

The challenge to fairness and justice of international anti-doping laws: Differential enforcement of international anti-doping laws

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Abstract:

This paper examines the challenge to fairness and justice in the enforcement of international anti-doping laws, focusing on differential enforcement by global regulatory bodies such as WADA and CAS. Through two case studies this paper illustrates that both the enforcement of relevant laws and the decision-making of judicial authorities have been interfered by external factors. Despite the presence of established frameworks like the World Anti-Doping Code, inconsistencies in enforcement undermine the integrity of anti-doping efforts, and raise questions about external factors that impair the fairness and consistency of international anti-doping laws.

Keywords: fairness, justice, anti-doping laws, enforcement

Introduction

The global fight against doping in sports is governed by a complex framework of international regulations, including the World Anti-Doping Code and the International Convention Against Doping in Sport. However, the enforcement of these regulations is frequently challenged by competing interests such as politics, commerce, and nationalism, which threaten the fairness and impartiality of anti-doping efforts. This essay explores how the commercialized nature of sports and political pressures have led to inconsistent enforcement of doping rules, focusing on cases involving Chinese athletes. Through these examples, we critically analyze how international regulatory bodies like WADA and CAS may have been compromised in their mission to maintain fair competition.

Background

Doping in sports has a long history. Widespread doping by athletes and confused management of the International Olympic Committee on doping lasted nearly a century. Until recent decades, a relatively systematic and mature doping control system occurred. In 1983, the Court of Arbitration for Sport (CAS) came into force (CAS, 2024). In 1999, the World Anti-Doping Agency (WADA) was established (ProCon.org, 2024). In 2004, the World Anti-Doping Code (Code) took effect (WADA, 2021). The International Convention Against Doping in Sport (ICADS) came into force in 2007 (Congressional Research Service, 2008). The CAS, the WADA, the Code and the ICADS constitute a contemporary global anti-doping regulatory framework.

However, the “competing interests (political, commercial, legal and organisational)” hinder the implementing of doping control by WADA (Hanstad et al., 2019). The same dilemma as WADA, it is not unusual for CAS to give differential rulings for athletes who have committed similar anti-doping violations, simply because the athletes come from different countries and have different economic value. In other words, these global anti-doping regulatory and adjudicatory bodies or the WADA and the CSA, have been challenged by the commercialization of sport and sport nationalism. The high revenue in sports industry leads to the international management organization of each sport item to focus on pursuing economic benefit, even though it will violate the Code and the doping Convention. Also, sport serve as a political resource for nations, governments may collude with the WADA and the CAS on doping, even bribe them. For example, “In the two years before the World Anti-Doping Agency cleared 23 Chinese swimmers of doping allegations, that country’s government contributed nearly \$2 million in additional funding to WADA programs, including one designed to strengthen the agency’s investigations and intelligence unit” (Associated Press, 2024). Meanwhile, the fairness and justice of the binding international legal instruments, or the Code and the ICADS are threatened and destroyed.

Case Studies

-Case 1

In April 2024, The New York Times (NYT) reported that in 2021, 23 Chinese swimmers had tested positive for trimetazidine (TMZ), a substance which is on WADA’s banned substances list (WADA, 2024a). However, most of them still competed in the Tokyo Olympics months after failing doping test (NYT, 2024).

WADA issued a statement in response to why these 23 athletes were not banned. WADA claimed that it was notified “the swimmers had tested positive in early 2021 for TMZ after inadvertently being exposed to the substance through contamination” by the China Anti-Doping Agency (CHINA), and after the standardized review, WADA “was not in position to disprove the possibility that contamination was the source of TMZ” and decided “the athletes would be held to have no fault or negligence” (WADA, 2024b).

WADA is criticized for “failing to fairly and evenly follow the global rules that apply to everyone else in the world” (USADA, 2024). According to Article 2.1.1 of the Code, “It is the Athletes’ personal duty to ensure that no Prohibited Substance enters their bodies. Athletes are responsible

for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an anti-doping rule violation under Article 2.1” (i.e. Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample)” (2021). In other words, athletes are fully responsible for all substances in their bodies and their testing samples, even if they ingest banned substances inadvertently or their samples are contaminated, they will not be absolved of responsibility and will still face consequences because it’s their duty to prevent that. The key point of the article is that athletes are responsible for whatever enters their bodies and, regardless of intent and knowledge.

Although some athletes may also be victims of contamination, they are the ones who bring unfair advantages to the playing field. Therefore according to the Code, which aiming to maximize fairness in competition, these athletes should face the consequences.

That is why the United States Anti-Doping Agency (USADA) CEO said WADA handling of Chinese swimmers positive test results was unacceptable and unfair (USADA, 2024). USADA believes WADA should punish these 23 athletes in competition, such as banning them and avoiding them from bring the unfair advantages to the Olympics, instead of claiming these 23 Chinese swimmers are innocent.

-Case 2

In February 2019, WADA filed a case against Chinese swimmer Sun Yang with CAS (CAS, 2021). Sun Yang was accused of violating the Article 2.3 and Article 2.5 of the Code, since in a doping test in 2018, Sun “questioned the credentials of two of the sample collection personnel and considered that they had not presented sufficient certification”, then Sun did not provide a urine sample, broke the blood container that contains his blood sample, and took it back (SWLEGAL, 2021). Article 2.3 states “Evading, Refusing or Failing to Submit to Sample Collection by an Athlete”, and Article 2.5 states “Tampering or Attempted Tampering with any part of Doping Control by an Athlete or Other Person” (WADA, 2021).

CAS initially handed Sun an 8 years ban, it was reduced to 4 years later by Sun’s appeal (SWLEGAL, 2021; CAS, 2021). However, it was still unreasonably harsh. Sun’s legal team appealed the CAS’s first arbitral award according to the first three situations mentioned in Article 10.3.1 of the Code, “For violation of Article 2.3 or 2.5, the period of Ineligibility (i.e. banned from competition shall be four years except: (i) in the case of failing to submit to Sample

collection, if the athletes can establish that the commission of the anti-doping rule violation was not intentional, the period of Ineligibility shall be two years; (ii) in all other cases, if the Athletes or other Person can establish exceptional circumstances that justify a reduction of the period of Ineligibility, the period of Ineligibility shall be in a range from two years to four years depending on the Athlete or other Person's degree or Fault" (WADA, 2021). Firstly, Sun's side insisted on Sun's refusal was based the situation (i.e. the sample collection personnel had not presented sufficient certification), which should be included in the exceptions mention above. Even if CAS and WADA would not account that as an exception, the usual penalty for such case should be 4 years, rather than the initial penalty of 8 years. Moreover, Sun and his team submitted a number of public tweets "containing racist slurs towards Chinese nationals" by the CAS presiding arbitrator of Sun's case to the Swiss Federal Supreme Court (SWLEGAL, 2021). The actual existence of these tweets questioned impartiality of the CAS arbitrator and the arbitral award, to some extent questioned but also answered of whether Sun was treated more harshly due to his nationality and prominence in some extent, and revealed the potential unfairness in the enforcement of anti-doping laws.

Conclusion

The differential enforcement of international anti-doping laws poses a serious threat to the fairness and integrity of global sports. The cases of Chinese swimmers and Sun Yang reveal how external factors such as political and commercial pressures can influence rulings, undermining the foundational goal of anti-doping laws: to ensure a level playing field. Without stricter adherence to impartiality and justice, the credibility of WADA, CAS, and the entire anti-doping framework is at risk, potentially compromising the integrity of international sports. However, this paper does not solutions to this issue.

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