

# ACCEPTING A DOUBLE-FAULT: HOW ADR MIGHT SAVE MEN'S PROFESSIONAL TENNIS

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## TOC

### INTRODUCTION

On the eve of the 2012 Australian Open—the first of the years' "Grand Slam" professional tennis events—players representing a majority of the men's tour gathered.<sup>1</sup> The topic of conversation: a potential strike and mass refusal to participate in the tournament.<sup>2</sup> These drastic actions, many players urged, were the last resort in a long-standing battle with the Association of Tennis Professionals ("ATP") and International Tennis Federation ("ITF"), the organizations jointly governing and controlling men's professional tennis.<sup>3</sup>

Fortunately—for the players, the Australian Open tournament, tennis fans around the world, and the sport itself—the proposed strike never materialized and the event went ahead as planned, culminating in a near 6-hour epic final between the world's top two players.<sup>4</sup> Nevertheless, the seriousness

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<sup>1</sup> See Robbie Salaman, *Labor War Looms Large Over Tennis*, THE LEGAL BLITZ, Feb. 1, 2012, available at <http://thelegalblitz.com/blog/2012/02/01/labor-war-looms-large-over-tennis/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> The final of the Australian Open featured two of the most dominant players in the modern game; world number one Novak Djokovic battled second ranked Rafael Nadal in the five hour, fifty-three minute final, eventually won by Djokovic 5-7, 6-4, 6-

surrounding the possibility of a players strike in men's professional tennis is real; the mere fact that the players felt compelled to contemplate striking is sufficient to warrant a closer look, by both the powers controlling men's professional tennis and the fans of the game, at the grievances that nearly led the players to such dramatic recourse.

Since its inception in the early 1970s, the ATP has grown from a players' association into a predominant force in men's professional tennis; together with the ITF, the ATP rules over the sport with little opposition.<sup>5</sup> Recently, however, both the ATP and ITF have come under siege by player complaints, ranging from prize money distribution and scheduling issues to doping rules and lack of player representation in tour management.<sup>6</sup>

While men's professional tennis is in the midst of perhaps the greatest competitive era in its illustrious history, incidents like the threatened players strike in Australia cast a dark shadow of uncertainty over the future of the sport.<sup>7</sup> Ultimately, men's

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2, 6-7, 7-5, marking, at the time, his fifth Grand Slam title. Alix Ramsay, *Djokovic Claims Longest Final*, AUSTRALIAN OPEN, Jan. 29, 2012, available at [http://www.australianopen.com/en\\_AU/news/articles/2012-01-29/201201291327841786232.html](http://www.australianopen.com/en_AU/news/articles/2012-01-29/201201291327841786232.html).

<sup>5</sup> See Salaman, *supra* note 1. While the ITF remains responsible for the four annual Grand Slams and national team tennis competitions, the ATP "owns and runs all of the events outside of the four Grand Slam tournaments." *Id.* Together, the two organizations form the dominant heart of men's professional tennis.

<sup>6</sup> See *infra* Part IV (discussing these current player complaints in greater detail).

<sup>7</sup> The last decade has been dominated by what many consider the greatest rivalry in the history of the sport between all time Grand Slam record holder Roger Federer and his arch-rival—and perhaps the greatest clay court player of all time—Rafael Nadal. In the 2008 Wimbledon finals, Nadal outlasted Federer in almost five hours; winning in the waning light after a five set epic that commentator John McEnroe, and most of the world's press, proclaimed the "greatest match ever played." See Richard Alleyne, *Wimbledon 2008: John McEnroe Hails Rafael Nadal Victory as Greatest Final Ever*, THE TELEGRAPH, available at <http://www.telegraph.co.uk/sport/tennis/wimbledon/2305019/Wimbledon-2008-John-McEnroe-hails-Rafael-Nadal-victory-as-greatest-final-ever.html>. Just one year later, Federer recaptured the Wimbledon crown, defeating long-time rival American Andy Roddick 16-14 in the fifth set. See Mark Hodgkinson, *Wimbledon 2009: Roger Federer Defeats Andy Roddick to Win Men's Single Title*, THE TELEGRAPH, available at <http://www.telegraph.co.uk/sport/tennis/wimbledon/5751328/Wimbledon-2009-Roger-Federer-defeats-Andy-Roddick-to-win-mens-singles-title.html>. The 77 total games made the match the longest Wimbledon final ever played. *Id.* The intense drama of these men's Wimbledon finals was overshadowed the following year when American John Isner and Frenchman Nicolas Mahut played the longest match in tennis history, battling in the first round for a staggering eleven hours and five

professional tennis has reached a crossroads and there are a host of questions that must be asked—is the prize money distribution acceptable? Is the schedule too demanding on top players? Is the established anti-doping program excessive and unrealistic? Is there a player representation crisis that the current system cannot solve? These are questions that need to be asked now; more importantly, they are questions that must be answered now.

In order to guarantee the future of men's professional tennis, the parties involved in the sport—the players, the ATP, and the ITF—all need to set aside their differing perspectives for the good of the sport generally. Parts II and III of this article explain the history and complex governance structure of men's professional tennis in the modern era. Part IV investigates the major issues currently threatening the sport, Part V looks at the existing mechanisms for dealing with these issues, and Part VI, finding these mechanisms inadequate, proposes that a new system—rooted in alternative dispute resolution methodology—should emerge. Part VII looks at recent developments regarding player compensation at the Grand Slams and the new ATP schedule. Finally, part VIII concludes the article, stresses the critical importance of joint responsibility for solving the problems currently facing the modern game, and reiterates the need for immediate action to prevent potentially irreversible damage to the future of the sport.

## I. HISTORY AND STRUCTURE OF MEN'S PROFESSIONAL TENNIS TODAY

### A. *The Association of Tennis Professionals (ATP)*

In 1972, the ATP was formed in a “secluded stairwell at the US Open” when a group of the sport's leading athletes met to discuss the overwhelming need for some form of a players'

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minutes over three consecutive days. See Bruce Jenkins, *Isner, Mahut Staging Most Amazing First-Rounder in Grand Slam History*, SPORTS ILLUSTRATED, June 23, 2010, available at [http://sportsillustrated.cnn.com/2010/writers/bruce\\_jenkins/06/23/isner.mahut.react/index.html](http://sportsillustrated.cnn.com/2010/writers/bruce_jenkins/06/23/isner.mahut.react/index.html). The final set alone lasted over eight hours and finally ended with a score of 70-68. *Id.* These instances of drama, and the quality of the player's in today's game, are strong evidence favoring the belief that men's tennis may be in the midst of its most exciting era yet.

association.<sup>8</sup> Just four years prior, professional tennis had been a severely limited notion: until 1968 and the emergence of the “open era” of tennis, all Grand Slam tournaments (the four most prestigious tournaments of the year<sup>9</sup>) and all national championships were restricted to amateur players only.<sup>10</sup> The unification of these Grand Slam and national tournaments—combined with the simultaneous move to permit the participation of professional players—was the catalyst for the creation of the ATP.<sup>11</sup>

The ATP—originally serving as a players’ association created to protect the rights and interests of the competitors<sup>12</sup>—was led by Executive Director Jack Kramer<sup>13</sup> and President Cliff Drysdale.<sup>14</sup>

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<sup>8</sup> See ATP Tennis, *How It All Began*, ATP World Tour Website, History Section, available at <http://www.atpworldtour.com/Corporate/History.aspx>.

<sup>9</sup> These four Grand Slams are, in order of annual occurrence, the Australian Open (January- February), the French Open (May-June), the Championships at Wimbledon (June-July), and the United States Open (August-September).

<sup>10</sup> ATP Tennis (History), *supra* note 8.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* For a number of years—from 1974-1989—the professional men’s tennis circuit was organized and managed by the “Men’s Tennis Council.” *Id.* This group, comprised of representatives from the ATP, ITF, and tournament directors from all around the world, served to define the contours of the sport while also maintaining relations between the bodies responsible for the organized professional game. *Id.* The ATP was a powerful representative of the player’s interests in these early years. *Id.* In 1973, after Yugoslavian player Niki Pilic missed a Davis Cup match, he was suspended by the ITF from competing in any of the Grand Slam events. See Frank Keating, *When SW19 Turned to the Picket Line*, THE GUARDIAN, June 23, 2003, available at <http://www.guardian.co.uk/sport/2003/jun/23/tennis.wimbledon200311>. In response, the ATP players’ council met and voted to boycott Wimbledon *Id.*; see also Rod Laver & Bud Collins, THE EDUCATION OF A TENNIS PLAYER 236-41 (2009) (Tennis Legend Rod Laver, recently voted as the number two greatest tennis player of all time in a Tennis Channel TV special, gives a wonderfully detailed and personal account of his experiences in the 1973 Wimbledon boycott over what he calls the “Pilic Affair”).

<sup>13</sup> Jack Kramer passed away in 2009 but was remembered fondly by the tennis world as “the most influential person in the game in the last 60 years.” Bill Dwyre, *Jack Kramer Dies at 88; Champion Ushered in Era of Pro Tennis*, LA TIMES OBITUARIES, Sept. 14, 2009. As a player, Kramer won several Grand Slam titles, but was most known for his work to expand the rights of professional tennis players. *Id.* Tennis Hall of Fame journalist and historian Bud Collins called Kramer “the most important figure in the history of the game.” *Id.*

<sup>14</sup> Cliff Drysdale is currently best known as a preeminent tennis announcer; he serves as a popular broadcaster on ABC Sports and ESPN, and is a contributing writer for Tennis Magazine. See ATP Players, ATP World Tour Website, available at <http://www.atpworldtour.com/Tennis/Players/Dr/C/Cliff-C-Drysdale.aspx>. Drysdale also

In 1973 the ATP made its first significant contribution to the development of men's professional tennis when it introduced a computer rankings system that "provided fair analysis of a player's performance as well as an objective means to determine entries into tournaments."<sup>15</sup> The ATP Rankings remain, to this day, the official ranking system used in men's professional tennis to determine both tournament seeding and the honor of the year-end number one worldwide ranking.<sup>16</sup>

For nearly two decades, the ATP served as male professional tennis players' connection to the bodies governing international tennis competition.<sup>17</sup> However, as professional tennis continued to grow and expand, the players felt they "should have a greater voice in their sport" and by the late 1980s they "had realized the time had come for them to take more control over the game."<sup>18</sup> Thus, during the 1988 US Open, then-ATP CEO Hamilton Jordan held what was later famously dubbed the "press conference in the parking lot."<sup>19</sup> Surrounded by many of the sports top players, the ATP publicly released an outline of problems and issues, as well as potential solutions, facing the sport of tennis.<sup>20</sup> This public literature, named "Tennis at the Crossroads," listed as "one of the options available to the ATP...the formation of a new [tennis] circuit, the ATP Tour."<sup>21</sup>

This new ATP Tour was quickly endorsed by many of the sports elite stars: 85 of the top 100 ATP ranked players signed a letter in support of the new circuit and by the Fall of 1988, "24 players, including eight of the Top 10, signed contracts to play the ATP Tour in 1990."<sup>22</sup> The ATP Tour was further supported by the tournament directors of most of the world's leading events.<sup>23</sup> In 1990, the ATP Tour was launched and promised to "become a

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enjoyed a very successful playing career, acquiring almost 60 singles and doubles titles and making the finals of the U.S. Championships in 1965. *Id.*

<sup>15</sup> See ATP Tennis (History), *supra* note 8.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

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

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

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

<sup>21</sup> ATP Tennis (History), *supra* note 8.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

partnership unique in professional sports, with an equal voice in how the circuit [was] run.”<sup>24</sup>

With the emergence of the ATP Tour, the ATP ceased to function as a players’ union and instead became the primary governing body responsible for the annual tournament calendar and event scheduling in men’s professional tennis.<sup>25</sup> The emergence of the ATP Tour, although well received by the vast majority of players, was not without some consternation. Most notably, the ITF—who remained responsible for the four prestigious Grand Slam tournaments— took exception to the formation of the ATP Tour and, viewing the “breakaway [as] denoting a form of civil war in tennis,” decided for form its own year-ending championships independent of the ATP Tour year-end finals.<sup>26</sup>

The inaugural 1990 season of the ATP Tour was a massive success: all of the Top 50 ranked players in the world contractually agreed to play on the new circuit, a new eight week off season was established, and after securing IBM as the ATP Tour’s primary corporate sponsor, the season launched into action with 76 tournaments in 28 nations.<sup>27</sup> The ATP Tour era began, significantly, “with an equal partnership between players and tournaments” and saw the average tournament prize money pool increase by nearly 50%.<sup>28</sup>

By 1993, the ATP Tour had extended its “global reach, adding Arabian Gulf tournaments in Doha and Dubai,” continuing to increase prize money, and agreeing to the “first television package for men’s tennis [to] broadcast 19 tournaments to a worldwide

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See *The History of Tennis: 20<sup>th</sup> Century*, TENNIS THEME, available at [www.tennistheme.com/tennishistory/tennishistory03.html](http://www.tennistheme.com/tennishistory/tennishistory03.html). Consequently, for a number of years there were actually two year end events—the ATP World Cup Championships and the ITF Grand Slam Cup. See Barclay’s ATP World Tour Finals History, ATP World Tour Website, available at <http://www.atpworldtour.com/Finals/2012/About/Heritage.aspx>. These competing year-end finals would endure until 1999, when the ATP and ITF announced that a new, jointly owned year-end tournament—the Tennis Master’s Cup—would replace the two prior events. *Id.* In 2009, the event was reborn as the Barclay’s ATP World Tour Finals at the O2 Arena in London. *Id.*

<sup>27</sup> See ATP Tennis (History), *supra* note 8.

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

audience.”<sup>29</sup> Seven years later, in 2000, the ATP Tour had launched a website, signed a partnership with Mercedes-Benz, sanctioned the creation of an ATP Senior Tour of Champions, and expanded their global broadcasts to more than 200 countries.<sup>30</sup> Also in 2000, the ATP Tour was renamed ATP, complete with a new logo, new website, and, shortly thereafter, the publication of an official magazine entitled DUECE.<sup>31</sup>

The ATP underwent its most recent alterations in 2008-09 when it unveiled the ATP World Tour as “a simplified tour structure that brings a rationalized, healthier player schedule, a \$1 billion investment in infrastructure and facility upgrades and a 33% increase in player compensation.”<sup>32</sup> The ATP World Tour included a new ranking points system, was sponsored by South African Airways, and the current tournament demarcations by ranking point valuations—ATP World Tour Masters 1000, 500, and 250 events—were originally introduced.<sup>33</sup> Additionally, the year-end championships—featuring the world’s top 8 singles players and top 8 doubles teams—was moved to London and renamed the Barclay’s ATP World Tour Finals.<sup>34</sup> Ultimately, the ATP presently remains a key part of modern men’s tennis and is one of the most powerful governing bodies in all of professional sports.

