

Sports Policy in the International Context: Starting from Scratch on Drug Testing

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On May 9, 2016, Olympian, tax lawyer, and long-time Olympic Committee member Dick Pound spoke at a CIPS event at the University of Ottawa. His speech on creating an international anti-doping policy, testing mechanisms, and dispute resolution mechanisms provided the framework for creating specific sports-related procedures that can be translated into any other area of multilateral agreement. He kindly shared his speaking notes with CIPS.

I know that most of you are here hoping to learn about the complex issues underlying the tax policy of exempting certain interest payments on loans made by non-resident lenders to Canadian borrowers. It will come as a great disappointment to you, I am sure, that I am not going to provide the enlightenment for which you seek.

Instead, I will try to give you a policy perspective of an international system that has been developed to deal with a particular sport problem, namely doping, as well as the resolution of disputes that arise within the context of the application of the system.

My approach will not be particularly academic, but rather from the perspective of someone in the field attempting to bring a certain degree of order where none existed.

Identifying the Problem

By way of overview, development of policy usually arises from a perceived need to bring rational order out of some form of “chaos.” It involves, amongst others, the following considerations.

- Analysis of the disparate facts, conduct, and outcomes arising from a course of conduct or schools of thought.
- Reaching consensus regarding the most acceptable outcomes in the circumstances — establishing the objectives sought.
- Identifying the communities or stakeholders that should be involved in the solutions and subject to the eventual policy.
- Determining what proscriptive behaviours should be mandated (together with possible guidelines and standards).

- Determining the consequences for non-compliance with the policy.
- Providing appropriate channels for appeals against decisions taken in purported reliance on the policy.
- Providing a process for possible amendments to the policy.
- Creating a process by which the policy can be made part of the rules governing the stakeholders affected in order to create binding obligations to apply the policy.

Based on these principles, let us focus on the identified problem, namely doping in sport. In general terms, and as not generally understood, doping in sport involves the use of prohibited performance-enhancing substances or methods.

By way of context, when I was a young athlete, in the late 1950s and early 1960s, there were already problems with the use of performance-enhancement. Indeed, it had been used for many years, as athletes and their advisors sought that competitive edge separating winners from non-winners. There were concerns expressed in some sport quarters, particularly track and field and the International Olympic Committee (IOC), about the possible health risks to athletes.

The conceptual difficulty, however, was that there were no articulated and enforceable rules that defined doping, prohibited its use, and prescribed penalties for breaching the rules. From the perspective of sport — an activity entirely defined and governed by rules — someone who was doping was not breaching any existing rule and therefore could not be penalized.

A crisis occurred during the Rome Olympics in 1960, in which I participated as a swimmer. During the cycling road race, a Danish cyclist collapsed and died, at least in part due to the use of amphetamines. This led to a flurry of activity by the IOC and the creation of a Medical Commission with a sub-commission on

doping and biochemistry, which generated a list of prohibited substances and methods.

But how to enforce the list? There was general agreement that disqualification should result. That could only be done by way of proof of the offense, not mere suspicion, so it was necessary to devise tests to establish use of the substances and methods. It was also necessary to establish the right to test athletes and to require them to provide biological samples for testing purposes.

The first testing at the Olympic Games, performed under the authority of the IOC, did not occur until 1968 in Grenoble. These were in-competition tests only since the IOC did not have the authority to test except at the Games. For three years, eleven months, and two weeks out of every four years, the athletes were not subject to IOC rules, but to those of their respective International Federations (IFs), most of which did not have similar rules.

There was an obvious problem. Doping was occurring, and could result in death. The IOC had acted as the leader of the Olympic Movement but could only govern its own event, the Olympic Games. International federations, jealous of their own autonomy, vigorously maintained their right to govern their own sport, refusing to apply IOC rules regarding testing and the IOC list of prohibited substances and methods.

Some moral suasion, however, was applied and eventually many (but not all) IFs agreed to drug testing at their world championships. However, there was still no coordination of effort, no consistency of lists, and no consistency in penalties or sanctions. In many cases, no rules had been adopted at all across many sports and in many countries.

Similarly, there was no consistent approach to dispute resolution. Some were resolved by the IFs, some by NFs (National Federations), some by NOCs (National Olympic Committees), and some

by the IOC. On a purely domestic basis, the final authority might well be the national courts.

Notwithstanding the lack of sport-related expertise and the length of domestic legal proceedings, the courts of competent jurisdiction in each country could eventually produce binding judgments on sport-related disputes submitted to them.

But, from the perspective of an international sport system, this produced complete chaos. The judgments of national courts only had effect in the country in which the judgment was rendered. Judgments in different countries might be contradictory. The Olympic Movement is international and required mechanisms that would operate consistently on an international basis. The situation persisted, with typical outcomes, such as an IF decision to ban an athlete for a doping offense, but which was purportedly overturned by domestic court, which declared the IF ban to be incorrect and declaring the athlete still to be eligible. Such a decision had no international effect and, indeed, often led to IFs adopting “contamination” rules, meaning that any athlete who participated in a competition involving a banned athlete would, him- or herself, be banned from competitions organized under the authority of the IF.

