports Act authorize athletes to request a public arbitration, neither the USADA, the USOC, nor the AAA had a template for conducting a public arbitration. Pepperdine University School of Law

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127 B Results Motion in Limine, at 2 (Campbell, dissenting).
128 Landis AAA Award, Case No. 30 190 00847 06, at 43 (noting that four of Landis’ additional B samples tested positive for some presence of exogenous testosterone).
129 B Results Motion in Limine, at 3 (Campbell, dissenting) (stating that “as a member of the Panel, I was never informed that the Panel was going to issue an order within five hours of the submissions of the briefs. I was never consulted about the order. I was never given an opportunity to deliberate with the Panel regarding the order”).
130 Id.
131 Id. at 5.
132 Michael A. Hiltzik, *Infighting Revealed in Landis Case: Cyclist arbitrator is excluded from a key ruling by two others on the panel weighing doping allegations*, L.A. TIMES D1 (May 9, 2007) (reporting Campbell stating that other arbitrators privately drafted ruling against Landis’ motion “without notice to me, to my knowledge, or inclusion.”).
133 In addition, the Landis team alleged that retest results had been leaked to the French publication *L’Equipe*. Landis AAA Award, Case No. 30 190 00847 06, at 15.
was selected as a neutral local venue that could accommodate the anticipated needs for a high profile public arbitration.\(^{134}\) On the eve of the arbitration, however, questions lingered as to the viability of holding the hearing when last-minute requests for video-conferencing, technological installation changes, and discovery contests remained fierce.\(^{135}\) Further, questions about what to expect in terms of the scope of the “public” access on the university’s private campus (security and circus concerns) needed to be addressed.

The law school’s trial courtroom became the venue for the hearing. The arbitral panel was seated at the judge’s chairs. The Panel and counsel for each party were assigned private conference/witness rooms (actually classrooms and mostly cleared out student law review offices). The parties’ counsel came equipped with computers, printers, exhibits, and a team of lawyers and assistants. Reserved seating in the hearing room was allocated for Landis, USADA, the press, and the public, with an additional live screen feed to an overflow classroom.\(^{136}\) The press, represented by over sixty media outlets, were given a separate work room (a converted classroom), equipped with wireless internet access and a screen showing the live broadcast of the arbitration hearing.\(^{137}\) The USOC Media

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\(^{134}\) Landis’ attorney, Howard Jacobs, a resident of Southern California, inquired into Pepperdine’s interest in hosting the arbitration in approximately August 2006. (Email correspondence between Howard Jacobs and Pepperdine Professor Maureen Weston, dated August 27, 2006) (on file with author).

\(^{135}\) Several motions, including one for continuance, were pending as of May 11, 2007. See, Landis AAA Award, Case No. 30 190 00847 06, at 15-17 (noting motions pending as of May, 2007).


\(^{137}\) See e.g., Email from Alan Abrahamsen, columnist, NBCSports.com, to Darryl Seibel (copied to, inter alia, Maureen Weston) (dated May 24, 2007) (describing media arrangements at Pepperdine and recommending such “[b]e viewed as a model for how to get it done right.”) (on file with author). Substantial technical work had to be done to prepare the hearing room for the broadcast feed. See also, Procedural Order No. 2, Case No. 30 190 00847 (AAA 2007).
Consultant, Susan Polakoff, coordinated the rotation of press who wished to observe personally the hearing in the courtroom. Many press members, however, opted to watch the hearing via the livefeed so that they could work at their computers simultaneously. To address concerns about a potential deluge of fans or the general public converging on the hearing, a process was announced that members of the public were welcome to attend but asked to register in advance. All parties and attendees to the arbitration were to be identified in order to secure access to the campus and hearing. A university security personnel was stationed outside the hearing room throughout the arbitration to address security concerns that attend a high profile international cycling event. A final prehearing conference was held Sunday, May 13, 2007, confirming hearing details. Upon the question whether witnesses would be sequestered, the “public” nature of the process dictated no such possibility. Thus, despite the pending debate on discovery motions and procedural details, the hearing was set to begin.

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138 The Panel’s required the media consultant to organize reports and ensure the media abided by the rules set by the Panel. The purpose of the Order was to ensure the arbitration process proceeded unimpeded. See, Procedural Order No. 2. Reporters were also restricted from asking counsel or the Panel questions during any recess. Id. See also, Transcript, Case No. 30 190 00847 06 (AAA 2007), at 1801 (May 14 to 23, 2007)
139 Abrahamson email, supra note 137.
140 See, Weston letter, supra note 136 (setting forth logistical details for the public arbitration) (on file with author).
141 Note that this event took place shortly after the devastating violence at Virginia Tech University, and university officials were justifiably concerned that safety procedures were intact.
142 A sequestration request was made during the hearing itself for one of the two French lab technicians because similar questions would be asked of each. See generally, Transcript.
143 Pending motions to strike had not been ruled upon as of Opening Statements on the first day of the hearing. See, Transcript, at 5-9.
IV. THE PUBLIC ARBITRATION BEFORE THE PANEL AT PEPPERDINE UNIVERSITY

Landis’ arbitration began on May 14, 2007. The hearing room was packed with lawyers, the parties and their supporters, the press, students, and members of the public. The Panel Chair opened the session, emphasizing that, in the interest of expediting the proceeding, a strict timeline would be followed and that the hearing would take place over nine days. The hearing focused heavily on scientific testimony from both sides, but also included some very emotional and potentially damaging moments, particularly in the testimony of former Tour de France winner and American cyclist Greg LeMond. The following section seeks to explain the theory under which each side proceeded, as well as highlights some of the more critical witness testimony. It will also attempt to analyze the impact the public nature of the arbitration had on the parties’ case presentations and ultimate disposition in the case.

144 Landis AAA Award, Case No. 30 190 00847 06 (AAA 2007), Award of Sept. 20 2007, at 19.
145 This timing was already set by United States Anti-Doping Agency v. Landis, Case No. 30 190 00847 06 (AAA 2007) Procedural Order No. 5, at 1. According to Procedural Order No. 5, the schedule was to have full days, 9:30 AM – 5 PM on May 14 through 18, as well as full days on May 21 through 23. Id. Whether or not May 19 was to be a full day would be determined by May 17, and May 20 was scheduled as an off day. Id. See also, Greg Katz, Arbitration Strategy Forces Attorneys to Race the Clock, DAILY JOURNAL 1, 4 (2008) (questioning the “chess clock” technique used in arbitration in which parties agree to fixed time limits in presenting their case limited Landis’ ability to fully cross-examine key witnesses).
146 Lemond’s testimony is discussed at Section IV.C, infra. Although invited to participate under Supplementary Procedure rules, neither the UCI nor WADA participated in the hearing. Transcript, Case No. 30 190 00847 (AAA 2007), at 5.
A. Case Theories and Burdens

1. Burdens of Proof

To establish the charge against Landis, USADA had the initial burden of proving an anti-doping violation to the “comfortable satisfaction” of the Panel. Doping is a strict liability offense, and it is not necessary for USADA “to prove intent, fault, negligence or knowing use.” Under the WADC, proof of doping is established by the presence of a Prohibited Substance in an athlete’s urine testing sample. This initial burden is presumptively met, under the WADC, which provides that doping reports produced by WADA-accredited laboratories, such as the French Laboratory in Landis’ case, are presumed valid and to have been conducted in accordance with International Standards for Laboratories (ISL). The burden then shifts to the athlete to rebut the presumption by showing a departure from the international standard occurred. USADA then has the burden to demonstrate that such a departure did not cause the adverse analytical finding.