### *B. International Tennis Federation (ITF)*

The ATP is only one of two primary governing bodies in men’s professional tennis; the other, the ITF, was originally formed in 1913 as the International Lawn Tennis Federation (ILTF).<sup>35</sup> The ILTF, created in response to the universal growth and popularity of lawn tennis and the desire of national tennis associations to unite and form uniform structures and rules, was founded at a general conference in Paris with thirteen inaugural members.<sup>36</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *See supra* note 26.

<sup>35</sup> ITF Tennis, *History of the ITF*, ITF Website, available at <http://www.itftennis.com/about/organisation/history.aspx>.

<sup>36</sup> *Id.*

Although the ILTF membership fell to ten nations following World War I, its work continued and in 1923 the organization adopted the ILTF “Rules of Tennis,” the first official codification of the sport’s rules and requirements on an international scale.<sup>37</sup> Also in 1923, the ILTF created a new category of official championship events—now known as the Grand Slams—to take place yearly in the United Kingdom, United States, France, and Australia.<sup>38</sup>

By the late 1940s, the ILTF “became the officially recognized organization with authority to control lawn tennis throughout the world,” the number of affiliate member nations had risen to nearly sixty, and the ILTF had established a worldwide standardization of tennis balls for use in ILTF events.<sup>39</sup> During World War II, ILTF funds were transferred to the UK, and after the war the ILTF headquarters also moved to London.<sup>40</sup>

In 1968, forty-seven ILTF member nations agreed to “Open Era” tennis and the ILTF officially began to allow professional players access to their tournaments and events.<sup>41</sup> Although the subsequent formation of a new professional tennis tour, World Championship Tennis, threatened to jeopardize the influence of the ILTF, the two entities would eventually unite as a single and unified professional tennis circuit in 1972.<sup>42</sup>

The 1970s was a decade of massive growth and change in the ILTF. In 1972, the ILTF approved of the use of yellow tennis balls (white was previously the required color).<sup>43</sup> In 1975, the ILTF introduced “The Code of Conduct [as] a method for controlling bad behavior in the men’s game.”<sup>44</sup> In 1977, the ILTF became the ITF and began monitoring technological developments in tennis equipment after some players complained about double strung rackets.<sup>45</sup> Finally, in 1979, the ITF assumed full responsibility for

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> ITF Tennis, *supra* note 35.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

organizing and running the Davis Cup competition—an international team tournament between nations.<sup>46</sup>

Currently, the ITF remains vitally involved in men's professional tennis. Not only is the ITF the official governing body of the Grand Slams, which remain the most prestigious tennis tournaments in the world, but it is also responsible for the Futures Tour.<sup>47</sup> Additionally, the ITF handles representation of the sport in the Olympic Games.<sup>48</sup> Finally, and most importantly, the ITF remains “the world governing body of [professional] tennis” and oversees fundamental aspects of the sport, including administration and regulation, organizing international competition, and structuring, developing, and promoting the game on an international level.<sup>49</sup>

## II. PRESENT GOVERNANCE STRUCTURE

Currently, the ATP and the ITF jointly govern professional tennis. Although these two bodies work together in many areas of the sport,<sup>50</sup> they are also separately responsible for varying aspects of the sport's structure and events. Ultimately, becoming a professional tennis player normally requires participation in events sanctioned, organized, and managed by both the ATP and the ITF.<sup>51</sup>

Young players seeking to join the professional ranks typically begin their journey in ITF Men's Circuit—or Futures—

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* The Futures Tour, managed and run as part of the ITF Professional Circuit, serves as “the entry level of Professional Tournaments enabling players to eventually reach the higher level tournaments on the ATP Tour.” ITF Tennis, *About Pro Circuit*, ITF Website, available at [www.itftennis.com/procircuit/about-pro-circuit/overview.aspx](http://www.itftennis.com/procircuit/about-pro-circuit/overview.aspx). The Futures Tour is comprised of one-week tournaments offering either \$10,000 or \$15,000 in prize money and helps younger players break into the professional ranks. *Id.*

<sup>48</sup> ITF Tennis, *supra* note 35.

<sup>49</sup> *Id.*

<sup>50</sup> The most important area where the ATP and ITF generally share competence and autonomy is regarding issues involving player doping violations; they often jointly present their cases to the Court of Arbitration for Sport in instances of appeals dealing with such concerns. *See infra* Part V (b) and (c).

<sup>51</sup> *See supra* note 5 (although the ATP controls most of the professional events played throughout the year, the most prestigious yearly events, the Grand Slam tournaments, and the Futures tour are controlled by the ITF and not the ATP).

tournaments.<sup>52</sup> The weeklong ITF Futures events began in 1998 as a replacement for ITF Satellite Circuit tournaments and served to provide young players with more opportunities to earn ranking points and prize money.<sup>53</sup> The circuit began with 212 tournaments, grew to over 300 in 2002, and currently features over 500 Futures events played all over the world.<sup>54</sup> The ITF Futures tournaments have served as the starting point for almost every ATP Tour ranked player today.<sup>55</sup>

After players have accumulated a sufficient amount of ATP ranking points on the ITF Futures tour, they qualify to play in ATP Challenger events.<sup>56</sup> The Challenger level is governed by the ATP and “generally feature[s] players ranked between 71 and 400 vying for a share of \$50,000-\$100,000 per tournament.”<sup>57</sup> In Challenger events, the main draw—the list of players who are automatically entered to compete in the tournament—is set at 32 players.<sup>58</sup> The Challenger tour functions as a kind of minor leagues in professional tennis; they remain “one step below ATP Tour events [and] many pros play in both.”<sup>59</sup> The ATP Challenger

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<sup>52</sup> See Jeff Cooper, *The Structure of Men's Professional Tennis Competition*, ABOUT.COM TENNIS, available at [http://tennis.about.com/od/tournaments/a/structure\\_mens\\_professional\\_tennis.htm](http://tennis.about.com/od/tournaments/a/structure_mens_professional_tennis.htm) (“Typically, after a successful junior or college career, players enter professional competition at the Futures level, governed by the ITF, where each ITF Men's Circuit tournament offers prize money of either \$10,000 or \$15,000”).

<sup>53</sup> ITF Tennis, *supra* note 47 (*About Pro Circuit*).

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

<sup>55</sup> *Id.* Incredibly, the final 2011 ATP Tour rankings “revealed that every player listed with an ATP Singles Entry Ranking has competed on the ITF Pro Circuit (Satellite Circuits and/or Futures Tournaments) at some point during their career.” *Id.*

<sup>56</sup> See ATP Challenger Tour, ATP World Tour Website, available at [www.atpworldtour.com/Tournaments/Challenger/ABOUT.aspx](http://www.atpworldtour.com/Tournaments/Challenger/ABOUT.aspx).

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

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* For several players, the Challenger Tour has proved to be an invaluable way to gain confidence after time away or personal problems and has, in fact, been the catalyst for a resurgence of their careers. For instance, in 1997 tennis legend Andre Agassi had gone through a horrendous 18-month stretch, become involved in drugs, and dropped to number 141 in the ATP rankings. See Randy Walker, *ON THIS DAY IN TENNIS HISTORY 18-22* (2008). From this lowest point, in both his professional playing career and his personal life, Agassi began regaining his form on the Challenger Tour. *Id.* By 1999, Agassi had risen back to very top of the men's game, winning Grand Slam events at both the French Open and the U.S. Open. *Id.* Agassi would finish his storied career with 68 singles titles, 8 Grand Slams, and an Olympic Gold medal. *Id.* Other players, including former world number four James Blake and current world number 49 Sam Querrey, have used the Challenger Tour to rebuild their rankings after

tour awards ATP rankings points, which can eventually be used by players to gain direct entry into ATP Tour level events.<sup>60</sup> As of 2008, there were 177 Challenger level tournaments in over 40 nations, with prize money totaling over \$10 million.<sup>61</sup>

The actual ATP World Tour—the primary circuit of tournaments and events comprising professional tennis today—is broken into three distinct categories of tournaments, based specifically on the number of ATP ranking points available to the winner of that specific event.<sup>62</sup> The first level, ATP World Tour 250 tournaments, award 250 ATP rankings points to the winner.<sup>63</sup> There are currently 40 ATP World Tour 250 events, with total prize money ranging from \$416,000- \$1.024 million.<sup>64</sup> The next level of ATP Tour events is the 500 series; worth 500 ATP ranking points, there are 11 of these tournaments and they have total prize money of up to \$2.1 million.<sup>65</sup> Finally, the 9 ATP World Tour Masters 1000 events attract the best players in the world: they are worth 1000 ranking points, and total prize money of \$2.45- \$3.64 million.<sup>66</sup> In addition, the ATP holds a year-ending championship in London called the ATP World Tour Finals.<sup>67</sup> This final ATP tournament of the year is held annually in London's O2 Arena and features only the top 8 singles players (and top 8 doubles teams), as determined by the ATP ranking system.<sup>68</sup> The ATP World Tour Finals feature round robin group play, followed by semi-final and final rounds; the total ATP ranking points available can be as great as 1500<sup>69</sup> and the total prize money pool is \$4.45 million.<sup>70</sup>

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suffering severe injuries that caused them to miss significant time on the ATP Tour. See AP, *ATP Challenger Tour Short on Prize Money, Long on Skill and Chock Full of- Yep- Challenges* [hereafter *ATP Challenger Tour Prize Money*], ESPN.COM, available at <http://sports.espn.go.com/espn/wire?section=tennis&id=6899219>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> ATP Tennis (History), *supra* note 8.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Barclay's ATP World Tour Finals, *supra* note 26.

<sup>68</sup> *Id.*

<sup>69</sup> Any player who goes the entire event—round robin and the elimination matches—undefeated acquires 1500 ATP ranking points. *Id.*

<sup>70</sup> *Id.*

The ATP, however, does not control the four most prestigious and renowned professional tennis tournaments. The “Grand Slams” of tennis—the Australian Open, French Open, Wimbledon, and United States Open—are the most important tournaments of the year in professional tennis and are governed exclusively by the ITF in collaboration with ITF National Associations who actually own, operate, and organize the Grand Slam events.<sup>71</sup> These four events are widely considered the most important in professional tennis, first and foremost, because of the history and tradition each tournament carries.<sup>72</sup> Additionally, the Grand Slam tournaments attract the most public and media attention,<sup>73</sup> offer the highest ATP ranking points to the event champion,<sup>74</sup> have the largest and strongest player fields,<sup>75</sup> and also have the largest prize money pools of any tournament in the sport.<sup>76</sup> Ultimately, the Grand Slam tournaments constitute the “landmark events” in professional tennis and “the careers of great players are usually remembered almost entirely for their Grand Slam records.”<sup>77</sup>

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<sup>71</sup> These National Associations—Tennis Australia, the French Federation of Tennis, the United States Tennis Association, and Wimbledon’s joint committee of The All England Lawn Tennis & Croquet Club and Lawn Tennis Association—work as affiliates of the ITF in managing and owning the Grand Slam events. ITF Tennis, *About the ITF; The Grand Slams*, ITF Website, available at [www.itftennis.com/about-grand-slams/overview.aspx](http://www.itftennis.com/about-grand-slams/overview.aspx).

<sup>72</sup> See generally Reference Book, *Grand Slam History*, available at [www.grandslamhistory.com/index.php?menu=history](http://www.grandslamhistory.com/index.php?menu=history).

<sup>73</sup> *Id.*

<sup>74</sup> See Cooper, *supra* note 52. The winner of a Grand Slam event earns 2000 ATP ranking points. *Id.*

<sup>75</sup> See *ATP Challenger Tour Prize Money*, *supra* note 59 (observing that 2010 Wimbledon finalist Tomas Berdych was beaten in the first round of the French Open by a qualifying player ranked outside the top 100, two-time French Open finalist Robin Soderling was beaten at Wimbledon by a young Australian qualifier, and concluding that such upsets “showcase the depth of [Grand Slam] fields”). Further, the structure of the Grand Slams makes them the most brutal and demanding events of the year; the draw is the largest of all the annual tournaments (128 players), each match is best of five sets, and the events span two full weeks. See Cooper, *supra* note 52.

<sup>76</sup> See Cooper, *supra* note 52 (noting that the average prize pool of the Grand Slam events is over \$20 million each).

<sup>77</sup> *Id.* In addition, the Grand Slam tournaments remain the premier events for most tennis fans; they “stand apart, and millions of fans who barely pay attention to the rest of the tennis calendar eagerly await these landmark events.” *Id.*

### III. MODERN DIFFICULTIES & ISSUES IN MEN'S PROFESSIONAL TENNIS

#### A. *Player Dissatisfaction*

##### 1. Prize Money

Despite the fact that player compensation has been steadily rising since the Open era of tennis began in 1968,<sup>78</sup> many current players have continued to maintain that they should be getting a bigger piece of the pie.<sup>79</sup> In 2009, the ATP World Tour announced that, despite difficulties in economies across the globe, prize money on the men's professional circuit would increase to \$82.3 million, an annual jump of almost 33% from 2006.<sup>80</sup> Then, in 2011, the ATP again announced prize money increases that, over the subsequent three seasons, would see total player winnings exceed \$90 million for the first time in the history of the sport.<sup>81</sup>

Yet, despite these increases, there was much tension at the beginning of the 2012 Australian Open. A week before the year's first Grand Slam event was scheduled to begin, several ATP players considered boycotting the tournament in protest to the present prize money allocation.<sup>82</sup> Although such drastic measures were avoided, and the tournament ended in one of the most

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<sup>78</sup> Prior to this, amateurs were only allowed to collect some expenses and there was no real prize money compensation. ITF Tennis (History), *supra* note 35.

<sup>79</sup> See Salaman, *supra* note 1 (noting player dissatisfaction with prize money, especially at the Grand Slam events); AP, *ATP Plans to Address Player Complaints*, ESPN, Jan. 18, 2012, available at [http://espn.go.com/tennis/story/\\_/id/7473893/new-atp-president-says-sympathizes-player-complaints-tour-conditions](http://espn.go.com/tennis/story/_/id/7473893/new-atp-president-says-sympathizes-player-complaints-tour-conditions) (observing that "the main issues apparently revolve around an overcrowded schedule and prize money at Grand Slams").

