

Latest CAS Olympics Ruling Contradicts 2011 Case

By **Ronald Katz** (February 12, 2018)

Early last week when the International Olympic Committee president — after losing an appeal at the Court of Arbitration for Sport that cleared 28 Russian athletes of doping allegations — stated that that court might need to be restructured, that statement, given the power of the IOC, had the potential of intimidating the CAS. On Friday, when the CAS essentially reversed itself by stating that the IOC had the right to keep the cleared athletes out of the Pyeongchang Olympics, it appeared that that intimidation had worked. This is especially true because the basis of the CAS opinion is diametrically opposed to a 20-page 2011 opinion of the CAS, *United States Olympic Committee v. International Olympic Committee*. Ironically that 2011 decision was decided by a panel of judges presided over by Richard McLaren, whose reports on alleged state-sponsored doping by Russia have been at the center of the current CAS decisions about whether there was sufficient proof that individual Russian athletes doped.



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The reasoning behind the CAS decision last Friday keeping the cleared Russian athletes out of this Olympics was set out in a press conference in Korea. The secretary general of the CAS read from a statement that said that “In its decisions, the CAS arbitrators have considered that the process created by the IOC to establish an invitation list of Russian athletes to compete as Olympic athletes from Russia (OAR) could not be described as a sanction but rather as an eligibility decision.”

This is the exact opposite of what was decided in the 2011 case presided over by McLaren. That case decided that, unlike the IOC exclusion decision last week, eligibility decisions “do not sanction undesirable behaviour by athletes,” but rather “facilitate the organization of an event and ensure that the athlete meets the performance ability requirement for the type of competition in question.” On the other hand, the 2011 case defines sanctions as “rules that bar an athlete from participating and taking part in a competition due to prior undesirable behaviour on the part of the athlete.”

In the 2011 case, what was in dispute was a rule passed by the IOC in 2008 that any athlete sanctioned for doping with a suspension of over six months could not participate in the next Olympic games after the suspension was imposed, even if those games occurred after the suspension was over. The United States was pleading the case of an athlete whose drug suspension ended in 2011 and who wanted to compete in the 2012 London Olympics. The United States won because of the doctrine of *ne bis in idem*, Latin for “not twice in the same thing.” Essentially, the CAS ruled in 2011 that the U.S. athlete could not be punished twice for the same thing, once as a sanction and the second time purportedly as an eligibility decision: “The effective purpose of the sanction is the same (even if the underlying motivations are different); the sanction is attributable to the same behaviour, and the sanction results in the same consequence, ineligibility from Competition.”

Like the athletes in 2011, the athletes at issue last week in Korea, had been sanctioned. The reasoning of the CAS panel in 2011, which clearly distinguished sanctions from eligibility decisions, applies equally today, although that reasoning was ignored by the CAS panel last week in Korea: "The Panel also notes that the Olympic Games are, for many athletes, the pinnacle of success and the ultimate goal of athletic competition. Being prevented from participating in the Olympic Games, having already served a period of suspension, certainly has the effect of further penalizing the athlete and extending that suspension."

The 2011 CAS panel recognized that the eligibility criteria has elements of both an eligibility rule and a sanction but ruled that the sanction aspect takes precedence: "Even if one accepts that the Regulation has elements of both an eligibility rule and a sanction, it nevertheless operates as, and has the effect of, a disciplinary sanction."

The reasoned 2011 CAS decision has much more weight than the decision of a few lines rendered after just a few days of deliberation last week. The fact that the 2011 decision on the very subject at issue — i.e., the difference between eligibility rules and sanctions — was not even mentioned last week gives cause for concern that the seeming pressure from the IOC president generated a political decision from the CAS. If the CAS, which makes many important doping decisions, is not considered by athletes and the public to be truly independent of the IOC, the entire anti-doping system in Olympic sport is undermined. Doping is one of the most important issues in sport, if not the most important, and it requires independent decision-makers to decide the numerous disputes that arise regarding doping.

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