\[147\] WADC art. 3.1 (Nov. 2009), available at http://www.wada-ama.org/rtecontent/document/code_v3.pdf. (“bearing in mind the seriousness of the allegation which is made.”). This standard of proof “is greater than a mere balance of probability but less than proof beyond reasonable doubt.” Id. at art. 3.1. The burden then shifts to the athlete to show a departure from the international standard occurred. Id. at 3.2.1. The burden then shifts back to USADA to establish that such a departure did not cause the adverse analytical finding. Id.

\[148\] Landis AAA Award, Case No. 30 190 00847 06 (AAA 2007), Award of Sept. 20, 2007, at 48 (citing UCI Regulations, Art. 16).

\[149\] WADC art. 3.2.1 (Nov. 2009), available at http://www.wada-ama.org/rtecontent/document/code_v3.pdf (“WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories analysis.”). In fact, only WADA-accredited laboratories are authorized to conduct tests involving athletes in sanctioned international competition. See, id. at art. 6.1 (“Doping Control Samples shall be analyzed only in WADA-accredited laboratories . . .”). See also, Landis AAA Award, Case No. 30 190 00847 06, at 49 (“The purpose of the ISL is to ensure laboratory production of valid test results and evidentiary data and to achieve uniform and harmonized results and reporting from all accredited Doping Control Laboratories.”).
2. USADA’s Case Theory and the Presumption of Compliance

USADA opened its case stating the Panel need answer only two questions: first, “does the difference in [Landis’] sample meet the criteria for a positive test,” and second, “are [the] analytical results reliable[?]”\(^{150}\) In support of the first element, USADA argued that Landis’ T/E level, at a ratio of eleven to one on the day of his Stage Seventeen comeback, was well above the normal range that would have resulted in a negative test.\(^{151}\) Comparison with other samples indicated that Landis’ T/E profile did not show naturally high occurring levels that might result in an eleven to one ratio.\(^{152}\) Furthermore, the GC/IRMS testing of the additional B samples also resulted in positive results for exogenous testosterone, just as the Stage Seventeen sample had.\(^{153}\) USADA further stated that even when the data files were reprocessed in the computer software system demanded by Landis and his attorneys, the result demonstrated that doping was even more likely than what was shown in the original version.\(^{154}\) According to USADA, all of these tests pointed squarely to the fact that Landis had doped as defined by the criteria for a verifiable positive.

In asserting the results were reliable, USADA relied upon the presumption of validity for results performed by WADA accredited laboratories\(^{155}\) and promised to demonstrate their case showing the laboratory’s compliance with ISL

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\(^{150}\) Transcript, Case No. 30 190 00847 06, at 9. Young begins his opening statement by declaring the proceeding unremarkable, stating, “there’s nothing particularly unique about the issues this panel has to decide.” \(\text{Id. at 17.}\)

\(^{151}\) Transcript, at 17 (also noting that “[i]t’s not USADA’s burden to prove that testosterone would have helped [Landis] in his Stage 17 comeback or, frankly, at any time during the Tour.”).

\(^{152}\) \(\text{Id. at 17.}\)

\(^{153}\) \(\text{Id. at 12, 15-16 (noting that there is “no natural explanation, nothing that isn’t a prohibited substance” that could result in the IRMS results from the Stage Seventeen test, and further noting the corroborating evidence from the other tested samples).}\)

\(^{154}\) \(\text{Id. at 16 (stating that in requesting the tests be done on MassLynx software, Landis “bet the house” that the result would come back negative, a bet which he lost).}\)

\(^{155}\) \(\text{Id. at 10.}\)
guidelines through the testimony of experts and the French laboratory technicians. This was the greatest point of contention for Landis’ team.

3. Landis’ Theory

In opening their defense, Landis attorney Maurice Suh described the case as “[a]n utter disaster: a disaster of the anti-doping movement.” Suh remarked that “during this arbitration you’re going to hear about how the intersection of LNDD’s and USADA’s incompetence and misrepresentations about the data have conspired to result in a false positive. You’re also going to hear that, once found out, they’ve done everything they can to hide it.” Suh questioned whether a positive test actually existed and queried the Panel to determine “[d]id the lab properly identify testosterone and epitestosterone? And . . . did they accurately quantify it?”

Given the presumption of validity accorded to the LNDD test result, Landis had the burden to rebut the presumption and to establish a departure from an International Standard. Landis’ counsel charged that in conducting Landis’ Stage Seventeen test, the French lab departed from international standards. Landis’ defense identified three major ISL violations by French Lab’s analysis.

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156 See, id. See also, id. at 19 (USADA stating that “at the end of the day, Respondent is asking the Panel to reject the laboratory’s results in this case because of what he claims is the lab’s flawed methodology; however, under the scheme of the WADC, ISO has already done the job of evaluating the Paris lab’s methods . . .” and reporting that an ISO inspector concluded that the lab complied with ISL, technical documents on IRMA and T/E, and on laboratory chain of custody).

157 Id. at 26.

158 Id. at 26 (refuting that Landis claims the results are due to natural explanations).

159 Id. at 32.

160 WADC, art. 3.2.1 (Nov. 2009), available at http://www.wada-ama.org/rtecontent/document/code_v3.pdf (noting the applicable standard of proof is by a balance of probability). “If the Athlete rebuts the preceding presumption by showing that a departure from the International Standard occurred, then the Anti-doping Organization shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.” Id.

161 Transcript, Case No. 30 190 00847 06, at 31 (noting that in the case Landis’ defense intends to look “comprehensively at the pattern and practice of laboratory errors”).
First, Landis asserted that the underlying chromatography done on Landis’ samples was poor and thus undermined any reliability of lab results. Second, he asserted that rather than being interpreted by a computer as the lab had initially indicated, it was actually interpreted manually yet not documented. Landis’ attorneys claimed that in twenty attempts to reproduce the results through manual interpretation, the lab was unable to do so and that it merely cherry-picked data to confirm desired results. Further, the testosterone levels were measured by checking only one indicator, as opposed to the international standard of three. Landis’ counsel argued that the standard of three is to be certain that an analyst is actually looking at testosterone, as opposed to inadvertently taking a reading from another substance. They asserted the LNDD also engaged in multiple violations regarding gaps in the lab’s chain of custody, improper documentation, quality controls; and collection standards, as well as the overwriting or manual corrections to results of computer testing data. These factors combined, they argued, resulted in a departure from international standards and cast doubt on the reliability

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162 *Id.* at 32-34. Suh states that it is “a bedrock principle in both these tests, GC/MS and IRMS, that you need good chromatograms.” *Id.* at 32.

163 *Id.* at 35. In expressing his dissatisfaction with the French lab Suh states: You know what's interesting about this? Is that we asked them in their discovery, in the discovery of this case, we asked them: How do you do your subtraction? And the response: We do it automatically. The machine does it. Don't worry about it. But you know what the truth is that we learned just before -- a week before this begins? They do it manually. *Id.*

Suh describes the manual processing of data as: The process by which technicians use their own judgment to pick where the start and end of those important peaks begin and end. And why is that important? Because when you pick the start and end of those peaks, you pick the end result. That's what you do. That is what it means. *Id.*

164 *Id.* at 36 (describing the alleged failure to document manual reprocessing of data done manually, where technicians use their own judgment to pick the start and end of important peaks, as tantamount to “cherry picking data” rather than following procedures for processing automatically).

165 *Id.* at 37.

166 *Id.* (describing alleged improper confirmation techniques).