<sup>80</sup> Kamakshi Tandon, *ATP Prize Money More Equitable*, ESPN, Feb. 17, 2009, available at <http://espn.go.com/espn/print?id=3911481&type=story>.

<sup>81</sup> See Street & Smith, *ATP Increasing Tour Prize Money; Will Reach Record \$90M By '14*, SPORTSBUSINESS DAILY, July 6, 2011, available at <http://www.sportsbusinessdaily.com/Daily/Issues/2011/07/06/Leagues-and-Governing-Bodies/Tennis.aspx>; *ATP Announces Prize Money Increases*, RACQUETSPORTSINDUSTRY.COM NEWS, July 6, 2011, available at [http://www.racquetsportsindustry.com/news/2011/07/atp\\_announces\\_significant\\_priz.html](http://www.racquetsportsindustry.com/news/2011/07/atp_announces_significant_priz.html).

<sup>82</sup> See Ian Ransom, *Prize Money Battle a High Stakes Game for Fringe Players*, REUTERS, Jan. 21, 2012, available at <http://www.reuters.com/article/2012/01/21/us-tennis-open-money-idUSTRE80K09S20120121>.

dramatic men's finals in recent memory,<sup>83</sup> the threats of a player strike seem more real than ever before.<sup>84</sup>

Player's primary complaints are focused not on the ATP Tour, but rather on the Grand Slam tournaments.<sup>85</sup> While the four Grand Slams the most popular events in professional tennis, they are controlled by the ITF and Grand Slam Committee,<sup>86</sup> not the ATP.<sup>87</sup> Further, the Grand Slam tournaments, each two weeks long, remain by far the most profitable events in professional tennis.<sup>88</sup> On average, the Grand Slams generate roughly \$200 million apiece; however, players receive only 10-12% of that total revenue via prize money.<sup>89</sup> In the 2012 Australian Open, for example, the total tournament prize money was around \$26 million, but the total revenue was "expected north of \$250 million."<sup>90</sup>

Meanwhile, it is generally felt that the players would like to see the Grand Slam prize money pool rise to around 20-30% of the total tournament revenues.<sup>91</sup> Even a 30% players share of the tournament revenues would be paltry when compared to most major American sports.<sup>92</sup> However, perhaps the most controversial

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<sup>83</sup> Then world number one Novak Djokovic defeated second ranked Rafael Nadal 5-7, 6-4, 6-2, 6-7, 7-5 in a match lasting nearly 6 hours. *See supra* note 4.

<sup>84</sup> According to some reports, at the player's pre-tournament meeting a majority of players actually may have been in favor of a strike and boycott of the year's first major tournament. *See Salaman, supra* note 1.

<sup>85</sup> Jon Wertheim, *Challenges Await New ATP Leader*, *SI.COM*, Dec. 22, 2011, available at <http://sportsillustrated.cnn.com/vault/article/web/COM1193269/index.htm> ("the [Grand] Slams are terrifically profitable and allocate a scandalously low percentage of their revenue to the players as prize money...on the other hand, the players don't have much leverage [at those events]").

<sup>86</sup> The Grand Slam Committee was formed in 1989 as the allied representative of all four Grand Slam tournaments, who, in conjunction with the ITF and the ITF national governing tennis associations, is responsible for administering Grand Slam events and rules. *See Grand Slams, WIMBLEDON*, available at <http://www.wimbledon.com/tennis-world/grandslams>.

<sup>87</sup> *See ITF Tennis, supra* note 35.

<sup>88</sup> *See Salaman, supra* note 1.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (observing the recent NBA collective bargaining agreement resulted in a total revenue split where the players receive 51% of those proceeds). Other major American sports also reflect this significantly larger proportion of revenues going to the players; in the NHL players receive a 57% share under their current collective bargaining agreement, while the NFL CBA allots its players 47% of total revenue, including 55%

issue related to prize money distribution in professional tennis is one that remains unseen and unconsidered by the average tennis fan: the issue of prize money allocation amongst the players themselves.<sup>93</sup>

In 2012, then world number two Rafael Nadal won his sixth French Open title; in the process, he also claimed the roughly \$1.7 million in champions winnings.<sup>94</sup> A few weeks later, Nadal was at the All England Club—the Wimbledon venue—and was down 4-2 in the opening set of his first round match against American Michael Russell.<sup>95</sup> Nadal, the defending Wimbledon champion, would recover from his slow start and win the match in straight sets.<sup>96</sup> However, as the match commentators would observe, Nadal's single tournament winnings at the French Open were more than Michael Russell has made in his entire 14-year professional tennis career.<sup>97</sup>

Russell, who started playing tennis at age five, was ranked the #1 in the U.S. Boys 18-Under, was the NCAA Rookie of the Year while at the University of Miami, and reached a career high ATP Tour rank of 60 in 2007.<sup>98</sup> Yet, Russell freely admits, playing tennis on the professional tour is often a battle of the will: only a week after his first round loss to Nadal at Wimbledon, Russell was practicing on a 3/4 size court, partially covered with bleachers, back in Chicago.<sup>99</sup> He was preparing for an ATP Challenger Tour event, "where players ranked around 100 toil in an attempt to make it onto the main circuit."<sup>100</sup> While top players enjoy luxurious accommodations and constant medical attention from

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of media related revenues. See Nicholas J. Cotsonika, *CBA Sticking Points: The Players' Cut & Team-by-Team Revenues*, YAHOO SPORTS, Feb. 2, 2012, available at [sports.yahoo.com/nhl/news?slug=nc-3periods-cba-bettman-fehr-nhlpa-020212](http://sports.yahoo.com/nhl/news?slug=nc-3periods-cba-bettman-fehr-nhlpa-020212).

<sup>93</sup> Tandon, *supra* note 80.

<sup>94</sup> *ATP Challenger Tour Prize Money*, *supra* note 59.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* "Straight sets" means that a player wins in the minimum amount of sets need for the victory; in the Grand Slams, where matches are the best of five sets, this means that a player wins the first three sets of the match. *Id.*

<sup>97</sup> See *id.*; see also ATP Tennis, *Players*, ATP World Tour Website, available at <http://www.atpworldtour.com/Tennis/Players/Ru/M/Michael-Russell.aspx> (listing Michael Russell's reported career earnings at \$1,644,217).

<sup>98</sup> ATP Tennis (Players), *supra* note 97.

<sup>99</sup> *ATP Challenger Tour Prize Money*, *supra* note 59.

<sup>100</sup> *Id.*

their own personal trainers, players like Russell “must budget their earnings wisely.”<sup>101</sup> In Russell’s case, this means that he handles his own travel arrangements and relies on his wife, a fitness competitor, for injury treatments.<sup>102</sup>

Many others in the game have reiterated Russell’s experiences regarding the difficulties of making it on tour as a mid-level player. James Blake, an American who attended Harvard and was ranked as high as number four in the world,<sup>103</sup> had to return to the Challenger level after he was injured and saw his ranking plummet outside the top 100.<sup>104</sup> Commenting on the realities of professional tennis for most players, Blake observed “it’s a tough sport...it’s not like a lot of the other sports where you get a guaranteed contract early on and you’re just sort of coasting. You’ve got to earn your keep out here every week. If you don’t do well, you’re going home early.”<sup>105</sup>

The fact remains that professional tennis is, and has almost always been, a top-heavy sport when it comes to prize money distribution.<sup>106</sup> At the end of 2011, players in the top 10 of the ATP Tour Rankings all had career prize money earnings of at least roughly \$4.5 million,<sup>107</sup> and most of those players are young

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> James Blake reached this career high in November of 2006 after making the quarterfinals of the U.S. Open and finals of the year-end Tennis Masters Cup. *See ATP Tennis (Players)*, *supra* note 97.

<sup>104</sup> After a successful 2003 season that saw Blake rise to number 37 in the ATP Tour rankings, he would suffer serious setbacks in 2004 and would fall outside the top 200 by April 2005. *See* James Buddell, *The Last Time...With James Blake*, *DEUCE MAGAZINE*, May 2009. While practicing with friend and fellow American Robby Ginepri for the master’s tournament in Rome, Blake slipped on the clay court and slammed into the net post, breaking his neck. *Id.* Shortly thereafter, Blake’s father would pass away from stomach cancer and Blake developed a stress-related illness that paralyzed half his face and blurred his vision. *Id.* His subsequent return to form is one of the great comeback stories in recent tennis memory.

<sup>105</sup> *ATP Challenger Tour Prize Money*, *supra* note 59.

<sup>106</sup> *Id.*

<sup>107</sup> According to ATP Tour public records, the career earnings for the top ten ranked male singles players at the end of 2011 were as follows: (1) Novak Djokovic, \$33,091,625 (2) Rafael Nadal, \$43,468,919 (3) Roger Federer, \$64,661,910 (4) Andy Murray, \$18,630,365 (5) David Ferrer, \$12,948,576 (6) Jo-Wilfried Tsonga, \$8,114,313 (7) Tomas Berdych, \$10,111,412 (8) Mardy Fish, \$6,024,497 (9) Janko Tipsarevic, \$4,483,108 and (10) Nicolas Almagro, \$5,913,214. *See ATP Tennis (Players)*, *supra* note 97.

enough that, barring injury, they remain likely to play for several more years.<sup>108</sup> It is undeniable that the top names in men's professional tennis—Novak Djokovic, Rafael Nadal, Andy Murray, and, of course, Roger Federer—drive the popularity of the sport globally.<sup>109</sup> These top players have dominated the Grand Slams over the past decade,<sup>110</sup> and their status as international sports icons is further evidenced by the willingness of smaller tournaments to pay massive appearance fees just to entice those top players to participate in their events.<sup>111</sup>

However, it is important to also remember that without the lower ranked players, the sport of tennis could not be sustained; after all, these top players need to compete against someone in the first and second rounds, and upsets are one of the most exciting parts of any tournament.<sup>112</sup> In fact, the prospect of appearing in a Grand Slam event against one of the top players in the world is often what motivates lower ranked players to continue toughing it

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<sup>108</sup> Of the top 10 ranked men at the end of 2011, only three players are beyond their 20's (Federer, Ferrer, and Fish are each 30 years old), and the rest are 27 or younger. *Id.*

<sup>109</sup> See e.g., Tandon, *supra* note 80. Former top American and world number 8 Mardy Fish openly stated that he was in favor of the top players getting the "lion's share" of any increases in prize money; after all, Fish argued "the reason people buy tickets to Grand Slams and stuff is to watch the top guys...I think it's important to realize that if you're ranked 60 to 80 in the world—the only reason they have a job is because of those [top] guys." *Id.*

<sup>110</sup> From 2006-2012, Roger Federer, Rafael Nadal, and Novak Djokovic—consistently top ranked ATP singles players—have won an astounding 24 of 25 Grand Slam titles. See ESPN SPORTS ALMANAC 814-15 (2006). The lone exception was when Juan Martin del Potro defeated Federer in the 2009 U.S. Open finals. *Id.*

<sup>111</sup> It was reported, for instance, that a tournament in Rotterdam paid Roger Federer a \$1 million, tax-free appearance fee just for playing in the event. See Simon Cambers, *Tenni,\$\$\$: Rafa and Roger's Appearance Fees*, THE TENNIS SPACE, Feb. 23, 2012, available at <http://www.thetennisspace.com/opinion/champion-rafa-and-rogers-appearance-fees/>. It was subsequently reported that Rafael Nadal was paid \$2 million Euros over two years by Spain's premier television station in exchange for guaranteed interviews at the end of all of his matches. *Id.*

<sup>112</sup> Further, upsets often thrust a player into the limelight, possibly making their career or allowing them to use it as a catalyst for better play thereafter. Consider, for example, current world number ten, Frenchman Jo-Wilfried Tsonga. See AP, *Tsonga Advances to Australian Open Final in Stunning Fashion*, ESPN, Jan. 24, 2008, available at <http://sports.espn.go.com/sports/tennis/aus08/news/story?id=3210247>. In 2008, Tsonga started the season as a relative unknown, entering the Australian Open ranked outside the top 40; but after a miraculous run to the final—where he finally fell to Novak Djokovic in 4 tight sets—Tsonga would go on to finish the year in the top 10 and has become a mainstay amongst the ATP Tour elite. *Id.*

out on the Challenger and Futures tours, where prize money and amenities are far less generous than the ATP World Tour and Grand Slams.<sup>113</sup> The prospect of upsetting top seeds and becoming a Cinderella story in the tennis world became a reality in 2009 for American Jessie Witten at the US Open.<sup>114</sup> Ranked 163 at the time, Witten won three matches in the qualifying draw to enter the main US Open tournament; then, he upset 29<sup>th</sup> seeded Igor Andreev in the first round and eventually advanced to the 3<sup>rd</sup> round of the tournament, where he won the first set before falling to then world number four Novak Djokovic.<sup>115</sup>

Nonetheless, the fact also remains that prize money pools in men's professional tennis, while on the rise on the ATP World Tour, continue to remain static as far as the lower level Challenger events are concerned.<sup>116</sup> Furthermore, even the increases in prize money at the ATP level have been overwhelmingly top heavy.<sup>117</sup> For example, in 2011, Indian Wells—an ATP Masters 1000 tournament—planned to drastically increase their prize money distributions.<sup>118</sup> However, the original proposal for the new prize money allocation was immediately met with harsh criticism, requiring excessive revision before it was officially implemented.<sup>119</sup> The primary concern with the original change was that the predominant portion of the increase in overall prize money would go to the semi-finalists, finalist, and tournament champion.<sup>120</sup> Those players exiting the event in the early rounds, meanwhile, would see almost no increase in their tournament winnings.<sup>121</sup> While more recent events have led to large pay increases and more reasonable prize money allocation

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<sup>113</sup> See Tandon, *supra* note 80 (noting that while the Grand Slams and ATP events often pay for players accommodations, the lower level events and qualifying tournaments require the players to pay all their expenses out of pocket).

<sup>114</sup> *ATP Challenger Tour Prize Money*, *supra* note 59.