There was a complete stalemate until a major scandal occurred in cycling during the 1998 Tour de France. French police found industrial quantities of doping substances and related equipment in the possession of the Festina team and arrested those involved. This attracted the attention of other IFs, mostly European-based, who were concerned that if this could happen to cycling, a popular European sport, during its marquee event, it might also happen to them.

The stage was finally set for the beginnings of a coordinated approach. Preliminary work even began on developing an anti-doping code. In the late summer of 1998, an emergency meeting of the Executive Board was called to deal with criticism

of the IOC in relating to anti-doping efforts. I said, at that meeting, that it was clear that cycling (and other sports) was obviously unable or unwilling to control doping, that no one trusted countries to control doping in their own athletes, and that the IOC was (correctly) perceived as unable to control the Olympic Movement. It seemed to me that the creation of an independent international anti-doping organization, one not under the control of any stakeholder, was the obvious solution. I noted that the IOC had already established a somewhat similar organization in 1984, the Court of Arbitration for Sport, which had a governance structure involving equal representation by the IOC, IFs, NOCs, and Olympic athletes. With some tweaking, the same sort of structure could work for an international anti-doping organization.

Implementing the Solution

Good ideas are a dime a dozen. Making the idea a reality is the key. We had to find a mechanism to generate the consensus to move forward with the concept. We decided to organize a World Conference on Doping in Sport the following February, to which we invited the entire Olympic Family, governments, international agencies, and anti-doping agencies. The outcome was the Lausanne Declaration, expressing willingness to proceed with the creation of an international agency.

My role was to get agreement on the governance structure, timing, and cost sharing among the stakeholders. We settled on a 50–50 structure, in which governments would have 50% of the votes and the sport movement 50% of the votes. While not the structure I had first envisioned, the 50–50 arrangement was satisfactory because governments would be engaged, instead of being on the outside looking in, and the sport movement needed their capacities in the fight against doping

in sport. It also meant they would absorb 50% of the costs. As to timing, we could not afford the usual glacial pace of international governmental negotiations; we needed the organization in the field in early 2000, testing in advance of the Sydney Olympic Games.

Creating the agency, which became known as WADA — the World Anti-Doping Agency — was one thing. Getting it to operate was another. In the process, I got stuck with becoming the president. No good deed goes unpunished....

By way of further context, we now had to confront the chaos of 200 different countries, 200 NOCs, 35 Olympic sports, and dozens more recognized IFs, all with different anti-doping rules and many with none at all. With WADA, itself an outcome of a policy based on the opportunity created by the Festina crisis, we had a platform on which to construct a policy that would end the confused anti-doping landscape resulting from inconsistent definitions, conflicting processes, and differing sanctions for essentially the same conduct.

That policy decision created what has become known as the World Anti-Doping Code. It provides a standardized set of anti-doping rules that apply to all sports, all athletes, and all countries. Moving from that standing start to the finish line was not easy. It involved a level of international consultation never before undertaken in sport. Process was as important as substance. We engaged a facilitator to deal with process issues and to identify and assist with the implementation of a process that would engage all stakeholders, whether governments or sport representatives. Naturally, you cannot force anyone to engage and respond, but you can make it impossible for any stakeholder to complain that it had not had the opportunity to do so.

On the matter of substance, we began with a survey of existing rules and took the best of each set as the basis for our initial draft of the Code. We had a steering committee made up of those with the

greatest experience in anti-doping (not all of whom were necessarily on the side of the angels) and began the process of drafting the Code. We expanded the reach of the steering committee as the draft matured, to generate consensus on the content and its expression. After nearly 18 months of consultation and drafting, we were ready to share the first draft with all stakeholders. We sent it out, asking for comments within three months. We considered all of the comments and prepared a second draft, which was similarly distributed, this time asking for comments within two months. This led to a third draft, which we proposed to discuss at a Second World Conference on Doping in Sport to be held in early 2003 in Copenhagen.

In Copenhagen, we reviewed the draft on a clause-by-clause basis. Some minor amendments were proposed — we left some low-hanging fruit so that the Conference was seen to be effective. As Chair of the meeting, once the review was completed, I asked whether there was now consensus that WADA should adopt the Code. There was. At international meetings of this nature, consensus is indicated by applause. There was applause. I asked whether anyone present was opposed to such adoption. I did not want there to be any possibility that some stakeholder could say that there may have been applause, but that it had not applauded. No one expressed any opposition. So I declared unanimous approval.

The WADA Foundation Board then retired, adopted the Code, and returned to the Conference to announce that the World Anti-Doping Code now existed and that it would come into effect on January 1, 2004, in time for the Athens Olympic Games.

Having a Code was only part of the solution. What we needed next was for all the stakeholders to incorporate the Code into their own internal rules, so that it became binding on them. It was agreed that the Olympic Movement stakeholders would

ensure that, as a condition of their participation in the Olympic Games, they would adopt the Code as part of their rules prior to the commencement of the 2004 Games. Which each of them did.