167 *Id.*
of the lab’s testing. Suh added, “Why do you have the ISL, if you can violate it left and right?” If so, USADA had the burden of demonstrating these departures did not cause a false positive result.

B. **Witness for the Prosecution: USADA’s Case**

In its case to prove Landis’ anti-doping violation and to counter claims that departures from laboratory standards caused a false positive test determination, USADA called a total of seven witnesses, three of whom were experts, two laboratory analytical chemists who conducted the testing at the French laboratory, and two professional cyclists, including Greg LeMond.

1. **USADA’s Experts**

With so much of both sides theories based on scientific evidence, the credibility and ability to discredit the opposing counsels’ experts, was critical. USADA’s first expert, Dr. Cedrick Shackleton, testified as to the statistical analysis for the presence of excessive testosterone in the tests run by the French

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168 *Id.* at 39.
169 *Id.*
170 *Id.*
171 USADA called the following witnesses: Cedrick H.L. Shackleton, Children’s Hospital Oakland Research Institute; J. Thomas Brenna, Professor of Nutritional Sciences, Cornell University; Cythia Mongongu, LNDD Analytical Chemist; Claire Frelat, LNDD Analytical Chemist; Greg Lemond, 3 time winner of Tour de France; Christiane Ayotte, Director of the Montreal WADA Accredited Laboratory, Joseph Papp, professional cyclist; Wilhelm Schanzer, Ph.D, Director of Institute of Biochemistry of the German Sports University Cologne; Don H. Catlin, Professor Emeritus of Molecular and Medical Pharmacology and Founder and Former Director of the Olympic Analytical Laboratory, UCLA. *See*, Landis AAA Award, Case No. 30 190 00847 06 (AAA 2007), Award of Sept. 20, 2007, at 20.
172 Dr. Shackleton was a senior researcher in endocrinology at the Children’s Hospital in Oakland Research Institute, and a professor at the University of Birmingham in the United Kingdom. Transcript, Case No. 30 190 00847 06, at 43. He had over forty years experience in the field and was published more than 250 times as of the date of the hearing. *Id.* at 44. His studies focused on steroid metabolism, and his lab was the first to find athletes guilty of doping during the Rome European Games in 1974. *Id.* at 43-44.
Dr. Shackleton’s testimony centered on the interpretation of the data in the French Lab’s tests of Landis’ samples. Using the chromatographs and other charts, he pointed to the peak positions of certain indicators of testosterone, and concluded that the kind of testosterone and its levels were unexplainable by any naturally occurring human condition. On cross examination, Landis counsel sought to establish the first part of their case theory, that the chromatograms were not clear enough to draw any kind of conclusion. Specifically, Suh attempted to point to co-elutions and sloping baseline readings as demonstrating that the

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173 *See id. at 43-64* (covering the entirety of Dr. Shackleton’s testimony on direct from Richard Young).
174 *Id.* (covering the entirety of Dr. Shackleton’s testimony on direct from Richard Young).
175 *Id. at 61* (looking at an exhibit showing Landis’ test results); when asked “Is there anything you could eat or ingest that is not testosterone or one of its precursors or downstream-prohibited substances that would cause a minus 6 delta value?” Dr. Shackleton replied “It’s not possible.” *Id. at 64.*
176 *See id. at 85* (Mr. Suh stating “You would agree with me that, first of all, that good chromatography is critical to good, reliable, accurate IRMS results; is that right?”). The debate with Dr. Shackleton on good chromatograms continued on pages 88-89:

- **Q.** While we’re waiting for that to come up, can you -- can you describe for me what good chromatography means? What does that mean to you?
- **A.** Good chromatography is -- well, it -- it can -- the optimum chromatography would be based on separation, and -- and that's mostly achieved with very lean -- very high resolution columns. There -- I mean, there are going to be times when it is that -- that baseline separation is not achieved.
- **Q.** But you use that data anyway? If you don't get baseline separation, you go ahead and use it anyway?
- **A.** It would depend on the circumstances. *Id. at 88-89.*
177 Co-elutions are when two peaks testing for substances on the chart overlap. *Id. at 91-92.* Landis’ defense attempted to argue that if the two peaks do not have significant definition (reaching back to the baseline before another begins) then they can interfere with one another and cause a higher reading than either would alone. *Id. at 111* (“How do you know that the volume under here isn't absorbed in this peak improperly . . . [b]low can you tell that -- that these values aren't contributing to these values?”). Dr. Shackleton’s response to a particular series of arguably co-eluting peaks was:

- I mean, have you -- have you . . . knowledge about what that hump is about? How big it is, relative to the -- to the size of the peak, even if it was included . . . [M]y argument would be as a person that does chromatography all the time, if that little hump has -- and I'm approximating now -- if that little hump is one percent or two percent of that peak . . . it wouldn't even be measurable, that difference, even if it was included. *Id. at 103.*
chromatograms were unreliable and should never have been used to make a
determination in the first place.\textsuperscript{179} Despite this challenge,\textsuperscript{180} Shackleton repeated
his opinion that the chromatograms were good, and, for the most part, were in fact,
very good at that.\textsuperscript{181}

USADA’s second expert, Dr. Thomas Brenna, described the functioning,
quality control methods, and data processing involved in the machines used to
analyze Landis’ samples.\textsuperscript{182} He testified that the French lab’s practices were
“favorably impressive.”\textsuperscript{183} Regarding the defense’s critique of the “manual”
adjustments and entry methods that were done twenty times, Dr. Brenna testified
that he believed Mr. Suh was mischaracterizing the methods of the lab.\textsuperscript{184} He
stated “that's not what I described. They inspected the software assignment. They
adjusted, and then they sent it back to the software for another calculation . . . that

\textsuperscript{178} See \textit{id.} at 94-95 for a discussion of the significance and cause of downward versus
upward sloping baselines.
\textsuperscript{179} \textit{Id.} at 98-99. Dr. Shackleton and Mr. Suh have another example of an exchange
disagreeing on whether or not two peaks are co-eluting based on “humps,” and whether this
is good chromatography. \textit{Id.}
\textsuperscript{180} See \textit{id.} at 94-114. For example, Mr. Suh asks Dr. Shackleton if he would “stake [his]
professional reputation on that this is a good chromatogram and that this has good peak
separation?” \textit{Id.} at 108.
\textsuperscript{181} \textit{Id.} at 112-13.
\textsuperscript{182} \textit{Id.} at 127-89 (covering Dr. Brennan’s direct testimony). For some clarification on the
kinds of controls and analyses used to be sure the IRMS machine is functioning properly,
see \textit{Id.} at 129-37.
\textsuperscript{183} \textit{Id.} at 139.
\textsuperscript{184} Dr. Brenna tried to clarify what Mr. Suh referred to as manual processing earlier in his
testimony:

Now an important thing to understand is that . . . we've used terms in a loose way
here . . . . Namely, we talk about . . . manually defining backgrounds . . . what we
manually defined was the limits of the peak, but the machine . . . automatically,
then, takes that input and calculates the background . . . and determines what the
actuaries of the peak are . . . . For what I saw . . . each chromatogram [came] up
once. That step, which I consider to be quality control; that is, to establish whether
the automatic software has actually chosen the peak limits properly. I saw that
done once. The peak limits were either adjusted or not adjusted once. They were
mostly adjusted -- by the way . . . [s]o we didn't calculate an isotope ratio, and say,
I don't like that one, I'm going to go back and move around a little bit more back
and forth and back and forth. There wasn't any of that stuff. \textit{Id.} at 166-67.
doesn't sound completely manual to me.”\(^{185}\) With regards to the twenty different ways, Dr. Brenna testified he only saw them make adjustments and entries once for every sample, and that he considered that a method of quality control.\(^{186}\) 

