OPINION: 3 Modest Proposals For The IOC Drug Summit

Law360, New York (October 6, 2016, 5:04 PM EDT) -- On Monday, Oct. 10, the International Olympic Committee will host in Lausanne, Switzerland, what its press release called an anti-doping summit focusing on "the protection of clean athletes and, more specifically, on a review of the WADA [World Anti-Doping Agency] anti-doping system." Given the doping chaos surrounding the Rio Olympics and Paralympics, the summit is not a moment too soon.

In particular, stating that WADA has a system appears to be somewhat of an overstatement. By WADA's own admission, it did not detect massive doping at the Sochi Olympics. Then, in an unprecedented manner, it recommended the ban from the Rio Olympics and Paralympics of a sovereign country, Russia, based on a so-called "independent person report." That report, however, was issued by a single Canadian law professor (whose independence could be questioned because he issued a previous report condemning Russia), and the report depended on anonymous witnesses, not including any witnesses in Russia.

WADA's recommendation was then acted on — in some cases inconsistently — by numerous organizations. These include the IOC, the International Paralympic Committee, numerous sports governing bodies like the International Association of Athletics Federation (which governs track and field), the Court of Arbitration for Sport and a Swiss court.

It is quite clear that what should be a judicial process has become a political process. That situation must be reversed if confidence is to be restored that fair athletic competition is occurring on a level playing field.

Below are three proposals along those lines.

An Independent Judicial Body Should Decide All Drug Cases

Foremost among WADA's many, well-publicized problems is conflict of interest. Two prominent examples are that the president of WADA is also vice chairman of the IOC, which WADA is supposed to be regulating, and the so-called "independent person" who issued the report that resulted in the Russian ban had earlier issued a report condemning Russia, which calls his independence into question.

Because it is obvious that sports doping is epidemic, it merits an independent judiciary to depoliticize the problem. Experienced judges should be appointed for one 10-year term, and should decide cases as three-judge panels.

There should be one judge each from the 30 largest countries, and they should be assigned to panels by a random selection system. Because the exigencies of sport often require a quick decision, and because the integrity of this proposed judicial body is insured by its structure, there should be no appeal process.

The Independent Judicial Body Should Not Decide Political Questions

Respectable courts around the world refrain from deciding political questions. The main reason for that is that courts are supremely unqualified for that task, which must be left to political entities like the IOC.

This lack of judicial qualifications was highlighted by the recent banning of Russian athletes from the Olympics and Paralympics. That monumental act, quite incredibly, was done based on the recommendation of a single person appointed by WADA for reasons that were not transparent.

The repercussions from that ill-advised approach are still occurring. They include the banning of athletes who have never failed a drug test, the hacking of confidential athlete medical records under WADA's custody, and the emergency IOC summit that will occur this coming Monday. That summit is likely to be quite tumultuous because it will include both WADA and Russia, who at this point are bitter adversaries.

Not deciding political questions is an obvious reform because individual athletes are the key components of any athletic competition. Either they dope or not, whether the cause of their doping is individual choice or state-sponsored.

All doping must be banned. With jurisdiction over individuals, the new judicial body does not need, nor should it have, jurisdiction over sovereign nations.

Indeed, what exactly constitutes state-sponsored doping is a political question. For example, prominent retired U.S. athletes like gold medalist Carl Lewis have stated that the U.S. had a permissive attitude toward doping for some years. Whether such alleged willful blindness amounts to state-sponsored doping is a question that political, not judicial, organs should answer.
Furthermore, allegations have been made against Russia, but getting discovery of evidence from a sovereign nation is itself a political question. For example, the evidence that should be at the center of the recent allegations against Russia is missing.

Allegedly the KGB found a way to tamper with the tamper-proof bottles containing urine specimens. No one, however, has been able to reproduce this feat, and the Swiss manufacturer of the bottles maintains that such tampering is not possible. Getting discovery from the KGB is not something any court anywhere could accomplish.

**Athletes Must Be Provided With Adequate Representation**

To date athletes, many of whom are imppecunious because of their athletic pursuits, have been faced with prosecution by WADA, which is a multimillion-dollar organization. The results, not surprisingly, have been one-sided, with few athlete victories.

The lack of victories does not mean, however, that WADA is always right. For example, the recent WADA ban on a drug called Meldonium — well publicized because it affected tennis star Maria Sharapova — was enacted before WADA discovered that Meldonium stays in the system for some as yet undetermined period of time. Many athletes were punished even though they took Meldonium when it was legal, and it may have showed up in testing merely because the legal dose had stayed in the system.

Many respected experts do not even believe that Meldonium is performance-enhancing. The well-known director of the Banned Substances Control Group, Don Catlin, for example, was quoted as saying, "There's really no evidence that there's any performance enhancement from Meldonium—zero percent."

The same could be said of other substances on WADA's lengthy prohibited list of so-called performance-enhancing drugs, which includes marijuana and caffeine. Athletes obviously need competent counsel and experts to defend against accusations that few, if any, individual athletes have the resources to defend against.

Those that do not have such resources should be provided with free representation. That is a cost of having a truly fair system.

**Conclusion**

The IOC is wise to call this anti-doping summit. Now it needs to show the political will to create a truly fair anti-doping regime that will restore confidence in international sports.

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