That was the sound of one hand clapping. The next issue was the governments. They said they could not simply adopt a document (the Code) that had not been prepared by governments (even though they made up 50% of the enacting body). They were prepared to sign the Copenhagen Declaration, which was a political (as opposed to a legal) commitment to find a way to make the Code binding on them, although they could not promise to have such a mechanism in place prior to the Athens Games. They settled on adopting an international convention under the aegis of UNESCO, one of the terms of which was that the Code would be a central element in their portion of the fight against doping in sport. In November 2005, the UNESCO Conference of Parties adopted the convention. It came into effect upon ratification by 30 member states in early 2006. There are now more than 180 ratifications.

The desired policy was now in place. Harmonized anti-doping rules now existed and a mechanism was established (i.e. WADA) to monitor compliance with the Code. Non-compliance would be reported by WADA to the appropriate signatories, such as the IOC, the IF affected, or the National Anti-Doping Organization in any country affected. By international standards, the process had been accomplished remarkably quickly and with remarkable buy-in.

Resolving the Inevitable Disputes

Sport is competitive by nature. It is governed by rules that are sometimes ambiguous. The stakes, whether personal, organizational, or national, can be very high. It is, therefore, not unusual for disputes to arise in the context of sport. That being so, it is far better to anticipate and to provide the means of resolving such disputes, rather than being in a position of having to devise ad hoc responses to each dispute.

As mentioned earlier, in a hermetically sealed domestic context, the courts of any country have the jurisdictional competence to deal with disputes arising within that country and can issue the necessary orders and judgments to resolve such disputes. Systemically, therefore, no conceptual problem exists on the purely domestic model.

That said, sport has some particularities that require special consideration. One is expertise in dealing with the subject matter. Anti-doping cases are very technical and require an ability, often gained only with extensive experience, to understand the scientific evidence. Football (soccer) transfer cases require knowledge of the context and economics of the sport and club systems. Most sport disputes require faster resolution than can be achieved by the state court systems. In Quebec, for example, the delay in getting a contested case to the Superior Court is about three years. The process is static, rigid, and expensive. Most sport-related disputes involve athletes who are generally impecunious and just want to get back to competing.

In Canada, this has led the federal government to create and fund the Sport Dispute Resolution Centre of Canada (SDRCC) as an arbitral body. Matters such as team selection, athlete assistance programs, doping infractions, unreasonable conduct on the part of officials or coaches, Canada Games, relationship issues between national and provincial associations, and the effects of rule applications can all be submitted to the SDRCC at no cost to the parties. The cases are mediated and/or heard and decided by experienced independent mediators and arbitrators. Hearings, if necessary, can be conducted by conference call and decisions are rendered very quickly. The system functions extremely effectively and efficiently, attracting much favourable attention worldwide.

In the international context, of course, litigation in domestic courts is ineffective and inefficient. Until 1984, there was no established system of arbitration for sport. If arbitration was known, it tended to be in relation to collective bargaining agreements in certain professional leagues. At the Olympic Congress held in Baden Baden in 1981, the desirability of an arbitral court for sport-related disputes was identified. In 1984, the IOC launched the Court of Arbitration for Sport (CAS). CAS took some years to become an accepted forum, but now, with 500–600 cases per year, it is one of the largest arbitral courts in existence, rapidly gaining on the number of cases heard by the International Chamber of Commerce (ICC) each year.

Cases are decided by arbitrators identified as having sports knowledge and arbitration experience. Parties are free to appoint arbitrators from a list of arbitrators established by CAS. There is a Code of Arbitration for Sport-Related Disputes established to explain how the process before CAS will unfold.

CAS, as an organization having its seat in Lausanne, is subject to oversight by the Swiss Federal Tribunal, the highest court in Switzerland. The Swiss Federal Tribunal has found that CAS is a competent and independent tribunal, the judgments of which are entitled to deference by the state courts. The Swiss Federal Tribunal will intervene only in cases of jurisdiction or where natural justice or due process has been denied. It will not substitute its judgment on matters of substance determined by CAS.

There are two particular advantages derived from recognition of CAS as a competent and independent arbitral court. The first is legal and particularly important in the international context. That advantage is derived from the provisions of the New York Convention whose 140 signatories recognize and enforce awards of such courts in their countries. This avoids the complexities and inconsistencies that may arise when state courts have issued judgments on sport-related matters.

The second advantage derived from the recognition of CAS as a competent and independent arbitral court arises somewhat by default. Government signatories to the UNESCO Convention seem to have no issue with the provision in the World Anti-Doping Code that gives CAS exclusive jurisdiction in all doping cases, to the exclusion of state courts. One can only assume that governments are quite happy to relieve own their courts, whose calendars are already crowded, from the additional workload of cases dealing with a subject matter with which they are entirely unfamiliar.

Once again, an identified need for a dispute resolution mechanism for sport-related disputes has led to the development of a policy that arbitration is preferred, the mechanism (CAS) has been created, and the necessary rules to explain its operations have been promulgated.

I do hope that other international policies, perhaps more complicated than the sport policies discussed here, may benefit from our living laboratory in the world of sport. 