On cross, Landis’ defense team attacked the credibility of the French lab’s methods and Dr. Brenna. At the outset, Landis’ attorneys pointed out that part of Dr. Brenna’s research is funded by a grant from USADA, implying that even though Dr. Brenna had never testified for the organization before, he was linked to them financially.\(^{187}\) Mr. Suh questioned him on the data storage system at the lab, and Dr. Brenna admitted that when the calibrations of instruments were done, the files were saved over each time, rather than being preserved.\(^{188}\) Lastly, while Dr. Brenna could not testify as to the guidelines for the lab in question, he was eventually forced to admit that at least one of the tests turned up a result that was within the margin of error, or measure of uncertainty, and that the procedures should have provided for it to be discounted.\(^{189}\)

USADA’s final expert, Dr. Christiane Ayotte, is director of a WADA-accredited doping control lab in Montreal.\(^{190}\) She testified in support of the IRMS and T/E analysis conducted by the French lab.\(^{191}\) On cross-examination, Landis

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185 Id. at 175.
186 Id. at 167, 171. Dr. Brennan’s exchange with Mr. Young was as follows:

Q. You call it quality control manual integration, whatever you want to call it. Is it common in IRMS work?

A. I insist we look at all of our chromatograms to ensure that our software is working properly, and I believe it is common. If you don't look at it when the data comes rolling off the machine, then you end up looking at it at some other time, like now. So you have to do quality control at some point, and so doing it at the beginning is a perfectly routine thing. Id. at 167.

187 See, id. at 189-91. The grant was for $1,344,737 over a three-year period. Id. at 191. At the time of the hearing Dr. Brenna was still receiving payments on the grant. Id.

188 Id. at 251. Suh also made it a point to show that another system, MassLynx, recommended by a defense expert, does log those data entries. Transcript, supra note 135 at 246-47

189 Id. at 240-42. The measure of uncertainty was .8, while an affirmative test was considered above 3. The result came back as 3.65.

190 Id. at 641.

191 Id. at 644.
attorney confirmed that she, as a WADA lab director, would be prohibited from testifying on behalf of an athlete in a doping arbitration under the WADA Code.  

Additionally, she could not criticize the procedures used by the French lab where those same procedures were followed by her own lab.  

Defense sought to create a cloud of suspicion around Dr. Ayotte’s testimony in eliciting her admission that the WADA “Code of Ethics” for Laboratory Directors restricted her from assisting an athlete in defense of a doping charge.  

Dr. Ayotte did counter that if her assessment of the laboratory package had indicated errors, she would inform the responsible testing authorities.

2. The French Lab Analysts

A central component of Landis’ defense charged that the LNDD lab technicians were not competent or sufficiently knowledgeable of the complicated testing equipment and software use and that their chain of custody and documentation was “fatally flawed.”

USADA presented the two French laboratory technicians, Cynthia Mongongu and Claire Frelat, who conducted the tests on Landis’ samples both from the Tour and in April. Each testified as to the laboratory practices and handling of Landis’ sample. This testimony was prolonged due to mistranslations by an interpreter ultimately dismissed during Ms. Frelat’s testimony.

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192 Id. at 675.
193 Id. at 644.
194 Id. at 676. See also, ISL, Laboratory Code of Ethics (2004).
195 Transcript, at 676.
196 Bonnie DeSimone, *Landis hearings take an early, unfortunate turn*, ESPN (May 15, 2007) (noting that the hearing was recessed due to glaring mistranslations by a hired interpreter of USADA’s French-speaking witnesses and to await the arrival of a new translator; also reporting that language differences and use of interpreters can complicate case presentation and impact lawyer’s phrasing of questions). http://sports.espn.go.com/oly/cycling/columns/story?id=2871715
See also, Transcript (Suh stating “I’ve had only high school French, even I know the translator is wrong...”).
3. The Cyclists and The Day in Black

While the expert and laboratory technicians’ testimony were highly scientific and technical, almost mind numbing to the lay observer, the day Greg LeMond testified was certainly eye opening and jaw dropping. Landis had worn a yellow tie throughout the hearing, except for his all black attire on the day Greg LeMond was to testify.\(^{197}\) Although the celebrity value of LeMond’s testimony was much anticipated, his actual testimony was remarkable. USADA attorney Matt Barnett questioned LeMond about a call Landis had made to LeMond days after news of the positive test. LeMond testified that he had shared with Landis LeMond’s own experience of being molested as a child. According to LeMond’s testimony, he confided this personal story in an effort to encourage Landis to “just come clean” and help the sport.\(^{198}\) He testified that Landis’ response was “What good would it do?” implying an admission of doping by Landis.\(^{199}\) LeMond’s testimony took a more surreal turn when Barnett asked LeMond about a call he had received the night before. LeMond reported that the caller claimed to be his uncle and threatened to expose the sexual abuse if he testified against Floyd.\(^{200}\) In front of a stunned hearing audience, Barnett asked LeMond the time of call made to his cell phone. The call was made to LeMond’s cell phone, which captured the

\(^{197}\) Tension between LeMond and Landis had developed as a result of controversial comments posted by both on a “Daily Peloton” blog website. See e.g., Transcript, Case No. 30 190 00847 06, at 1105-1110 (Landis’s interpretation that LeMond commented shortly after news of the tests were announced that Landis was guilty of doping).

\(^{198}\) Id. at 613-14.

\(^{199}\) Id. at 613. See also, Landis AAA Award, Case No. 30 190 00847 06 (AAA 2007) Award of Sept. 20, 2007 (analyzing “did the Respondent’s comment to Greg LeMond amount to an admission of doping?”).

\(^{200}\) Transcript, at 616 (LeMond’s testifying the caller stated that “This is your uncle, and I’m going to be there tomorrow . . . we can talk about how we used to hide your weenie”).
caller’s number and displayed on the hearing room’s video screen. LeMond testified that he reported the incident to the police and learned that Landis’ business manager, Will Geoghan, placed the call. Barnett asked whether the caller was in the hearing room and to identify himself. At which point, Geoghan, sitting behind Landis’ table, stood up, to a deafening silent room.

Cross-examination of LeMond proceeded, with Landis attorney Howard Jacobs asking a series of questions about LeMond’s business ventures and failures and his testimony in a prior lawsuit against Lance Armstrong. LeMond refused to answer these questions. LeMond’s personal attorney objected and reported that he had instructed his client to answer any questions regarding Lance Armstrong, admittedly having “no legal basis” upon which to refuse. Despite the Panel’s instruction for LeMond to answer the question, LeMond refused. Jacobs’ repeated request to either question the witness or to strike LeMond’s testimony was denied. Jacobs’ frustration was evident as he announced:

This is where arbitration, as a concept, fails in a case like this. Because in a civil lawsuit, we would have the right to depose a witness and find out what he’s going to answer and not answer, and then we would file a motion in limine, and this would be kept out, rather than having this type of

202 Transcript, at 620.
203 Id.
204 Id. at 625-26 (Lemond personal attorney Bruce Manning reporting that he instructed, albeit without a legal basis, his client to refuse to answer any questions involving Lance Armstrong). Id. at 629.
205 Id. at 625-26, 629.
206 Arbitrators are not bound to follow formal evidentiary rules and frequently err on the side of allowing evidence, with the admonition that the arbitrators can be trusted to consider evidence “for what it’s worth.” See, Stephen K. Huber, State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts, 10 CARDOZO J. CONFLICT RESOL. 509, 522 (2009).
thing happen in the middle of a hearing. This is completely unfair.\textsuperscript{207}