<sup>115</sup> *Id.*

<sup>116</sup> Tandon, *supra* note 80 (“prize money at the minor league challenger and futures events...has stayed static for over a decade”).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* (“almost all of the [prize money] increase was originally allocated to tournament winners and finalists, and those losing early on were in some cases actually scheduled to receive less than last season”).

amongst players at the Grand Slam events, significant obstacles and debate on this issue persist.<sup>122</sup>

## 2. Scheduling

Another common complaint amongst many of today's tennis elite revolves around the professional tournament schedule.<sup>123</sup> The men's professional tennis annual schedule is comprised of 67 tour level events, played in 32 countries on 6 continents.<sup>124</sup> Specifically, there are 63 ATP World Tour events, the 4 Grand Slam tournaments, and the Davis Cup competition, which only adds to the tour level events.<sup>125</sup> Under the ATP rules, a player's world ranking is determined by their performance in these events over the past 52-week period; thus, players are truly forced to compete in a variety of events if they want to retain a high ATP ranking.<sup>126</sup>

In addition to the plethora of tour level events, there is also the fact that players are required under ATP rules to participate in the 4 Grand Slams, 9 ATP Masters 1000 events, and, for those who qualify, the year-ending ATP Finals.<sup>127</sup> Failure to meet these requirements can lead to fines and the loss of valuable ranking points.<sup>128</sup>

Ultimately, the men's professional tennis schedule is absolutely grueling for players, especially the most successful, who are constantly playing into the later rounds of almost every tournament they attend.<sup>129</sup> The season lasts for 11 months every year; from January until November professional tennis players

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<sup>122</sup> See *infra* section VII(b).

<sup>123</sup> See Krystle Lee, *Does the ATP Calendar Need to Support the Players More?*, TENNIS BRAIN, Oct. 3, 2009, available at <http://www.tennis-brain.com/2009/10/does-atp-calendar-need-to-support.html> (noting that "ATP players have long spoken about the need for a longer off season [and] it's time to evaluate the ATP calendar again").

<sup>124</sup> *The Fall Frenzy, An in Depth Look at the Schedule Issues and ATP World Tour Finals*, TENNIS ON TENNIS, Sept. 28, 2011, available at <http://tennisontennis.com/2011/09/28/tennis-on-tennis-the-fall-frenzy-an-in-depth-look-at-the-schedule-issues-and-atp-world-tour-finals/>.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Salaman, *supra* note 1.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* (observing that while lower ranked players might not mind the crowded schedule because it gives them more chances for points and prize money, they often lose in the opening rounds and thus usually play far less actual tennis than the top players despite playing in a greater number of events).

are on the courts, competing almost weekly.<sup>130</sup> While some feel that the schedule complaints and concern over the amount of mandatory events are severely overstated,<sup>131</sup> very few other professions require such intensive physical exertions on a continual yearly basis.

Indeed, recent events evidence the physical toll that the cramped schedule is having on the top players and, concurrently, on the viability of the game itself.<sup>132</sup> At the 2009 U.S. Open—one of the later events of the year and the final Grand Slam—there were an “alarmingly high” number of players suffering from knee injuries.<sup>133</sup> Just two years later, again at the U.S. Open, by the fourth day of tournament play there were 14 retirements from the men’s draw, 11 of those as a direct result of “musco-skeletal problems.”<sup>134</sup> Additional evidence of the effect of the long schedule on player health came just following the 2011 U.S. Open; only one week after a four hour marathon final between Spain’s Rafael Nadal and Serbia’s Novak Djokovic, both men were back on the court, playing for their respective nations in the semi-finals of the Davis Cup competition.<sup>135</sup> The result: Djokovic was forced to retire from his opening match with a back injury and Serbia would lose the tie to rival Argentina, by just a single point.<sup>136</sup> Although Nadal was more fortunate—winning both matches he played—he would

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<sup>130</sup> *Id.*

<sup>131</sup> See *My Take on the ATP Scheduling Issues*, ANY GIVEN SURFACE, Oct. 27, 2009, available at <http://anygivensurface.wordpress.com/2009/10/27/my-take-on-the-atp-scheduling-issues/>.

<sup>132</sup> See e.g., Michael Pettifer, *Tennis ATP World Tour Schedule Must Change for the Good of the Sport*, BLEACHER REPORT: MEN’S TENNIS, Sept. 18, 2011, available at <http://bleacherreport.com/articles/855032-atp-tour-schedule-must-change-for-the-good-of-the-sport>; *ATP Players Strike Needs to Happen*, ATP TENNIS WORLD, available at <http://www.atptennisworld.co.uk/tennis-blog/atp-players-strike-needs-to-happen/> (arguing that a strike might be the only solution to ensure the safety and fitness of ATP players).

<sup>133</sup> See Lee, *supra* note 123.

<sup>134</sup> See Pettifer, *supra* note 132; but see *The Fall Frenzy*, *supra* note 124 (noting that, throughout the course of the 2011 season, retirements were actually down overall; however, the statistics cited also evidence the fact that over the past several years there have been a very high number of annual injury retirements, regardless of the 2011 season-specific numbers).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* The Davis Cup is comprised of a number of “ties” scattered throughout the year; each tie is comprised of 4 singles matches and a doubles match each worth one point. The winner of the tie is the first to three points.

comment afterwards that the ATP schedule remains dangerously overcrowded and in severe need of change.<sup>137</sup>

In the end, the fact remains that the ATP schedule is long, crowded, and with little off-season for recovery, it is clearly affecting the health of many of the game's top players.<sup>138</sup> Additional events, such as the Davis Cup competition and the Olympics, also increase the schedule of many men's professional tennis players.<sup>139</sup> As top players continue to be committed to massive amounts of competitive tennis each year,<sup>140</sup> concerns over injuries and the overall health of those who are the face of professional tennis internationally will continue to be an area of intense debate and concern.

Recently, the ATP's new administration gave clear indications that it both understands the players concerns over scheduling and intends to address those concerns directly in the near future.<sup>141</sup> However, despite these promises, many of the sport's top players continue to question both the current schedule and the sincerity of those promises.<sup>142</sup> Thus, at the end of the day

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<sup>137</sup> *Id.* (Nadal commented "they [the ATP] don't want to change anything...you can't always just think about the personal benefit...it seems as though those in charge aren't aware"). Nadal's Davis Cup teammate and then world number 5 David Ferrer agreed, stating "we're not machines, we're at the limits of our physical ability...no doubt something has to change." *Id.*

<sup>138</sup> The only real off-season for the players is the 8 weeks between the end of Davis Cup in mid-November and the start of the new ATP season on January 1<sup>st</sup>; this off season is even less for those players who are competing in the Davis Cup finals or in the smaller Australian Open warm-up events. *See Salaman, supra* note 1.

<sup>139</sup> Riven, *Rafael Nadal to Lead Tennis Players Strike?*, SPORTIGE, Sept. 16, 2011, available at <http://sportige.com/rafael-nadal-atp-schedule-strike/>.

<sup>140</sup> *The Fall Frenzy, supra* note 124. Since 2005, Andy Murray has averaged just fewer than 59 matches each year. *Id.* However, Rafael Nadal, Novak Djokovic, and Roger Federer have all averaged over 70, with Nadal and Federer pushing the 80 mark almost every single season. *Id.*

<sup>141</sup> *ATP Plans to Address Player Complaints, supra* note 79; *see also infra* Section VII(a), Recent Developments, Scheduling Alterations (discussing the 2014 ATP schedule changes that were made in an attempt to address some of these player concerns).

<sup>142</sup> *See Tennis Ace Nadal Slams ATP for Tough Hard-court Tournament Schedule*, AFP, July 31, 2008, available at <http://afp.google.com/article/ALeqM5g2ZVpFI3zoZuogDhxGZ6OAb0VP0g>. World number 1 Rafael Nadal, commenting on the increase of hard-court events on the ATP schedule, has said "that's a big mistake, in my opinion, for the tour...if you saw the players, the number of injuries the players have in the last months...you have to consider if we [the ATP Tour] is going in the good way, in a good direction or not." *Id.* Nadal further felt that the ATP leadership was actually in favor of

the problems associated with the current schedule are an issue that remain hotly debated, and which all levels of the game's governance will eventually be forced to face.<sup>143</sup>

### B. Match-Fixing

Another major problem in men's professional tennis is match fixing.<sup>144</sup> Match fixing—where a player intentionally loses a match in order to satisfy gambling bets previously made and determined by the outcome of the match—has been a problem in many sports.<sup>145</sup> In professional tennis, the possibility that players might be intentionally involved in fixing the results of their matches in advance first appeared in the early 2000s.<sup>146</sup>

However, match fixing became a major focus in the men's game in 2007 when Nikolay Davydenko, then ranked number four

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such events: “the top management of ATP are always thinking about playing more and more tournaments on this kind of surface...I do not think it's a good way.” *Id.*

<sup>143</sup> The fact is that the scheduling problems involve both the ATP and ITF because they jointly run and schedule the events in men's professional tennis; as such, they will need to work together to formulate a solution to this area of player concern. *See* Pettifer, *supra* note 132 (“The ITF are responsible for the scheduling of the Davis Cup Tournament, with the ATP responsible for the rest of the season's calendar...it would seem that the two organizations will need to come together sooner or later to discuss the problem”).

<sup>144</sup> *See* Miguel A. Ramos, *Game, Set, Match-Fixing: Will the International Anti-Doping Initiatives Pave the Way for Similar Reform for Corrupt Betting in Tennis*, 32 HOUS. J. INT'L L. 201, 202-03 (2009). Betting in tennis is not just a major concern in the modern game, it is also big business: “tennis betting currently ranks third in betting volume on one of the world's largest betting exchanges, trailing behind only horse racing and soccer.” *Id.* at 202-03.

<sup>145</sup> Richard H. McLaren, *Is Sports Losing Its Integrity?*, 21 MARQ. SPORTS L. REV. 551, 563 (2011).

<sup>146</sup> *See* Richard H. McLaren, *Corruption: Its Impact on Fair Play*, 19 MARQ. SPORTS L. REV. 15, 17-18 (2008). In 2003, bookmakers suspended betting after there was a large amount of money placed on Spanish player Fernando Vicente, who had not won a match in several months and was playing the much higher ranked Russian Yevgeny Kafelnikov. *Id.* After Vincenete won in a massive upset, the ATP determined there was no evidence of wrongdoing by either player and no investigation ensued. *Id.* Then, in 2006, a first round match at Wimbledon, the British Grand Slam and considered by many the most prestigious tournament in all of professional tennis, also raised eyebrows. *Id.* The match, between Carlos Berlocq and British wildcard Richard Bloomfield, was another big upset: Bloomfield, despite being ranked 170 spots below Berlocq, won the match easily in straight sets. *Id.* Because so many bets had been placed on Bloomfield, Internet betting site Betfair informed the ITF of the irregular betting. *Id.* Although the ITF investigated the matter, they found no wrongdoing and no sanctions were imposed. *Id.*

in the world, lost a match to 87<sup>th</sup> ranked Martin Vassallo Arguello at an ATP Tour event in Poland.<sup>147</sup> After winning the first set easily, Davydenko, a massive favorite, lost the second set and retired in the final set with a foot injury.<sup>148</sup> The odd circumstance causing concern— and leading some to refer to the match as the “most notorious match in tennis history”—was that after Davydenko won the opening set 6-2, there was a massive influx of bets *against* Davydenko.<sup>149</sup> Pursuant to an agreement regarding odd betting patterns, Betfair.com, one of the largest gambling sites in the world, reported to the ATP that several Russian accounts stood to win over \$1.5 million if Davydenko lost the match.<sup>150</sup> Ultimately, Betfair would void all bets that had been made on the suspicious match and confirmed that over \$7 million in bets had been placed against Davydenko.<sup>151</sup>

The fallout from the Davydenko match was immediate and intense; the resulting ATP investigation into both players lasted for over a year, involved court subpoenas against the families and friends of the players, and would bring match fixing to the forefront of the professional tennis world.<sup>152</sup> In the end, the ATP would clear both players of any wrongdoing, but the incident led a number of other professional tennis players to come forward with stories of their encounters with match fixing offers.<sup>153</sup>

Another match fixing issue faced by the ATP involves players betting on sports, including tennis, via online sites.<sup>154</sup> In 2007, Alessio Di Mauro was the first professional tennis player sanctioned for betting after he was found to have made online bets

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<sup>147</sup> Ramos, *supra* note 144, at 204-05; *see also* John Barr & William Weinbaum, *Evidence Shows Something Terribly Corrupt in Infamous Match*, ESPN, Feb. 7, 2008, available at <http://sports.espn.go.com/sports/tennis/news/story?id=3235411>.

<sup>148</sup> *Id.* Davydenko would lose the match by the official score-line of 6-2, 3-6, 1-2 (retired). *See* ATP Tennis (Players), *supra* note 97.

<sup>149</sup> *Id.*; *see also* Barr & Weinbaum, *supra* note 147.

<sup>150</sup> Ramos, *supra* note 144, at 204-05.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* In 2005, Belgian Gilles Elseneer reported having been offered \$100,000 to throw a match at Wimbledon; likewise, two Czech players reported having received anonymous calls offering to pay them to fix their matches at Russian tournaments. *Id.* at 206-07.

<sup>154</sup> *See* McLaren, *supra* note 145, at 564-66.

involving nearly 350 ATP matches.<sup>155</sup> In 2010, Austrian tennis professional Daniel Koellerer was fined 15,000 euros and banned for 3 months by the ATP for listing his matches' betting odds on his personal website.<sup>156</sup> In the end, the ATP has taken the stance that players cannot bet on tennis, period. Consequently, there have been numerous instances of ATP actions against players for betting, whether or not it involved match fixing or even their own matches.<sup>157</sup>

### C. Doping

Finally, the third major area of concern in modern professional tennis is the influx of accusations and evidence of doping.<sup>158</sup> While doping and performance enhancing drugs ("PEDS") have made major headlines in other sports, notably major league baseball and international cycling, it has also become an increasingly problematic issue in tennis.<sup>159</sup>

Since the early 2000s, the ATP and ITF have levied numerous suspensions for doping offenses. In the 2005-06 season, the ATP suspended several players ranked fairly high in the world rankings: Guillermo Canas (then ranked 8 in the world) was suspended for 2 years,<sup>160</sup> Stephan Koubek (then ranked 89) received a 3 month suspension and forfeited his tournament winnings for accidentally ingesting a banned substance,<sup>161</sup> and

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* Koellerer's manager received an even harsher penalty; he was suspended by the ATP and lost all ATP credentials for an entire year. *Id.* at 565.