The Panel did not accept Mr. Jacobs’ proposition of unfairness.\textsuperscript{208} Yet, recognizing it lacked contempt powers,\textsuperscript{209} the Panel excused the witness. LeMond’s desire to speak freely on the stand, although denied by the Panel, was welcomed by a cadre of press awaiting him outside the hearing room.\textsuperscript{210} USADA then announced Will Geoghan as its next witness.\textsuperscript{211} The Panel permitted Landis’ request to postpone this unanticipated testimony; Geoghan was immediately terminated.\textsuperscript{212}

This testimony became a field day for the press. The public perception of Landis changed on this day, even though ultimately irrelevant to the arbitrators.\textsuperscript{213}

\textsuperscript{207} Transcript, at 637. “I just have to put on the record that this proceeding starts to become a farce if I can’t get answers when there’s instructions not to answer for which there’s no legal basis.” Id at 635.

\textsuperscript{208} Id. at 637.

\textsuperscript{209} Although arbitrators have subpoena powers under the Federal Arbitration Act, 9 U.S.C. 4, the Act does not authorize arbitrators to hold witnesses in contempt. Theoretically, the Landis’ team could have petitioned to a federal court to authorize contempt, but this procedural move obviously would have prolonged the already painful process. See e.g., Mark Zalewski, Roller coaster day in Landis hearing, Cyclingnews.com (May 18, 2007), available at http://www.cyclingnews.com/features/roller-coaster-day-in-landis-hearing (quoting Pepperdine Professor and arbitration expert, Thomas Stipanowich, stating “The arbitrators are the judges of the relevance and materiality of all the evidence. However, they are limited to civil remedies, so it would be a decision limited to the arbitration process such as the striking of the testimony of the witness, or possibly levying some other sanction).

\textsuperscript{210} After LeMond was dismissed, a press conference in the hallways ensued where he spoke of the need for cycling to get clean from doping. See, Bonnie DeSimone, LeMond discusses testimony, ESPN (May 18, 2007) http://sports.espn.go.com/oly/cycling/columns/story?columnist=desimone_bonnie&id=2879160.

\textsuperscript{211} Landis attorneys apparently were unaware of this call until the next morning. See, Bonnie DeSimone, Landis Fires Business Manager, ESPN (May 18, 2007).

\textsuperscript{212} Id. at 640.

\textsuperscript{213} Jason Sumner, Inconclusive Landis Hearing, Velonews 45 (June 11, 2007) (“Although Geoghegan’s actions arguably had little influence on the arbiters ruling, its effect on the mainstream media was titanic. The previously ho-hum hearing was instantly thrust on to newspaper front pages across the country.”).
USADA also called professional cyclist Joe Papp who, although unconnected to the Landis case, was separately charged with a doping violation. He testified about his experience using testosterone during cycling competition and how cyclists attempt to evade positive tests by strategically using just enough – microdosing – testosterone to go undetected.\textsuperscript{214} The defense noted that Papp had been cooperating with the U.S. Attorney’s office in connection with trafficking charges and that his doping sanction had not yet been announced, suggesting that his testimony was an exchange for a reduced sanction.\textsuperscript{215}

C. Landis and His Defense

When the time had finally come to present its defense, the Landis team was reminded of the time remaining on the “chess clock” for each side.\textsuperscript{216} Although the Landis lawyers had designated ten witnesses,\textsuperscript{217} it called a total of six witnesses in the hearing.\textsuperscript{218} In support of the claim of sloppy lab practices and failure to follow ISL procedures regarding documentation, Dr. Bruce Goldberger

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\textsuperscript{214} Transcript, Case No. 30 190 00847 06, at 850 (describing microdosing the amounts of testosterone and the “recovery-enhancing” effects of testosterone use).


\textsuperscript{216} Id. at 709 (Friday, May 18, USADA 14.3, Landis 11.9 hours); See also, id. at 1130 (announcing balance of time remaining 6.9 hours for Landis and 13.5 for USADA as of May 21, 2007, the 9 day hearing). As of the last day of the hearing, Wed. May 23\textsuperscript{19}, the Panel Chair noted “The time update at the end of the day yesterday is Landis had 1 hour, 40 minutes remaining, and USADA had nine hours, 46 minutes remaining.” Id. at 1061.

\textsuperscript{217} Landis AAA Award, Case No. 30 190 00847 06, Respondent’s Witness List and Summaries (May 7, 2007), available at http://ia351412.us.archive.org/1/items/Floyd_Landis_Case_Documents_14/RespondentWitnessListandSummary.pdf.

\textsuperscript{218} Dr. Corinne Buisson, LNDD IRMS Supervisor; Dr. Bruce Goldberger, University of Florida, Department of Pathology, Immunology and Laboratory Medicine and Department of Psychiatry; Wolfram Meier-Augenstein, Senior lecturer in Environmental Forensics at Queen’s University in Belfast, Ireland; Dr. John K. Amory, M.D., Professor at University of Washington; Simon Davis, Technical Director of Mass Spec Solutions; and the respondent, Floyd Landis. See, Landis AAA Award, Case No. 30 190 00847 06 (AAA 2007), Award of Sept. 20, 2007, at 20.
opined that the Lab committed numerous errors based on his review of the LNDD analytical reports.\textsuperscript{219} An expert in testosterone and its effects on the body, Dr. John K. Amory, a member of USADA’s independent anti-doping review board, also testified about the lab errors and chain of custody problems, concluding that IRMS test results were not reliable and “inconsistent with known science.”\textsuperscript{220} Simon Davis, technical director for a company that manufactures the IRMS equipment used by LNDD, testified as to his review of the LNDD testing reports.\textsuperscript{221} Dr. Wolfram Meier-Augenstein, flown in by private jet from Ireland at a cost of $20,000,\textsuperscript{222} testified about the laboratory errors and poor chromatography.\textsuperscript{223} Landis also called Corinne Buisson to testify as to the limited training provided to the LNDD personnel on IRMS testing process and MassLynx software.

A primary witness for the defense, was, of course the accused doper, Floyd Landis. Landis described his coming from a Mennonite family in Lancaster, Pennsylvania and his experience as a professional cyclist, which included riding for the U.S. Postal Service team with seven-time Tour de France winner, Lance Armstrong, and his move to ride for Phonak in 2005.\textsuperscript{224} When asked about the 2006 Tour de France, Landis described the arduous Stage 16 where his team “bonked” and their meeting later that evening to plan how to regain time in Stage

\textsuperscript{219} Transcript, at 853, 862. See also, Transcript, at 86 (noting “glaring issues” with LNDD chemistry and chain of custody documentation); Id. at 871 (describing standard practice of analyzing a minimum of three ions in use of GC/MS gas chromatography mass spectrometry for identification of T/E). Noting LNDD used only a single ion in its confirmation analysis. Id at 873.

\textsuperscript{220} Id.

\textsuperscript{221} Id. at 1482. Id. at 1582-87 (concluding that LNDD technicians’ did not appear to understand and follow proper procedures for reprocessing data files).

\textsuperscript{222} Sumner, \textit{supra} note 213, at 47 (noting that although Amory did not charge for his time, Meier Augenstein, charged a daily rate of $1,500 and insisted on the business-class flight, and charter from Vancouver to Los Angeles to avoid dealing with US customs).