<sup>157</sup> *Id.* at fn. 58 (in 2007, Potito Starace was suspended for 6 weeks and fined \$30,000 for betting on matches he wasn't involved in and Daniele Bracciali was suspended 3 months and fined \$20,000 for betting on other matches; in 2008, Mathieu Montcourt was suspended 2 months and fined \$12,000 for betting on tennis and Italian professional Federico Luzzi was found to have bet on over 800 matches, including his own and was accordingly fined \$50,000 and suspended 200 days).

<sup>158</sup> See McLaren, *supra* note 145, at 554-58.

<sup>159</sup> *Id.* at 551-52.

<sup>160</sup> Bonnie DeSimone, *Canas Keeps the Ball in Court in Doping Case*, ESPN, April 5, 2007, available at <http://sports.espn.go.com/sports/tennis/news/story?id=2819004> (Canas' suspension was reduced to 15 months and he would return to great success, rising as high as number 12 in the world in 2007 and remaining consistently in the top 100 until his retirement in 2010).

<sup>161</sup> See Ryan M. Rodenberg & Katie A. Featherston, *ADR and Drug Testing in Professional Tennis: An Effective Doubles Team?*, 16 MARQ. SPORTS L. REV. 31, 38-40 (2005).

Mariano Hood (then ranked 33 in doubles) was also suspended and lost his event winnings after testing positive for a banned substance he claimed to be using to treat hair loss.<sup>162</sup>

Despite these bans, the ATP and ITF also made excruciatingly clear that repeat offenses would be given even harsher treatment. In 2003, relatively unknown Argentine player Mariano Puerta was suspended for doping; two years later, Puerta would make a surprise run to the French Open final, losing in four sets to future world number one Rafael Nadal.<sup>163</sup> However, Puerta's promising career would end shortly thereafter; only a few months after his French Open showing, Puerta, then ranked number 12 in the world, would test positive for a banned substance again, and this time the ATP suspended him for 8 years.<sup>164</sup>

More recently, the ITF suspended top French star Richard Gasquet from competing in the 2009 French Open after he tested positive for trace amounts of cocaine.<sup>165</sup> Following a hearing on the matter, Gasquet would eventually be cleared of any wrongdoing and the tribunal would conclude that the positive test results were caused by kissing a woman at a nightclub that had likely used the drug herself.<sup>166</sup> Then, in 2010, Americans Wayne Odesnik and Robert Kendrick were suspended for one and two years, respectively, after each tested positive for banned substances.<sup>167</sup>

Thus, while doping in men's professional tennis has become increasingly problematic, the ATP and ITF have responded

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<sup>162</sup> *ITF Suspends Argentina's Mariano Hood for doping*, SINAENGLISH, Feb. 8, 2006, available at <http://english.sina.com/sports/1/2006/0208/64721.html>.

<sup>163</sup> Greg Garber, *Gamesmanship is Name of the Game in Tennis*, ESPN, Aug. 9, 2007, available at <http://sports.espn.go.com/espn/cheat/news/story?id=2955743>.

<sup>164</sup> *Puerta Is Facing the Longest Ban in Tennis History*, THE ASSOCIATED PRESS, Dec. 22, 2005, available at <http://www.nytimes.com/2005/12/22/sports/tennis/22tennis.html>.

<sup>165</sup> *Banned Gasquet out of French Open*, Associated Press, ESPN, May 11, 2009, available at <http://sports.espn.go.com/sports/tennis/news/story?id=4157477>.

<sup>166</sup> *Gasquet Cleared to Resume Playing*, Associated Press, ESPN, July 15, 2009, available at <http://sports.espn.go.com/sports/tennis/news/story?id=4329491>.

<sup>167</sup> *Players Rally Around Banned American Kendrick*, TENNIS.COM, Aug. 1, 2011, available at <http://www.tennis.com/articles/templates/ticker.aspx?articleid=13549&zoneid=6>; Tom Gainey, *Wayne Odesnik Suspended Two Years From Tennis for Doping*, TENNISX, May 19, 2010, available at <http://www.tennis-x.com/xblog/2010-05-19/4203.php>.

accordingly and levied penalties against those violating their established anti-doping policies. However, many players continue to feel that the doping problem in their sport needs to be addressed differently.<sup>168</sup> Interestingly, the criticisms of the current doping regulations have come from both sides: while some players have advocated more stringent restrictions and harsher penalties, others contend that the existing rules are overly oppressive and unrealistic.<sup>169</sup>

#### IV. PRESENT SOLUTIONS

##### A. ATP Players' Council

The ATP Players' Council is a 12-person committee that serves to represent the ATP players in their relations with the ATP and ITF; the council is comprised of four representatives of players ranked 1-50 in singles, two representatives of players ranked 51-100 in singles, two representatives of players ranked 1-100 in doubles, two at large representatives, and one representative apiece for ATP coaches and alumni.<sup>170</sup>

Generally, the council serves to consider player grievances on tour and has recently enjoyed the participation of many of the game's top players.<sup>171</sup> Since 2008, Roger Federer and Rafael Nadal had served as the President and Vice-President of the council and there seemed to be great anticipation that the players, supported by these top superstars, were more unified than ever before in seeking reform and change regarding major issues in the sport.<sup>172</sup>

However, the ATP Players' Council seems more noble in conception than effective in realistic practice; not only does the council, as an advisory body, lack any actual powers, but the recent dissention amongst ATP players has been reflected in the

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<sup>168</sup> See *infra* note 223.

<sup>169</sup> See *infra* notes 223, 224 and accompanying text.

<sup>170</sup> ATP Tennis (*Structure*), ATP World Tour Website, available at <http://www.atpworldtour.com/Corporate/Structure.aspx>.

<sup>171</sup> ATP Staff, *Federer, Nadal Re-elected to ATP Player Council*, ATP TENNIS, June 20, 2010, available at <http://www.atpworldtour.com/News/Tennis/2010/06/Other/ATP-Player-Council.aspx>.

<sup>172</sup> *Id.*; see also *infra* notes 287-89 and accompanying text (discussing the invaluable role that unification had in allowing players to negotiate the recent and major prize money increases at the Grand Slam events).

composition of the council itself.<sup>173</sup> Notably, the council has been split at the very top of its hierarchical representation over the past few years.<sup>174</sup> Further complicating the struggles within the Players' Council is the recent resignation of now world number one Rafael Nadal from his position as the council's vice-president in 2012.<sup>175</sup> Although Nadal officially commented that his decision was due to fatigue and lack of time to fulfill his duties, it is widely believed that the real reason he left was frustration and tension over many of the current issues plaguing ATP players.<sup>176</sup>

### *B. Court of Arbitration for Sport (CAS)*

CAS was originally created in the early 1980s after the International Olympic Committee, meeting in Rome, decided to develop a sports-specific arbitral venue for dealing with international sporting disputes.<sup>177</sup> In 1981, IOC member Keba Mbaye, then a judge at the International Court of Justice, was tasked with preparing the foundation for what would soon thereafter emerge as the Court of Arbitration for Sport.<sup>178</sup> In 1983,

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<sup>173</sup> Associated Press, *Rafael Nadal Resigns from Council*, ESPN, Mar. 27, 2012, available at [http://espn.go.com/tennis/story/\\_/id/7743721/rafael-nadal-resigns-atp-player-council-vice-president](http://espn.go.com/tennis/story/_/id/7743721/rafael-nadal-resigns-atp-player-council-vice-president); Simon Briggs, *Rafael Nadal resigns as ATP players' body vice-president after lack of movement on changes to ranking system*, March 26, 2012, available at <http://www.telegraph.co.uk/sport/tennis/9168264/Rafael-Nadal-resigns-as-ATP-players-body-vice-president-after-lack-of-movement-on-changes-to-ranking-system.html>.

<sup>174</sup> See *Nadal quits post from ATP player council*, Gulf News Report, March 28, 2012, available at <http://gulfnews.com/sport/tennis/nadal-quits-post-from-atp-player-council-1.1000689>. For the past several years, Rafael Nadal has pushed for a 2-year ranking system, arguing that such a mechanism could help lengthen players' careers and health by allowing them to withdraw from tournaments when injured and not have to worry about defending their ranking points every year. *Id.* However, council President Roger Federer was openly opposed to such a system, feeling it would make things boring on tour and harder for players to break into the very top ranking spots. *Id.* Further, Nadal and Federer notoriously disagreed over the appointment of ATP chief executive Brad Drewett; while Federer supported Drewett as a business savvy candidate, Nadal had pushed for former Wimbledon finalist Richard Krajicek, believing that a former player would prove more sympathetic to player concerns. *Id.*; see also Briggs, *supra* note 173.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> See CAS website, History of the CAS Section, [hereafter CAS (History)] available at <http://www.tas-cas.org/history>.

<sup>178</sup> *Id.*

the IOC officially ratified the CAS statutes and the following year CAS began operating as a voluntary alternative dispute resolution option for international sporting organizations around the world.<sup>179</sup>

In 1992, professional horse rider Elmar Gundel was fined and suspended by the International Equestrian Federation (FEI) for a doping offense.<sup>180</sup> Under FEI procedures, which had incorporated CAS as their appellate jurisdiction, Gundel challenged the fine and suspension.<sup>181</sup> CAS reduced the suspension length but Gundel, displeased with the ruling, filed a public appeal with the Swiss Federal Tribunal and argued that CAS lacked legitimate independence and should not be considered a true arbitration court.<sup>182</sup> The Swiss court determined that CAS was not a branch of the FEI, was not funded by the FEI, and thus “retained sufficient personal autonomy with regard to it.”<sup>183</sup>

However, the ruling of the Swiss Tribunal in the Gundel appeal would give immediate rise to concerns of the very close relationship between CAS and the IOC—who were still responsible for funding CAS, had control over the statutes establishing its jurisdictional reach, and also had significant influence over the appointment of CAS arbitrators.<sup>184</sup> The Swiss court had clearly implied that “such links would have been sufficient to seriously call into question the independence of the CAS in the event of the IOC’s being a party to proceedings before it...[t]he [Swiss court’s] message was thus perfectly clear: the CAS had to be made more independent of the IOC both organizationally and financially.”<sup>185</sup> Consequently, the structure of CAS changed significantly in the following years: an independent council (ICAS) was created to run and finance CAS, appeal and ordinary arbitration divisions were established, and these reforms were codified into a new “Code of sports-related arbitration.”<sup>186</sup> In 2003, after CAS upheld an IOC disqualification of two Russian

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *See* CAS (History), *supra* note 177.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

cross-country skiers, the Swiss Federal Tribunal, in a very detailed opinion, stated that the newly reformed CAS was clearly independent of the IOC and remained fully capable of passing enforceable arbitration decisions in sports-related cases.<sup>187</sup>

The ATP and the ITF expressly provide for issues related to their governance of professional tennis—including disputes with players regarding doping and match fixing violations—to be appealed to CAS.<sup>188</sup> Accordingly, most major issues related to those two primary areas are taken by players to CAS to be heard and considered; the ATP and ITF also argue their side of the case, but remain bound by any decision CAS renders.<sup>189</sup> Thus, there have been numerous instances of players taking their concerns to CAS and seeking reversal of ATP and ITF decisions regarding violations of institutional rules and resulting lack of eligibility to play in ITF and ATP sponsored events.

Although CAS has heard a number of tennis-related disputes and appeals, they have not hesitated to overturn what they deem unfair or excessive ATP and ITF penalties and have even, in some instances, completely vindicated players. This was the case in the recent 2009 doping scandal involving Richard Gasquet, one of France's top players.<sup>190</sup> After testing positive for cocaine at the March ATP Masters tournament in Miami, Gasquet was immediately suspended by both the ATP and ITF, and an anti-doping tribunal was quickly assembled to hear his case and decide the fate of his career.<sup>191</sup> This tribunal determined that the evidence was not sufficient to sustain the 2-year ban sought by the ITF and ATP and consequently reduced the punishment to a retroactive 2<sup>1/2</sup> month suspension.<sup>192</sup>

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<sup>187</sup> *Id.*

<sup>188</sup> See ATP Tour, Inc., *The 2014 ATP Official Rulebook*, 282-83 (Exhibit R).

<sup>189</sup> *Id.* (“The decision of CAS in that arbitration shall be final, non-reviewable, and enforceable”)

<sup>190</sup> See Telegraph and Sports Agency, *Richard Gasquet Suspended After Positive Drug Test*, THE TELEGRAPH Nov. 5, 2009, available at <http://www.telegraph.co.uk/sport/tennis/5308029/Richard-Gasquet-suspended-after-positive-drugs-test.html>.

<sup>191</sup> *Id.*

<sup>192</sup> The Associated Press, *Gasquet Cleared to Resume Playing*, ESPN.COM July 15, 2009, available at <http://sports.espn.go.com/sports/tennis/news/story?id=4329491>.

The ITF and ATP appealed the tribunal's decision to CAS and sought reinstatement of their proposed 2-year suspension.<sup>193</sup> After agreeing to hear the appeal, CAS determined that there was insufficient evidence to suspend Gasquet for a 2-year period; as such, they issued a final determination exonerating the French player of intentional drug use.<sup>194</sup> While the CAS panel did not officially annul Gasquet's suspension, they did further decree that the ITF and ATP could not consider the 2<sup>1/2</sup> month suspension to constitute Gasquet's first doping offense.<sup>195</sup> This aspect of the CAS ruling was particularly important because a lifetime ban is currently the automatic punishment for a second doping violation.<sup>196</sup>

However, CAS has also remained willing to uphold even the most severe of ATP and ITF decisions; in March 2012, CAS upheld the decision to permanently ban Austrian player Daniel Koellerer.<sup>197</sup> After having attempted match fixing during the 2009 and 2010 seasons—in which Koellerer apparently approached at least 5 other players in an attempt to fix matches—the ATP and ITF jointly created the Tennis Integrity Unit to investigate the allegations.<sup>198</sup> Having found the evidence credible and determining that Koellerer was indeed guilty of attempted match fixing during these years, the ATP and ITF imposed a lifetime ban.<sup>199</sup> Koellerer immediately appealed the permanent suspension—the most severe ever imposed by tennis' governing organizations against a player—to CAS.<sup>200</sup> However, the tribunal determined that “the tennis governing bodies had met their

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<sup>193</sup> *Id.*

<sup>194</sup> See Sachin Nakrani, *Richard Gasquet Escapes Ban After CAS Clears Him Over Positive Cocaine Test*, THE GUARDIAN Dec. 17, 2009, available at <http://www.guardian.co.uk/sport/2009/dec/17/richard-gasquet-cocaine-cas-ban>.

<sup>195</sup> The CAS panel statement noted “The CAS did not formally annul the decision of the anti-doping tribunal considering that Richard Gasquet did not file an appeal himself against the two-and-a-half-month ban...however, the CAS has specified in its award that, in case of any subsequent doping infraction, the present case should not be counted as a first doping offense.” *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See Associated Press, *Daniel Koellerer Loses Appeal of Ban*, ESPN.COM, Mar. 23, 2012, available at [http://espn.go.com/tennis/story/\\_id/7727747/daniel-koellerer-austria-loses-appeal-lifetime-ban-match-fixing](http://espn.go.com/tennis/story/_id/7727747/daniel-koellerer-austria-loses-appeal-lifetime-ban-match-fixing).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

burden of proof” and “the sanction was sufficiently high enough to reflect the seriousness of the corruption offences.”<sup>201</sup> Accordingly, the final decision of CAS bound both sides and Koellerer remains permanently banned from participation in all ATP and ITF events.

### C. ATP & ITF Anti-Doping Program

In 1993, the ATP and ITF jointly created what they described as a “comprehensive and internationally recognized drug testing program.”<sup>202</sup> This detailed system of rules and procedures to address anti-doping in professional tennis accords with the World Anti-Doping Association (“WADA”) guidelines and uniformly tests all players for substances banned under the established WADA Code.<sup>203</sup> Substances completely banned under the WADA Code—and hence concurrently banned by the ATP/ITF anti-doping program—include anabolic agents, hormones and all related substances, beta-2 agonists, agents having anti-estrogenic results, and diuretics or other masking chemicals.<sup>204</sup> Other substances are banned only during actual competition; these include stimulants, narcotics, cannabinoids, and glucocorticosteroids.<sup>205</sup> Further, the program prohibits all use of artificial oxygen enhancements, manipulation of any urine test samples, and gene-based doping.<sup>206</sup> The program does, however, permit players to seek permission to use banned substances for particular, documented medical purposes.<sup>207</sup>

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<sup>201</sup> *Id.* The CAS tribunal did, however, reverse the \$100,000 fine that the ATP and ITF had also levied on Koellerer, finding that the fine was not appropriate since Koellerer failed to actually realize any financial gains from his attempted match fixing. *Id.*

<sup>202</sup> Tennis Anti-Doping Program 2005, Information Sheet (2005), available at <http://www.atptennis.atponline.net/en/common/TrackIt.asp?file=/en/antidoping/English.pdf>.

<sup>203</sup> See Rodenberg & Featherston, *supra* note 161, at 31-33; see also Darryl C. Wilson, *Let Them Do Drugs—A Commentary on Random Efforts at Shot Blocking in the Sports Drug Game*, 8 FLA. COASTAL L. REV. 53, 78 (2006).

<sup>204</sup> See VII The Code, Section 7.06 Tennis Anti-Doping Program 2005, located in the ATP Official Rulebook, 167-70 (2005), available at <http://www.atptennis.com/en/common/TrackIt.asp?file=/en/antidoping/rules.pdf>.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at section 7.06(E).

The anti-doping program, while extensive, is fully disclosed to all players, who must sign a consent form agreeing to be bound by the anti-doping code and further agreeing to the established procedures for appeals and decisions on all doping issues.<sup>208</sup> Under the anti-doping program, players are presumed innocent and are generally permitted to continue playing on tour until a decision on their case is made.<sup>209</sup>

The appeals process for any doping offense is also clearly defined by the ATP and ITF; once an offense occurs and is reported, the appropriate governing body appoints an “Anti-Doping Tribunal” to consider the evidence in the case, a notice is sent to the player under investigation, and unless the player seeks to dispute the offense, they are punished according to the recommendations of the Tribunal.<sup>210</sup> If, at any time, a player elects to confess to the offense, the ATP or ITF may make suggestions to the Tribunal regarding an appropriate sanction taking into account the player’s honesty.<sup>211</sup> Players electing to challenge the charge to the Tribunal are permitted to know the identities of the Tribunal members and to express any concerns over particular selections.<sup>212</sup> At the actual hearing, which is conducted in English and only transcribed at the request of the ATP or ITF, procedures are established by the Tribunal chairman—although any such procedure must allow for both parties to present their arguments, including the calling and questioning of witnesses.<sup>213</sup> Ultimately, the standard of proof is whether the governing tennis body involved in the case (the ATP or ITF) “has established the commission of the alleged Doping Offense to the comfortable satisfaction of the Anti-Doping Tribunal.”<sup>214</sup> If, following the Tribunal’s final determinations, the player remains dissatisfied, he may take a final appeal to CAS within 21 days of the Tribunal’s decision.<sup>215</sup> CAS may decline to hear the appeal or agree conduct a *de novo* review of the case; in

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<sup>208</sup> Rodenberg & Featherston, *supra* note 161, at 33.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 34-35.

<sup>213</sup> *Id.* at 35.

<sup>214</sup> Rodenberg & Featherston, *supra* note 161.

<sup>215</sup> *Id.* at 36.

either situation, the decision by CAS is the final step in the appeals process and their decisions are unreviewable.<sup>216</sup>

This appeals process is efficient and has proven effective. In 2002, Czech player Bohdan Ulihrach tested positive for a banned substance during the ATP Kremlin Cup in Moscow.<sup>217</sup> He appealed the matter before the ATP Anti-Doping Tribunal and argued that he unknowingly took the substance and hence the usual strict liability standard in doping offense cases should not apply; instead, he contended, his lack of intent to cheat should be considered in determining the sanctions.<sup>218</sup> The Tribunal rejected these arguments and suspended Ulihrach from professional tennis competition for 2 years; it additionally decreed that he would forfeit all prize money and ranking points acquired after the offense occurred.<sup>219</sup> Following the Tribunal's determinations and penalties, Ulihrach took his final appeal to CAS.<sup>220</sup> However, before CAS could agree to hear the appeal, the ATP Anti-Doping Tribunal received new evidence that ATP trainers had actually been distributing a tainted product<sup>221</sup> and elected to reopen Ulihrach's case, finally exonerating him and dropping all penalties.<sup>222</sup>

Despite this success story, many ATP players continue to complain about the Anti-Doping program; some players feel it is too lenient<sup>223</sup> while others argue it is an undue burden and

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 37.

<sup>219</sup> *Id.*

<sup>220</sup> Rodenberg & Featherston, *supra* note 161.

<sup>221</sup> The electrolyte substance being used by ATP trainers was actually 700% stronger than the pharmaceutical labels listed and would likely result in positive drug tests like the one Ulihrach had been suspended for. *Id.* at 38.

<sup>222</sup> *Id.*

<sup>223</sup> See e.g., *Roddick Slams Odesnik as Ban Looms*, TENNISHEAD, available at [http://www.tennishead.net/On\\_Tour/Features/450987/roddick\\_slams\\_odesnik\\_as\\_ban\\_looms.html](http://www.tennishead.net/On_Tour/Features/450987/roddick_slams_odesnik_as_ban_looms.html). Former American superstar Andy Roddick was infuriated when fellow American Wayne Odesnik was caught transporting human growth hormone into a small Australian tournament; he commented "that's just plain cheating and they should throw him out of tennis...we don't need stories like that, I have zero sympathy." *Id.* Roddick continued, saying "I take a lot of pride in what we have to do on a daily basis and how responsible we have to be for one jackass to ruin it for the rest of us." *Id.* American James Blake was equally unsympathetic towards the ban Odesnik faced: "People look for a way to get ahead, and that's unfortunate. It's something that's frustrating. You want to feel like you're playing on a fair playing field. I'm glad they

improper intrusion into their personal lives.<sup>224</sup> In the end, regardless of these criticisms, the fact remains that the ATP and ITF anti-doping code indicate the commitment of men's tennis to preventing doping in the sport. Also, perhaps more importantly, the anti-doping program demonstrates the ability of the organizations governing professional tennis—namely, the ATP and ITF—to work cohesively together for the betterment of the sport as a whole. Such unified efforts will be absolutely essential to finding effective solutions to the major problems threatening the game today.

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caught him.” *Id.* In 2007, Ivan Ljubicic publicly stated that he didn't believe any players returning from doping bans should be given wild card entries into ATP events; Ljubicic stated in a Miami press conference that giving wild cards to formerly suspended players is “like a guy coming out of prison, and you're just giving him a gun straight away....” See Paul Fein, *Kings of Clay Interviews*, TENNIS DISCUSSIONS ARCHIVE, April 28, 2007, available at <http://kingsofclay.proboards.com/index.cgi?board=discussions&action=print&thread=1258>.

<sup>224</sup> Many players complain that the drug testing by the ATP and ITF is too stringent and intrusive. See e.g., AP, *Murray Upset with Late-Night Drug Testing*, TENNIS.COM NEWS, Jan. 27, 2012, available at <http://tennis.com/articles/templates/news.aspx?articleid=16112&zoneid=4> (the then world number four complained when he was drug tested after his long semi-final loss to Novak Djokovic and commented that “I just think it's a little bit in your face, the whole thing”). Accusations of doping in tennis recently reached the point of legal involvement when a French comedy TV station aired a skit depicting Rafael Nadal signing papers with a syringe and filling his gas tank with his own urine—clearly insinuating that the muscular Spanish player takes performance enhancing drugs; Nadal voiced his disappointment at the classless portrayal on Twitter. See Romana Cvitkovic, *ATP Tidbits” Nadal's Anti-Doping, Djokovic Waxing and Winning, and Davis Cup Outtakes*, TENNIS GRANDSTAND, Feb. 11, 2012, available at [http://network.yardbarker.com/tennis/article\\_external/atp\\_tidbits\\_nadals\\_anti\\_doping\\_djokovic\\_waxing\\_and\\_winning\\_and\\_davis\\_cup\\_outtakes/9878272](http://network.yardbarker.com/tennis/article_external/atp_tidbits_nadals_anti_doping_djokovic_waxing_and_winning_and_davis_cup_outtakes/9878272). Nadal's frustrations over the French TV show came shortly after former French player Yannick Noah commented that French athletes could no longer compete with Spanish players because of the Spaniards' “magic potions” and even suggested that the French Tennis Federation relax their anti-doping rules to allow French players to better compete with their alleged artificially assisted Spanish rivals. See Associated Press, *Rafael Nadal Upset at Yannick Noah*, ESPN, Nov. 20, 2011, available at [http://espn.go.com/tennis/story/\\_/id/7263074/rafael-nadal-angered-yannick-noah-comments-doping](http://espn.go.com/tennis/story/_/id/7263074/rafael-nadal-angered-yannick-noah-comments-doping); but see Sean Calvert, *Does Tennis Have A Problem With Doping?*, SPORTS JOURNALIST, Feb. 16, 2012, available at <http://www.thesportsjournalist.co.uk/2012/02/16/does-tennis-have-a-problem-with-doping/> (arguing that the ATP and ITF anti-drug program is actually severely under-funded and does not do enough to control the ever-present threat of doping throughout the sport).

## V. WHY MED-ARB ADR IS THE SOLUTION

A. “*Med-Arb*”

Mediation-Arbitration, or Med-Arb as it is more commonly known, is a hybrid alternative dispute resolution (ADR) method that combines elements of mediation and arbitration.<sup>225</sup> Essentially, Med-Arb is a two-step process where “a neutral and impartial third party facilitates communication between negotiating parties and, failing settlement, receives evidence and testimony provided by the parties and issues a binding arbitral decision.”<sup>226</sup> Thus, parties to this dispute resolution method agree to first mediate their concerns with the other side; if this mediation proves unsuccessful, arbitration, concluding with a final and binding award, follows.<sup>227</sup> Generally, the same third party neutral serves both as the initial mediator and then as the arbitrator should the mediation prove unsuccessful and the arbitration proceedings become necessary.<sup>228</sup>

B. *Advantages of Med-Arb*

The Med-Arb method of dispute resolution has a variety of advantages naturally emerging from the mix of mediation and arbitration processes.<sup>229</sup> The combination of mediation and arbitration into a single methodology, with a lone med-arbiter serving to manage both the mediation and arbitration, makes

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<sup>225</sup> See Yolanda Vorys, *The Best of Both Worlds: The Use of Med-Arb for Resolving Will Disputes*, 22 OHIO ST. J. ON DISP. RESOL. 871, 885 (2007).

<sup>226</sup> Richard Fullerton, *Med-Arb and Its Variants: Ethical Issues for Parties and Neutrals*, 65 OCT DISP. RESOL. J. 52, 54 (2010) (citing the definition of Med-Arb provided by the Colorado State Bar Association and noting that although other Med-Arb definitions can be found, “most are similar to [the CO state bar definition]”).

<sup>227</sup> See Thomas V. Hildner & Lisa J. Trembly, *Arbitration: Take Charge by Understanding and Designing the Process*, 272 OCT N.J. LAW 14, 17 (2011).

<sup>228</sup> *Id.* This person is generally known as a “med-arbiter” and the use of the same person as both mediator and arbitrator is considered the “purest” form of Med-Arb. See Sherry Landry, *Med-Arb: Mediation with a Bite and an Effective ADR Model*, 63 DEF. COUNS. J. 263, 264 (1996).

<sup>229</sup> Vorys, *supra* note 225, at 885 (“Med-Arb capitalizes on the advantages of both mediation and arbitration, while eliminating many of their disadvantages”).

Med-Arb a time and cost efficient way to resolve disputes.<sup>230</sup> Since the same person serves first as the mediator and then “changes hats” and also serves as the arbitrator, they save valuable time should mediation fail because they are already fully informed of the parties and the dispute.<sup>231</sup> Also, time and money are saved because there is no need to find and hire two separate people to be mediator and arbitrator.<sup>232</sup>

Another benefit of Med-Arb is that it allows for a streamlined dispute resolution procedure: not only are the parties more likely to mediate in good faith and with greater effort, but if they fail to do so, their insincerity may be a factor that the med-arbiter considers in the subsequent binding arbitration.<sup>233</sup> Further, the knowledge that a binding arbitration follows the initial mediation also gives both parties more incentive to settle at that initial stage and allows the med-arbiter to build a greater understanding of the relationship between the parties—during the mediation phase—before potentially rendering a final award in arbitration.<sup>234</sup> Finally, Med-Arb mediation stage agreements are often treated as more legitimate by national courts, making their enforcement easier and more certain.<sup>235</sup>

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<sup>230</sup> See generally Robert L. Ebe, *A Different Approach to Conducting Med-Arb in Complex Commercial Litigation Matters*, 29 ALTERNATIVES TO HIGH COST LITIG. 65, 70 (2011).