\textsuperscript{223} Transcript, at 1340. See also, id. at 1346 (not affiliated with WADA); Id. at 1348 (describing features of good chromatography).

\textsuperscript{224} Id. at 1057, 1073.
17. He described his breakaway ride in Stage 17 and later exhilaration in winning the 2006 Tour de France. Landis maintained his innocence, denied that he had used testosterone before or after Stage 17, and staked his reputation against cheating. USADA’s cross-examination of Landis focused on whether he admitted to LeMond that he had doped and what he knew of Geoghegan’s intimidating call made to LeMond before his hearing testimony, casting doubt as to his credibility.

D. The Unexamined Witness: The Panel’s Expert

The Panel appointed Dr. Botre in the pre-hearing discovery phase to assist it with complex technical matters, as well as to observe the additional B Sample reprocessing. Dr. Botre was present during the entire hearing, save the period of Joe Papp testimony. Dr. Botre joined with the arbitrators during all private sessions and sidebar meetings with counsel. Dr. Botre, a director of a WADA-accredited lab in Italy, served as the role of scientific expert to the Panel and likely was influential in assisting their understanding and interpretation of evidence presented. A seeming elephant in the room, neither party called Dr. Botre for

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225 Id. at 1084-89, 1103-04 (referencing his awkward attempt to explain the positive test to the press as possibly due to naturally high levels of testosterone or too much Jack Daniels). See also, id. at 1099, 1105 (noting he learned of the initial positive test result by a fax sent to the team headquarters and of the B result via a UCI announcement on the internet).

226 Id. at 1098.

227 Id. at 1092. Responding to the why the Panel should believe him, Landis commented “[p]eople are defined by their principles and . . . how they make their decisions . . . [i]t wouldn’t serve any purpose for me to cheat and win the Tour because I wouldn’t be proud of it, and that’s just not what the goal was from the beginning.”). Id. at 1132-33.

228 Id. at 1395; See also, id. at 1411 (questioning Landis on pressures on riders to dope in order to compete) See also, Bonnie DeSimone, Landis grilled on final day of testimony, ESPN (May 25, 2007), available at http://sports.espn.go.com/oly/cycling/columns/story?columnist=desimone_bonnie&id=2879160) The Panel Chair assured Mr. Suh that his professional integrity was not in question.

229 Transcript, at 850.

230 Id. at 1802 (Panel Chair Patrice Brunet, commenting that “Dr. Botre has been very helpful in helping us understand some of the issues.”). The majority award contains highly
cross-examination.\textsuperscript{231} Interestingly, neither the AAA nor WADA rules address the use or role of a panel expert.\textsuperscript{232} While time constraints may be one explanation for not examining Dr. Botre, it is possible the parties did not want to offend the Panel by cross-examining its expert?

\textbf{E. The Majority Decision and the Dissent}

Although the hearing concluded on May 23, 2007, the Panel did not issue its final award until September 27, 2007, nearly four months after the conclusion of the nine-day arbitration.\textsuperscript{233} The hearing was not officially closed until the Panel received Dr. Botre’s report.\textsuperscript{234} In a two-to-one ruling, the Majority determined Landis to be guilty of doping.\textsuperscript{235} In its 84-page decision, the Majority first recognized that USADA charged Landis with a doping violation based on two claims: (1) that the Athlete had exogenous testosterone in his sample, a Prohibited Substance under UCI regulations; and (2) that the T/E ratio has been violated and that both testing reports were based on the GC/IRMS analysis made by the Paris

technical scientific discussions and graphs, presumably done with the assistance of Dr. Botre. \textit{See,} Landis AAA Award, Case No. 30 190 00847 06 (AAA 2007), Award of Sept. 20, 2007, at 21-43 (technical graphs and descriptions of IRMS testing). \textit{Id.} at 44-45 (noting Dr. Botre’s summary of date reprocessing results).

\textsuperscript{231} At the “appeal” to CAS, Landis contended that Dr. Botre’s views were potentially biased because, as a WADA lab director, he is prohibited by the WADA Code of Ethics from criticizing WADA labs or testifying on behalf of an athlete. \textit{See,} Landis v. United States Anti-Doping Agency, CAS 2007/A/1394, award of June 30, 2008, at 28. [hereinafter Landis CAS Award], \textit{available at} http://www.wada-ama.org/rtecontent/document/Landis.pdf.

Despite Landis’ counsel explanation that time constraints restricted their ability to call Dr. Botre, the CAS Panel rejected any claim of bias. \textit{See id.} at 30 (noting that Landis elected not to question Dr. Botre). \textit{Id.} at 28.


\textsuperscript{233} Landis AAA Award, Case No 30 190 00847 06, at 83 (noting hearing held May 14 to 23, 2007). \textit{See also,} Landis CAS Award, \textit{supra} note 231, at 2 (noting AAA Award dated September 20, 2007).

\textsuperscript{234} \textit{See,} Landis AAA Award, at 10

\textsuperscript{235} \textit{Id.} at 53.
At the outset, the Panel expressed its trust in the general scientific reliability of IRMS testing.\textsuperscript{237}

Recognizing the presumption of doping established by the Lab’s report of an adverse analytical finding,\textsuperscript{238} the majority considered Landis’ claims of ISL violations. The Panel did agree with Landis’ third claim that the Lab failed to follow ISL procedures requiring at least three diagnostic ions to confirm an elevated T/E value.\textsuperscript{239} Finding that USADA did not meet its shifted burden, the Panel declared that the adverse finding could not be based on the T/E ratio and dismissed this charge.\textsuperscript{240}

Yet, Landis’ other claims of laboratory errors and possible misconduct did not persuade the Panel. Regarding Landis’ claim that the chromatograms for the testing samples were so poor as to cause unreliable IRMS results, the Panel found USADA’s experts, who testified that the Stage 17 chromatograms provided a reliable basis to find an positive test. Although Landis presented experts who criticized the presumption of lab compliance and testified to the poor chromatography underlying the IRMS testing, their expertise was discounted by the Panel which noted that these experts worked outside WADA laboratories and in scientific research and laboratories for criminal prosecutions in DUI/drug cases. The Panel acknowledged that while those labs followed higher and more rigorous

\textsuperscript{236} \textit{Id.} at 47. The Panel noted the principle of strict liability operative in doping cases, thus making it unnecessary for USADA to prove intent, fault, negligence or knowing use on the part of the athletes to establish an anti-doping violation. \textit{Id.}

\textsuperscript{237} \textit{Id.} at 47-48 (citing three CAS cases regarding IRMS analysis as providing “conclusive scientific evidence”).

\textsuperscript{238} \textit{Id.} at 48-49.

\textsuperscript{239} \textit{Id.}, at 50-51. “[T]he Panel concludes that the Lab failed to follow the prescribed procedures for Select Ion Monitoring, as outlined by WADA [Technical Document] . . . . therefore, the Athlete rebutted the presumption in favor of the Lab that there had been compliance with the ILS.” \textit{Id.} at 53. The Majority went so far as to state that “the forensic corrections of the Lab reflect sloppy practices on its part. If such practices [sic] continue it may well be that in the future an error like this could result in the dismissal of an AAF [adverse analytical] finding by the Lab. \textit{Id.} at 290. It concluded, however, that this violation did not cause the AAF. \textit{Id.} at 289.