<sup>231</sup> Carlos de Vera, *Arbitrating Harmony: ‘Med-Arb’ and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 149, 156 (2004).

<sup>232</sup> *Id.*

<sup>233</sup> David J. McLean & Sean-Patrick Wilson, *Compelling Mediation in the Context of Med-Arb Agreements*, 240 N.Y. L. J. 28, 30 (2008). While mediation can often be undercut by a party who is not truly dedicated to the resolution of the dispute, “Med-Arb eliminates that possibility [because] a binding arbitration decision will follow if the parties are unable to reach a settlement agreement.” *Id.*

<sup>234</sup> See *id.*

<sup>235</sup> See *id.* at 30, fn. 6 (“A settlement agreement resulting from a “pure” mediation is generally enforceable as a contract but courts are unlikely to give that agreement the same deference as an arbitral award. Mediated settlements in the context of Med-Arb are different, however, since the mediation and arbitration processes are intertwined, and the mediated settlement can be recorded in the arbitral award and become binding and enforceable.”).

*C. Disadvantages of Med-Arb*

Despite these advantages, Med-Arb remains a controversial ADR method.<sup>236</sup> Many critics of Med-Arb argue that it has a “chilling” effect on the parties and they are less forthcoming and honest about their case, their concerns, and the weaknesses of their arguments because they know that the mediator may also serve subsequently as arbitrator.<sup>237</sup> Other skeptics contend that Med-Arb unfairly coerces the parties into settling their disputes at the mediation phase.<sup>238</sup> Consequently, the skeptics continue, the parties do not feel as though they have actually consented to the Med-Arb settlement and are thus less satisfied and committed to honoring and enforcing that settlement.<sup>239</sup> Further, it has been argued, parties may continue to manipulate the resolution process and simply refuse to mediate the dispute in good faith because they are guaranteed that arbitration will result regardless of their commitment to the preliminary mediation stage.<sup>240</sup>

However, the biggest criticism of Med-Arb is that the intermixing of the mediation and arbitration dispute resolution processes causes irreconcilable ethical problems.<sup>241</sup> An inevitable result of one person serving as both mediator and arbitrator is that they become privy to confidential information from both sides.<sup>242</sup> Consequently, the argument goes, a med-arbiter is far more likely to develop a bias or preference towards one of the parties.<sup>243</sup> While mediator bias for one party may not be to great of a problem—since the mediator is merely acting as an intermediary—such partiality could become a major concern if the

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<sup>236</sup> Ebe, *supra* note 230, at 70.

<sup>237</sup> Vera, *supra* note 231, at 157-58.

<sup>238</sup> *Id.* at 159-60; *see also* Gerald F. Phillips, *The Survey Says: Practitioners Cautiously Move Toward Accepting Same-Neutral Med-Arb, but Party Sophistication is Mandatory*, 26 ALTERNATIVES TO HIGH COST LITIG. 101, 102 (2008) (noting that some practitioners currently described same-neutral Med-Arb as “contrary to accepted practice [and a] conflict of interest problem”).

<sup>239</sup> *Id.*

<sup>240</sup> *See* Ebe, *supra* note 230, at 70.

<sup>241</sup> *See id.* at 68-70; Landry, *supra* note 228 at 265-66; Vera, *supra* note 231, at 158-60.

<sup>242</sup> Vera, *supra* note 231, at 158.

<sup>243</sup> *Id.* at 159-60.

med-arbiter is then required to make discretionary choices and rulings as arbitrator.<sup>244</sup>

Even absent clear bias, critics argue, serving as both mediator and arbitrator is impermissible on purely ethical grounds.<sup>245</sup> Ultimately, the purpose of mediation is to help the parties understand what they want from the resolution process and what areas they may remain willing to compromise on; arbitration, conversely, is primarily concerned with using an impartial body to hear each party's arguments, the relevant evidence, and then make a reasoned determination on the basis of those facts and theories.<sup>246</sup>

Accordingly, mediation ethics—established by the Model Standards of Conduct for Mediators—are generally concerned with issues of self-determination, impartiality, and confidentiality.<sup>247</sup> These ethical codes focus on the voluntary nature of the parties' involvement in the mediation, the ability of the mediator to meet separately with each party to promote candid discussion of the disputed issues, and maintaining the confidentiality of information acquired from either party.<sup>248</sup> Arbitrator ethics, on the other hand, are guided by the Code of Ethics for Arbitrators in Commercial Disputes, and focus on avoiding the appearance of impropriety, fairness of the proceedings, independence, and preserving the trust and confidence of the parties.<sup>249</sup>

The divergent nature of these ethical concerns raised by Med-Arb is, for many commentators, simply irreconcilable.<sup>250</sup> First, the parties in Med-Arb are not voluntarily involved in the mediation insofar as they cannot simply refuse to mediate and walk away; the whole point of Med-Arb is that failed mediation requires the

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<sup>244</sup> *Id.* at 159.

<sup>245</sup> See e.g., Richard Fullerton, *Alternative Dispute Resolution: The Ethics of Mediation-Arbitration*, 38 COLORADO LAWYER 52, 55 (2010) (hereinafter, "ADR ETHICS") (observing that "by having a single neutral conduct both the mediation and arbitration, several core principles guiding the conduct of arbitrators and mediators may be compromised").

<sup>246</sup> See Vorys, *supra* note 225, at 880-86.

<sup>247</sup> See ADR ETHICS, *supra* note 245, at 54-55.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> See Phillips, *supra* note 238, at 27.

parties to then submit to binding arbitration.<sup>251</sup> Second, while a mediator needs to freely converse with each party independently, an arbitrator has an ethical duty to remain independent from the parties.<sup>252</sup> Third, there is no real sense of confidentiality between the mediator and parties, while in arbitration strict confidentiality is required to prevent one side from being unfairly prejudiced.<sup>253</sup> Finally, parties may manipulate the Med-Arb process by intentionally misleading or even lying during the mediation stage in order to gain leverage or preference in the subsequent binding arbitration.<sup>254</sup>

#### *D. Med-Arb and Men's Professional Tennis*

Despite the concerns associated with Med-Arb—which many proponents consider overstated or curable<sup>255</sup>—this process continues to gain popularity in the context of resolving international disputes between sophisticated parties.<sup>256</sup> Given the issues currently facing men's professional tennis, Med-Arb remains an advisable dispute resolution method for several reasons.

First, one of the keys to resolving the disputes hampering men's professional tennis is that both the governing bodies (ATP & ITF) and their players need to assume joint responsibility for the problems that have arisen. The Med-Arb process, by first requiring the parties to mediate and then engage in binding arbitration, forces both parties to come to the bargaining table on more equal terms and promotes an environment where both the ATP, ITF and the players will have to candidly consider the strengths, weakness, and implications of their respective positions that have led to the need for dispute resolution between them.

Second, the fact that Med-Arb combines two ADR methods will help to ensure that the best possible agreement between the

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<sup>251</sup> See ADR ETHICS, *supra* note 245, at 56.

<sup>252</sup> *Id.* at 55.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 57.

<sup>255</sup> See *id.* (observing that some commentators argue “concerns about the possible contamination of the neutral by receiving arguments or information in private meetings are overstated...judges regularly rule on the admissibility of evidence and if that evidence is rejected the judge disregards the information that has been tendered”).

<sup>256</sup> See Phillips, *supra* note 238, at 103-04. .

ATP, ITF and players is reached. There are several complex issues involved in the present professional tennis crisis and “Med-Arb is the perfect ADR blend for complex disputes involving multiple issues, because those issues not resolved in mediation can then be resolved through arbitration instead.”<sup>257</sup>

Third, the time and money saved by the Med-Arb process would be invaluable because this is truly a dispute that needs to be quickly and efficiently resolved. The tennis players involved in the dispute currently will not be in the game forever, and hence are naturally more inclined to seek immediate gains. Conversely, the ATP and ITF are more likely to be concerned with the implications of any resolution on the indefinite future of the sport generally. Med-Arb allows these divergent interests to be considered together; while the mediation allows for long-term solutions to be sought, the requirement of subsequent binding arbitration ensures that major issues are guaranteed to be resolved presently.

Fourth, the flexibility of Med-Arb allows for a variety of social, cultural, and legal backgrounds to be accounted for and integrated into the resolution process.<sup>258</sup> In professional tennis, where the players are from across the globe,<sup>259</sup> the governing bodies are responsible for tournaments in dozens of nations, and the leadership of the ATP and ITF themselves come from a variety of backgrounds,<sup>260</sup> the ability to account for these cultural differences could be instrumental in reaching a mutually agreeable resolution.

Finally, Med-Arb should be used to resolve the current disputes between players and the ATP and ITF because it would allow one neutral party to deal with the problems existing

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<sup>257</sup> Gil Fried & Michael Hiller, *ADR In Youth and Intercollegiate Athletics*, 1997 B.Y.U. L. REV. 631, 641 (1997).

<sup>258</sup> See Vera, *supra* note 231, at 154.

<sup>259</sup> The top 25 ranked men’s singles players at the end of the 2011 season represented 13 different nations (Serbia, Spain, Switzerland, Great Britain, France, the Czech Republic, the United States, Argentina, Sweden, Ukraine, Croatia, Germany, and Japan). ATP Tennis, *Rankings*, available at <http://www.atpworldtour.com/Rankings/Singles.aspx?d=26.12.2011&r=1&c=#>.

<sup>260</sup> Former ATP Tour President and Chief Executive Brad Drewett was Australian (the new ATP President, Chris Kermode, who will take office on January 1, 2014 is British); ITF President Francesco Ricci Bitti is Italian and Executive Vice-President Juan Margets is Spanish.

between the parties. In jointly selecting a med-arbiter, the players, the ATP, and the ITF can guarantee selection of someone who both understands the intricacies of the professional tennis world and also with whom they are *all* comfortable. Consequently, the parties would be better able to present their respective cases and more willing to focus on particular issues that are of the utmost importance to them personally while also conceding on lesser concerns.

## VI. RECENT DEVELOPMENTS

### A. *Scheduling Alterations*

This past January, the 2014 ATP schedule was released; it incorporated a series of changes meant to address and alleviate player concerns and displays a promising willingness to consider player input when determining official ATP policies.<sup>261</sup> The schedule remains incredible diverse in its internationality, featuring 61 tournaments in 31 different countries and spanning six continents.<sup>262</sup>

The primary changes to the schedule are headlined by the addition of a month-long South American tournament segment in February, including a new World Tour 500 event in Rio de Janeiro, Brazil.<sup>263</sup> Although former ATP Executive Chairman and President Brad Drewett<sup>264</sup> noted that the new South American swing would exploit general tennis growth and development opportunities throughout the region, none of the tournaments are mandatory and thus player schedule obligations are not affected by the change.<sup>265</sup>

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<sup>261</sup> See ATP Announces 2014 ATP World Tour Calendar, 01/21/2013, available at <http://www.atpworldtour.com/News/Tennis/2013/01/Features/ATP-Announces-2014-Calendar.aspx>.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> Drewett began serving as ATP Executive Chairman and President in January 2012 but was subsequently diagnosed with ALS and passed away in May of 2013. See ATP Staff, *Brad Drewett Leaves Lasting Legacy*, May 3, 2013, available at <http://www.atpworldtour.com/News/Tennis/2013/04/18/Brad-Drewett-Passes-Away.aspx>.

<sup>265</sup> See ATP Announces 2014 ATP World Tour Calendar, *supra* note 261. All of the tournaments in this “South American swing” are ATP World Tour 250 and 500 events. Technically, no 250 level tournament is mandatory for any player to attend and the

Additionally, the 2014 ATP calendar will once again provide for a one-week break between the BNP Paribas Paris Masters 1000 tournament and the year-ending championships held in London's O2 Arena.<sup>266</sup> This alteration to the ATP schedule was again indicative of a willingness to heed the wishes of the players themselves; then ATP Chairman Drewett stated: "Following careful consideration and feedback from our tournament and player members, the prevailing consensus for the benefit of our key stakeholders was to reinstate a week's break in between the ATP World Tour Masters 1000 event in Paris and our season-ending event in London."<sup>267</sup>

While the 2014 ATP schedule incorporates some changes meant to address and alleviate player concerns, it remains to be seen what effect those changes will actually have. The new schedule does not alter the mandatory tournaments that top players are required to participate in, does not reduce the amount of tournaments generally, and in fact will reduce the off-season for those players who qualify for the year-ending ATP World Tour Finals.<sup>268</sup> Additionally, despite player concerns regarding the

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current mandatory schedule requirements for ATP World Tour 500 events are as follows: all top 30 ranked players (as determined by the previous year end ranking points) must play a minimum of four 500 level tournaments during the calendar year. See Frequently Asked Questions, Section 5, available at <http://www.atpworldtour.com/Rankings/Rankings-FAQ.aspx>. Further, at least one of the four required 500 events must occur after the US Open tournament is held. *Id.* Players failing to meet this participation requirement, to play one 500 event after the US Open, or who withdraw from any 500 level event after the acceptance list is released, receive zero points for each event under required four-tournament minimum. *Id.* Any such zero point penalties may be appealed and subsequently reviewed; however, no suspensions or fines may be levied as penalties against players who fail to meet the tour level 500 event mandatory participation requirements. *Id.*

<sup>266</sup> *Id.* The one-week period between the Paris Masters 1000 event and the year-end championships is actually a return to a previous scheduling format; the ATP World Tour included a week break between the two events as recent as 2011. See 2011 ATP Results Archive, available at <http://www.atpworldtour.com/Scores/Archive-Event-Calendar.aspx?t=2&y=2011>. In 2012 and 2013 the schedule was amended so as to eliminate this extra week and the Paris Masters event was followed directly by the ATP World Tour Finals in London. *Id.*

<sup>267</sup> See ATP Announces 2014 ATP World Tour Calendar, *supra* note 261.

<sup>268</sup> Assuming the Australian Open, the first Grand Slam event annually, continues to occur the second week of January, players qualifying for the year-ending championships in 2014 will have less than two months between the end of that competition and the 2015 season's premier major event. Players wanting to play in a warm up tournament will have even less of an off-season; the year's first events—held

number of tournaments played on hard court surfaces<sup>269</sup>—generally considered the most physically demanding and damaging to a player’s body—the new ATP schedule actually increases the number of hard court events.<sup>270</sup> Finally, it also remains unclear how much of the scheduling changes are actually the result of the ATP’s desire to expand the sport’s global influence, exploit new markets, and appease concerns of tournament cities and sponsors.<sup>271</sup>

### B. Grand Slams Increasing Prize Money

Over the past year there have also been massive steps taken in terms of prize money awarded by each of the Grand Slam events. This recent trend began in November 2012 when the Australian Open announced it would be increasing the players’ prize money for the 2013 tournament by \$3.7 million dollars.<sup>272</sup>

Less than a month after the Australian Open’s decision, the US Open followed suit, announcing in December 2012 that the tournament prize money would increase \$4 million.<sup>273</sup> Then, in an even more dramatic move, the USTA unveiled in March 2013 a

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at Brisbane, Doha, and Chennai—begin December 30. Given player concerns regarding the lack of sufficient time between annual tennis seasons, the extra week between the year’s final masters 1000 event and the year-ending championships actually works to shorten an already minimal period between tennis seasons for the game’s top players.

<sup>269</sup> See *infra* note 142 and accompanying text (discussing the concerns of players, and especially of Spanish superstar Rafael Nadal, regarding the number of ATP events played on hard-court surfaces).

<sup>270</sup> Specifically, the ATP schedule for 2014 includes changing the ATP 500 event held in Acapulco, Mexico from a clay court surface to a hard court. See ATP Announces 2014 ATP World Tour Calendar, *supra* note 261.

<sup>271</sup> See *id.* Commenting on the 2014 ATP calendar’s new month-long South American tour, Brad Drewett said “The four-week South American swing including a new event in Rio de Janeiro is an exciting development for the sport...[t]here are significant opportunities for growth in South America, a region that has become a key focus for us as we look to grow and develop the sport in that territory.” *Id.*; see also Andre Chris Smith, *ATP Feature Story: Growth of Tennis in Japan*, 10 NINS 4 ALL, available at <http://10nis4all.wordpress.com/welcome-to-10-nis-4-all/atp-feature-story/> (discussing ATP tennis expansion and influence in Japan and Asia).

<sup>272</sup> See Associated Press, *Aussie Open increases prize money*, ESPN Tennis, October 2, 2013, available at [http://espn.go.com/tennis/story/\\_/id/9756996/australian-open-announces-increase-prize-money](http://espn.go.com/tennis/story/_/id/9756996/australian-open-announces-increase-prize-money).

<sup>273</sup> See ATP Staff, *US Open Prize Money to Reach \$50M*, ATP World Tour, March 20, 2013, available at <http://www.atpworldtour.com/News/Tennis/2013/03/12/US-Open-Prizemoney.aspx>.

restructuring of US Open prize money distribution which immediately added an additional \$4.1 million to the 2013 player compensation and aimed for a total prize money pool of \$50 million by 2017.<sup>274</sup> Together, these changes raised the prize money for the 2014 US Open to \$33.6 million, \$8.1 million more than the players received in 2012.<sup>275</sup>

These massive increases in tournament prize money at the Australian and US Opens would be rapidly emulated by both the French Open and Wimbledon. In mid-April 2013, the French Open committed to increasing their overall prize money by \$4.1 million, to a total of \$28.7 million in 2013.<sup>276</sup> Although the winners of the tournament saw a hefty increase in earnings<sup>277</sup>, it was players eliminated in the opening three rounds who actually received the greatest increase in pay, 25 percent more than in 2012.<sup>278</sup> In addition, the French Tennis Federation indicated that it intends to further increase prize money an additional \$13.08 million by 2016.<sup>279</sup> Just over a week later, Wimbledon, the oldest of all the Grand Slam events, gave the players the largest prize money increase in the history of professional tennis.<sup>280</sup> In total, the All England Lawn Tennis Club elected to raise the overall prize money by nearly \$10 million, increasing the Wimbledon championships player compensation to a hefty \$34.4 million, a staggering 40 percent increase over the 2012 total prize pool.<sup>281</sup>

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<sup>274</sup> *Id.*

<sup>275</sup> *Id.* Perhaps even more amazingly, the USTA plan to further increase US Open prize money to \$50 million by 2017 would mean that the player prize pool would nearly double in only 5 years. *Id.*

<sup>276</sup> Douglas Robson, *French Open increases prize money more than \$4M in 2013*, USA TODAY Sports, April 15, 2013, available at <http://www.usatoday.com/story/sports/tennis/2013/04/15/roland-garros-increases-prize-money-2013/2083515/>.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* Despite the success regarding player compensation at the French Open, the ATP players have continued to express serious concerns regarding the 15-day schedule (Grand Slams are normally 2-week events) of the tournament, which has begun on Sunday since 2006 in order to allow tournament sponsors and organizers to benefit from better television ratings and attendance on the weekend. *Id.*

<sup>280</sup> See Christopher Clarey, *Wimbledon Joins In by Hiking Its Prize Money*, The New York Times, April 23, 2013, available at <http://www.nytimes.com/2013/04/24/sports/tennis/24iht-tennis24.html>.

<sup>281</sup> *Id.*

Importantly, the major increase in player compensation at Wimbledon remains with the early round losers and is intended to “increase the pool of players able to make a viable living from the sport.”<sup>282</sup>

Most recently, in September 2013, the Australian Open instituted an additional \$2.8 million in prize money for the 2014 tournament; taken with its prior unprecedented increase in 2012,<sup>283</sup> Australian Open prize money has now increased by almost \$7 million in the past two years.<sup>284</sup>

In all, the past few years have seen the Grand Slams of professional tennis each take massive steps towards increasing their player prize money pools.<sup>285</sup> Further, these increases are, in large part, intended to provide sufficient compensation to players losing earlier in the tournaments in order to ensure the ability of players outside the highest echelons of the game to earn a legitimate living in the sport.<sup>286</sup>

Most importantly, these changes are the result of player unification and willingness to push for such change. Ultimately, the initial impetus for the discussions between players and the Grand Slam organizers that led to the Australian Open increase in prize money was the threat of a large-scale player strike prior to the 2012 tournament.<sup>287</sup> Craig Tiley, tournament director of the Australian Open, openly acknowledged that the unity and determination of the players was a major factor in facilitating a legitimate discussion on the issue of prize money: “We took the

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<sup>282</sup> *Id.* All England Lawn Tennis Club chairman Philip Brook noted that the tournament prize money increase was intended to help players who lose in earlier rounds; ultimately, the new prize money increase means that players losing in the first three tournament rounds enjoy at least a 62 percent pay increase over 2012. *Id.*

<sup>283</sup> *See* Associated Press, *supra* note 272.

<sup>284</sup> *Id.*

<sup>285</sup> *See* Clarey, *supra* note 280. Assuming no additional changes, the final Grand Slam tournament prize money pools, in order of overall compensation provided, are presently as follows: French Open at \$28.7 million (16% increase from 2012), Australian Open at \$31 million (15% increase from 2012), US Open at \$33.6 million (31% increase over 2012), and Wimbledon at \$34.4 million (40% increase from 2012). *Id.*

<sup>286</sup> *See supra* notes 278, 282 and accompanying text.

<sup>287</sup> *See* Clarey, *supra* note 280 (observing that “it has been, above all, the players’ greater engagement that has been the difference in this bid for a much bigger chunk of Grand Slam revenue...their unity made the possibility of a potential boycott or other labor action much more credible”).

threat [of player boycott or labor action] seriously and started talking to the playing group right away.”<sup>288</sup> Tiley further believes that these changes may be just the beginning of major advances for the sport, all originating from the players’ realization that they possess great collective power over the professional tennis world.<sup>289</sup>

However, these increases in Grand Slam prize money are only a promising start towards addressing player concerns and cannot be viewed as a complete solution to the general dissatisfaction that served as the catalyst for such changes. Although substantial, the prize money increases at the Grand Slams are still well short of the initial goals and demands of the players.<sup>290</sup> Additionally, as top-British star Andy Murray observed, the willingness of the Grand Slam tournaments to increase player prize money must be followed by the main ATP tournaments in order to truly achieve lasting change in the sport: “The Grand Slams aren’t where a guy ranked between 50 and 100 necessarily makes the majority of their money for the year. That’s in the ATP tournaments. So we can’t look at the Grand Slams and blame them if a guy ranked 100 in the world isn’t making as much as we would like...it’s tournaments throughout the year where that needs to improve.”<sup>291</sup> Nevertheless, these recent

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<sup>288</sup> *Id.*

<sup>289</sup> *See id.* Tiley commented that “I think this is a great turning point; I think the sleeping giant has been awoken...I think the playing group have realized the potential for their united ability, and I believe that’s healthy.” *Id.*

<sup>290</sup> Despite the fact that these recent changes in prize money are “unprecedented in size and scope, the raises do not match what players were initially requesting...players wanted 25 percent of the total revenue and have not yet achieved that at any Grand Slam tournament.” Clarey, *supra* note 280. The closest Grand Slam, the Australian Open, now provides combined prize money for men and women totaling around 23 percent of the tournament’s total revenues. *Id.*

<sup>291</sup> *See* Paul Newman, *Tennis Prize-Money Increase Quells Player Strike Threat*, *The Independent*, October 11, 2012, available at <http://www.independent.co.uk/sport/tennis/tennis-prizemoney-increase-quells-player-strike-threat-8205938.html>. Murray has expressed further concern that the prize money issue in tennis goes “a lot deeper than the ATP Tour;” specifically, Murray argues that greater prize money at the “minor leagues” of professional tennis must also address the prize money issue. *See* AP, *Players welcome Aussie Open prize money increase*, *TENNIS*, January 14, 2013, available at <http://www.tennis.com/pro-game/2013/01/players-welcome-aussie-open-prize-money-increase/45991/#.UqdhNY1Q3Rc>. He recently observed that “the Challenger Tour prize money hasn’t changed in years. Futures tournaments, I don’t think their prize money

developments have provided an invaluable step towards unifying the ranks of men's professional tennis and demonstrating the ability of the players, the governing bodies, and tournament organizers to put aside their differences for the good of the sport as a whole.<sup>292</sup>

### CONCLUSION

There are many problems and issues currently facing men's professional tennis. Players and the international bodies governing the sport—the ATP and ITF—have come into conflict over a number of issues. Player concerns over prize money and scheduling have led to dissatisfaction and even talk of a strike. Meanwhile, the ATP and ITF continue to try to find ways to work with the players in addressing other issues—most notably match fixing and doping—that continue causing controversy. These problems have reached a boiling point and must be addressed now; they are concerns that permeate the very heart of the sport and the relations between tennis' governing bodies and its players.<sup>293</sup>

Med-Arb, while somewhat controversial, is nonetheless an emerging ADR method that may prove highly effective in resolving the current issues plaguing men's professional tennis. The ability of the Med-Arb process to integrate two ADR methods—mediation and arbitration—into a single process not

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has changed in the last 20 to 30 years." *Id.* Murray fears that the inability of younger players to earn a legitimate living and finance their growth and development onto the professional tour is thus severely restricted and the sport suffers as a whole. *Id.* He notes, "that's what is stopping guys playing tennis early rather than the guys that are on the main tour stopping early. So the problem is not so much with the main tour. It's the smaller events." *Id.*

<sup>292</sup> Australian Open tournament director Craig Tiley advocated such a belief when, after announcing the increase in prize money at the Australian Open, he noted "I think the sport's a winner...For our sport to be a truly global sport, it needs to be a wealthy sport and the players need to be wealthy playing it, not just those administering it." See Clarey, *supra* note 280.

<sup>293</sup> There are some signs that the pressure of the player's—particularly the active voice of the game's top players—calls for more prize money from the Grand Slam events is being addressed. See e.g., Peter Bodo, *The Enlightened Professionals*, TENNIS WORLD, April 24, 2012, available at <http://blogs.tennis.com/tennisworld/2012/04/cha-ching.html>. The Grand Slams have heeded player concerns regarding prize money, as recent unprecedented increases in the prize money pool at these events evidence. See *supra* Section VII(b).

only saves time and costs, but it allows the parties greater involvement and comfort in the resolution process while concurrently providing the assurance that a final and binding decision will result if they are otherwise unable to settle the dispute.<sup>294</sup> In the diverse context—in terms of both the issues and parties involved—of the problems presently facing men's professional tennis, Med-Arb has the potential to provide invaluable benefits and may represent the best dispute resolution method for the ATP, ITF, and the players.<sup>295</sup>

Despite recent progress in addressing player concerns regarding scheduling and prize money at the Grand Slam events, there is still a great deal of work to be done. As long as these additional issues remain unattended, men's professional tennis will exist under a cloud of uncertainty and precarious doubt. Before every tournament the possibility of a player strike will be in the minds of the players, the ATP and ITF, the individual tournament directors, and, most importantly, the fans of the sport. The players currently involved in these disputes want to get back to the game they love, and the bodies governing professional tennis want to preserve the integrity of the game while not jeopardizing its future. The need for an efficient, effective, and agreeable solution to this dispute is apparent and dire. For the good of the game, the ATP, the ITF, and their players must come together, admit that they all bear responsibility for the emergence of these issues, and commit to resolving these problems now.

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<sup>294</sup> One major issue, critical to overcoming the problems facing men's professional tennis, is that the players, while "united" in their push for resolution of many of the issues discussed, nonetheless lack an actual unifying body, such as a union, capable of bargaining on their behalf, in Med-Arb or otherwise. This is a major topic that would almost certainly need to be considered by the players before officially seeking any ADR procedures with the ATP and ITF. Although the ATP Players' Council might provide a vehicle through which players could currently initiate dispute resolution with the ATP and ITF, it seems likely that, in the long-term, a far more permanent solution would need to emerge.

<sup>295</sup> As one Med-Arb commentator put it, "Med-Arb is a good dispute resolution mechanism for disputes lacking a 'perfect answer.'" Kristen M. Blankley, *Keeping A Secret from Yourself? Confidentiality, When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 *BALYOR L. REV.* 317, 331 (2011). Certainly, there is no perfect answer to the issues facing the ATP, the ITF, and their players; however, solutions, however imperfect, must be pursued.