\textsuperscript{240} \textit{Id.} at 55.
standards than required of WADA accredited labs, it was not the Panel’s jurisdiction to apply those standards in rebutting the presumption of a WADA accredited lab.241

The Panel similarly acknowledged that the WADA practice falls below what might be required under general scientific laboratory practices, yet it rejected Landis’ claim that the Lab’s chain of custody in handling the B Sample was fatally flawed, noting that the WADA technical documents do not require documentation of transfer within the controlled zone of the Lab.242

The Panel was also unconvinced of evidence that the Lab was unable to reproduce original results by manual reprocessing of EDF files, concluding that the reprocessing of EDFs was consistent with a doping determination.243 It further rejected the assertions of destructed and deleted data or claims of a Lab conspiracy.244 The Panel put to rest its treatment of USADA’s proffered testimony by professional cyclists Greg LeMond and Joe Papp. Regarding LeMond’s testimony, the Panel only considered whether his conversation with Landis amounted to an admission of doping by Landis. The Panel was express in stating that it did not regard LeMond’s testimony to establish an admission of doping by Landis.245 The Panel further disregarded testimony by Joseph Papp, called by USADA, where he discussed his use and rationale for using testosterone, as irrelevant to whether Landis in fact doped during the Tour.246 The Panel rejected

241 Id. at 66. (“Is too much leniency being extended by the presumption? We leave that question for others to answer for it is beyond our jurisdiction and scope in this arbitration proceeding.” Therefore, “evidence of scientific criminal labs and their standards and practices is of no consequence in rebutting the presumption favoring an anti-doping lab.”). 242 Landis’ expert Goldberger testified that the better practice is to require documentation of all transfers of the specimen; yet, that requirement was not called for under the ISL. “Whether or not it is good practice to document these transfers is irrelevant to the laboratory’s adherence to the ISL in this case, thus finding not violation under WADA standards.” Id. at 74-75.
243 Id. at 68-69.
244 Id. at 70.
245 Id. at 78.
246 Id. at 79.
Landis’ claim that a “cumulative effect” of the Lab’s errors and of the technician’s failure to understand the critical hardware and software and lack of competence in operating the IRMS equipment amounted to an ISL violation.\footnote{Id. at 80-81.}

The Panel also shut down Landis’ claim that WADA Code of Ethics, or as Landis termed, “Silence,” which then prohibited a WADA Laboratory from providing testing service on behalf of an athlete or from criticizing the work of a WADA lab, prevented USADA experts affiliated with WADA-accredited laboratories, had conflict of interest between taking an oath and the “Code of Silence”\footnote{Id. at 81 (referencing WADA Code of Ethics, Sec. 3.3).}. The majority noted that it would “[i]n no way undermine the credibility of these individuals who have clearly demonstrated commitment and dedication to their work.”\footnote{Id.} In the end, the Panel upheld the charge of exogenous testosterone and imposed a two-year sanction required under the UCI rules.\footnote{Id.}

The dissenting arbitrator, Christopher Campbell, wrote that “[f]rom the beginning, the [French Lab] has not been trustworthy . . . at every stage of testing it failed to comply with the procedures and methods for testing required by the [ISL] . . . and should not be entrusted with Mr. Landis’ career.”\footnote{Id. at 23 (dissenting).} Agreeing with the Landis team’s contentions, the dissent noted “[g]iven the plethora of laboratory errors in this case, there was certainly no reliable scientific evidence introduced to find that Mr. Landis committed a doping offence.”\footnote{Id. (dissenting).}

V. LESSONS FROM LANDIS AND THE FUTURE OF PUBLIC ARBITRATION

A. From Public to Private: Landis’ Second Hearing at CAS

Having lost at the AAA level, Landis exercised his right to “appeal” this ruling to an international panel of the Court of Arbitration for Sport (CAS), filing a
timely request with CAS in October of 2007.\footnote{Landis CAS Award, CAS 2007/A/1394, award of June 30, 2008, at 2, \textit{available at} \url{http://www.wada-ama.org/rtecontent/document/Landis.pdf}.} Both USADA and CAS procedural rules authorize an appeal of a first-instance decision rendered by a domestic CAS tribunal to CAS.\footnote{The Code of Sport-Related Arbitration sets forth the procedural rules for CAS arbitrations.\textit{COURT OF ARBITRATION FOR SPORT, STATUTES OF THE BODIES WORKING FOR THE SETTLEMENT OF SPORTS-RELATED DISPUTES, PROCEDURAL RULES, R47 [Hereinafter, “CAS Code”]} (2010), \textit{available at} \url{http://www.tas-cas.org/rules}. \textit{See also}, USADA PROTOCOL, \textit{supra} note 26, at ¶ 10(c) (providing the final decision by the AAA... arbitrator(s) may be appealed to the Court of Arbitration for Sport).} While the CAS process follows a similar system for party-appointed arbitrators and a panel chair, the arbitrators are selected from an international CAS panel. This review is de novo.\footnote{Landis CAS Award, CAS 2007/A/1394, at 5 (citing CAS Rule 57). \textit{See also}, Weston, \textit{Dress Rehearsal, supra} note 27.} The process is closed. Neither the WADA nor CAS rules provide for a public hearing option. Frankly, it’s questionable whether the parties would have opted for a public process after the exhausting hearing in Malibu.

A five-day private arbitration hearing before a panel of three arbitrators, one appointed by each party, and the Chair appointed by CAS, was held in New York in March and April of 2008.\footnote{See, CAS Code, at R54 (arbitrator selection).} In this hearing, Maurice Suh solely represented Landis, and Richard Young continued to represent USADA.\footnote{Landis CAS Award, CAS 2007/A/1394, at 1.} No panel expert was used. The Panel consisted of Landis’ appointed arbitrator, Jan Paulsson, an attorney of Paris, France, USADA’s appointed arbitrator, David W. Rivkin, a New York attorney, and David A.R. Williams, a New Zealand barrister.\footnote{\textit{Id}.}

As the Appellant, Landis asked the Panel to resolve the fundamental question of “whether USADA had established to the comfortable satisfaction that Floyd Landis committed an anti-doping violation in relation to Stage 17 of the
Tour de France.” In furtherance thereof, he identified seventeen issues relating to his claims of LNDD failures to follow procedure, incompetence in testing, documentation and general ISL violations. Landis continued to advance his theory of fraud, corruption, and shoddy work by the French lab.

Unlike the AAA Panel’s finding of an ISL violation, the CAS panel determined that no ISL violation was proved or, even so, it did not cause the positive test. Further, it concluded the Stage 17 B Sample IRMS test was reliable, thus Landis was guilty of doping. The Panel not only imposed the same two-year ineligibility sanction, stripping Landis of his Tour de France title, it also imposed a $100,000 sanction against Landis personally for “litigation misconduct.”

The tone of what may have appealed in the public versus the CAS hearing was markedly different. Landis’ own party-appointed arbitrator, Jan Paulsson, appeared to admonish Landis’ counsel for elaborate and unsupported assertions of serious claims. The CAS award cited Paulsson’s own statements from the hearing:

But I think this is the time in the post hearing briefs not so much for prose, but for references because it would be of assistance to the arbitrators in considering the rhetoric of persuasion which we’ve heard today . . . if [Landis’ counsel] continues to pursue themes of bias in the lab and

259 Id. at 3 (listing issues for determination by CAS panel).
260 Id. at 2-3.
261 Id. at 24; cf. Landis AAA Award, Case No. 30 190 00847 06 (AAA 2007), Award of Sept. 20, 2007 at 172.
262 Landis CAS Award, CAS 2007/A/1394, at 54.
263 Id. (stating that “[a]ll that the Appellant has established after a wide-ranging attack on LNDD [the French laboratory] is that there were some minor procedural imperfections.”). Landis Panel Criticizes Legal Team, GLOBAL ARB. REV. (July 2, 2008), available at http://www.globalarbitrationreview.com/news/article/14646/landis-panel-criticises-legal-team/..
cover-up in light of the evidence of these hearings, it
would be handy not to have a lot of adjectives about it, but
just notice of what is the evidence of those propositions, in
objective form.264

The Panel also criticized Landis’ experts for “cross[ing] the line,” acting as
advocates rather than objective scientists.265

B. A Final Public Attempt in U.S. Court

Rather than avail himself under the CAS procedural code to appeal the
CAS decision to the Swiss Federal Court, Landis’ opted to file a lawsuit seeking
vacatur of the CAS ruling in federal court in California. This lawsuit cited claims
of arbitrator bias, noting that CAS arbitrators, including at least one who served on
his panel, operated under conflicts of interest by working simultaneously as
arbitrators and advocates on CAS cases.266 He also asserted that the CAS panel
acted in excess of its powers in imposing the litigation misconduct sanction.267
Before the federal judge could resolve the question of whether it even had
jurisdiction to hear the challenge to an international arbitral award, Landis agreed
to withdraw this petition, under the terms of a confidential settlement.

C. Lessons from Landis

Landis’ case provided the world its first opportunity to observe first-hand
the arbitration process used in an anti-doping agency’s prosecution of an athlete for
an alleged doping violation. The case was extremely high profile and intensely
watched; it has also been characterized as a “frontal attack on the entire Anti-

264Landis CAS Award, CAS 2007/A/1394, at 47.
265 Id. at 49 (noting that Landis’ counsel assisted in drafting expert witness testimony statements).
266 See, Landis v. United States Anti-Doping Agency, Petition to Vacate Arbitration
Award, (D. Cal. 2008) [hereinafter Landis Vacatur Petition].
267 Id.
Doping system." Ultimately, Landis lost and it is reported that the public arbitration alone cost Landis over two million dollars. Landis has paid both a significant personal, financial, and professional toll in the long road taken to attempt to save his 2006 title and to clear his name. As a result of his suspension for doping, Landis remains unable to compete in top international cycling races in Europe. Landis continues to compete domestically. But the uphill battle continues nearly four years later. In February 2010, a French court issues an international arrest warrant for Floyd Landis for alleged hacking into the French laboratory’s computer system.

Comments from the CAS award provoke speculation over whether the public arbitration strategy backfired? Does the fact that, overall, the public hearing was a success, get dwarfed because of the ultimate result for Landis? What does all of that say about the fate of public arbitration in sports doping? What is the likelihood it gets tried again?

268 Landis CAS Award, CAS 2007/A/1394, at 5.

269 CBS Sports, Arbitrators Uphold Landis Ban; Forfeiture of Tour Title, http://www.cbssports.com/cycling/story/10362854/2. Although victorious, USADA spent a comparable amount in prosecuting the Landis case. See, Bonnie D. Ford, Landis May Not Race Again, But He's Not Done Fighting, ESPN, (July 1, 2008), http://sports.espn.go.com/oly/cycling/columns/story?id=3468423 (“Two years, close to $4 million spent by both sides combined, and an unquantifiable amount of collateral damage later, Floyd Landis' doping case rolled across what is normally the administrative finish line on Monday. The Court of Arbitration for Sport released its ruling upholding a lower panel's opinion that Landis was guilty as charged of using synthetic testosterone to boost his performance in the 2006 Tour de France.”).


272 Id. Circumstances surrounding the French arrest warrant were not resolved at the time of publication of this article.
The Amateur Sports Act and USADA Protocols provide for a “public” hearing. Landis to date is the only athlete to have pursued this process. The purpose of the public hearing option is to afford athletes the opportunity to open the doors into a typically private process and to counter characterizations, such as that asserted by Marion Jones, of sports arbitration as a “kangaroo court.” But is it possible that taking a high profile arbitration case public, and thus the need to appeal to a dual audience of the public and cycling fans, and a dispassionate panel of arbitrators, make the process impractical? The advocacy strategy in a high-profile public arbitration is complex, due to the desire to present the case to the public senses, yet also to an apparent dispassionate arbitral panel.

Landis’ arbitration provided the public, legal community, and athletes a window into an otherwise closed process. The case offers valuable instruction on practical and theoretical issues to consider for future uses of public arbitration. Among these include consideration given to the presentation of complicated scientific evidence and use of technology; dealing with parallel audiences (press, public opinion, fundraising fans, and the private arbitrators), establishing rules.

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274 Shaun Assael, Landis Wants the Public in on His Hearing, ESPN (Aug. 16, 2006), available at http://sports.espn.go.com/oly/cycling/columns/story?id=2551555 (quoting John Ruger, Ombudsman for the USOC who helped draft the open hearing rule, saying its “intent is to be fair to an athlete who, for whatever reason, doesn’t think he can get a fair hearing in a closed session.”).


276 From an advocacy perspective, what is the difference between presenting a case in a public versus private arbitration? Does the desire to appeal to the public in the vein of a jury trial undercut the fact that the ultimate decision-makers are likely dispassionate and concerned with specific technical evidence. In a private arbitration, particularly before an international panel, play to different audience; strategies, skills, theories that might play to a jury or the public don’t necessary fly with stodgy arbitrators.

governing arbitral rulings; addressing the use and role of a panel expert as well as scientific experts; the taping of the hearing, and arbitral access to video replay, time restrictions on case presentations, and financial resources available to parties to participate in the public hearing option.

Although the rules provide that the hearing “shall be public,” in practice, athletes opt for a private hearing. CAS and WADA rules provide for the right of either party to “appeal” to CAS only in a closed hearing. Perhaps Landis’ case has opened the door for these entities to consider providing athletes a choice for a public hearing as well.

V. CONCLUSION

Floyd Landis and his mission to take his case public was of value in a number of ways, including, making the process more transparent, introducing the Wiki defense concept, causing the authorities to re-evaluate questionable practices, and generating substantial support in calling for continued improvement in ensuring process fairness.\(^{278}\) As one commentator noted, “[w]hile the proceedings may not have given the public a clearer understanding of whether or not Landis is guilty, they did shed some light on the previously mysterious anti-doping judicial process.”\(^{279}\) His public arbitration process provided an important means for transparency and a measure of accountability on the doping arbitral process.

\(^{278}\) A number of changes were made as a result of issues raised by Landis. See, Weston, *Doping Control*, supra note 15 at 20 (noting that effective January 2010, CAS changed its conflict of interest rules to preclude arbitrators acting as advocates before CAS); Weston, *Doping Control*, supra note 15, at 37 (noting amendment to WADA’s Code of Ethics to provide that WADA laboratory experts not be an advocate for either party). In February 2009, a symposium on *Arbitrating Sports* convened many of the lawyers in the Landis case, along with arbitrators, academics, and bloggers in an effort to generate constructive ideas about the doping arbitration process. See, Carey J. Prill, Foreword, 10 PEPP. DISP. RESOL. L.J. 1 (2009); Michael Lenard, *The Future of Sports Dispute Resolution*, 10 PEPP. DISP. RESOL. L.J. 175 (2009) (calling for more scholarly work in this area). Landis also recognizes his case’s impact on “Athletes Rights.” See, Floyd Landis, An American Hero Website, Athletes Rights Advocates, [http://www.floydlandis.com/rights.html](http://www.floydlandis.com/rights.html) (last visited Apr. 30, 2010).