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iNADO White Paper on the Concept of an “Independent Testing Authority”¹

The following is a White Paper developed by iNADO on the concept of the “independent testing authority” as this relates to the anti-doping responsibilities of International Federations (IF). iNADO members are now actively engaged with many IFs in a variety of initiatives whereby some of the anti-doping responsibilities of an IF are delivered by fully independent Anti-Doping Organisations (ADOs). As such, the NADO community represented by iNADO has a great deal of experience and an ongoing interest in the concept of the independent delivery of anti-doping services.

The International Olympic Committee (IOC) has, beginning with its Olympic Summit on 8 October 2016, released a series of public statements regarding the concept of an independent testing authority but without seeking input from the broad community of anti-doping organisations and without exploring available options for the expanded delivery of anti-doping services by existing independent anti-doping organisations in order to meet increasing demands from the public, governments, athletes and other stakeholders that anti-doping functions be separate from sport. This White Paper seeks to fill this gap by identifying realistic options for the global delivery of independent anti-doping services in areas where gaps in testing and investigations may presently exist without reliance on a massive new world-wide testing bureaucracy such as that apparently envisioned by the IOC.

Primarily, the White Paper strives to define the nature of the required independence of anti-doping organisations and to demonstrate that independence must encompass far more than testing. Secondly, the White Paper identifies two approaches for IFs to consider. It explores the existing model of separate and autonomous anti-doping units created by IFs with responsibility for that sport’s elite athletes. It also introduces an approach that would see a new ‘third-party’ entity acquire the collective anti-doping responsibilities (not just testing) of the IFs that may choose to join such an initiative.

The fundamental goal of either approach is that the Code mandated anti-doping responsibilities of an IF will be discharged by an entity that is fully independent from the IF.

Background

The 2015 World Anti-Doping Code identifies all IFs as anti-doping organisations. It defines International Level (IL) athletes as those elite athletes that fall under the jurisdiction of IFs and who are specifically identified by the IF. Since IFs are anti-doping organisations, they are required to develop and implement fully Code-compliant anti-doping programs for this sub-set of IL athletes participating in their respective sports.

In late 2015, in response to the Russian doping scandal, the IOC formally requested that WADA explore the concept of an independent testing authority that could serve the collective anti-doping needs for all IFs. The IOC’s original rationale for this request was based on the principle of independence, i.e., upon

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the conflict that exists within IFs who are both responsible for the advancement (e.g. development, promotion, marketing) of the sport and maintain responsibility for detecting and deterring doping in the sport. iNADO has always agreed with this principle. An independent testing authority may also be supported on the ground that some IFs may be implementing the Code in an inconsistent and consequently ineffective manner. Again, iNADO agrees; individual NADOs cooperating with IFs and NFs have seen frequent evidence of this. Furthermore, development of one or more independent testing authorities may permit the realisation of efficiencies from multiple anti-doping organisations pooling their resources rather than each IF fulfilling its anti-doping responsibilities individually. This is logical.

The challenge is acting to improve anti-doping in these three areas in a cost-effective and timely way. Here iNADO parts company with the IOC approach.

In its declaration distributed immediately upon conclusion of its “Olympic Summit” held 8 October 2016, the IOC called for a “new anti-doping testing authority to be established within the framework of WADA.” Regrettably, the Summit did not include representatives of any national anti-doping organisations (NADOs) and, according to the Summit Declaration, WADA was represented only by its President, IOC Board Member Reddie. Consequently, the Summit was unprepared by the background and experience of its participants to engage in a thorough discussion of available options for effectuating a robust, independent, global testing program through collaboration with independent NADOs. Thus, options for implementing global independent testing in collaboration with NADOs is not addressed in the three-page Olympic Summit Declaration. Even before the 2016 Olympic Summit, a group of NADOs have been working on a “White Paper” to discuss practical and alternative approaches toward addressing gaps in testing and investigations existing around the world which the IOC proposes addressing with a new global testing authority.

Moreover, the IOC’s October 2016 assertion that countries with recognized and effective NADOs possess a national interest to dope is inconsistent with the factual record. Contrary to the IOC position, all countries and “national interests” are not equivalent. Not all countries regard it in their interest to engage in a state-sponsored doping scheme such as recently exposed in Russia. In fact, many countries which have signed the UNESCO Convention on Doping in Sport, along with their NADOs, have a proven track record of strong anti-doping programs. Therefore, the IOC’s rationale that all countries have a perceived national interest or intent to dope their athletes must be rejected.

Nor is the IOC’s demand for a global independent testing bureaucracy to combat supposed “national interests” practical or calculated to be an effective solution. For one, the IOC’s proposal ignores the track record of NADOs who are virtually the only proven independent and effective anti-doping organisations in the world, and in whom many national governments have invested tens of millions of dollars over the past fifteen years. Instead, the IOC seems in favor of an unproven, untested, and currently non-existent global bureaucracy. Given the established effectiveness of dozens of NADOs around the world, establishing a global bureaucracy to perform the drug testing (and other essential anti-doping activities) that in many countries is already being done well is unwarranted. Further, the IOC’s proposal ignores the length of time it would take to effectively implement a massive, new, global testing bureaucracy – to the detriment of clean athletes for years to come.

The IOC in its Olympic Summit Declaration of October 2016 proposed a new global testing bureaucracy and conditioned additional IOC funding to WADA on acceptance of this proposal. Continued efforts by the IOC to control and direct WADA and the structure of anti-doping programs in international sport is inconsistent with the fundamental principle to which the IOC earlier advocated: that anti-doping programs should be separate from sport.

There is also an important question of checks and balances and of who would provide oversight of a global testing authority. Independent NADOs are difficult to co-opt and uniquely situated to maintain their independence and clean sport focus because there are many of them and their governance and funding are not intertwined with WADA or the IOC. In contrast, a global testing authority largely funded by sport would, like WADA currently, be subject to significant influence and control by sport. Were the proposed global testing bureaucracy to be co-opted, such as occurred with the IAAF leadership which was bribed to cover up tests, or should a global testing authority be influenced to slow the pace of the investigation of anti-doping corruption, then the integrity of anti-doping operations globally would be undermined.

Furthermore, a world-wide testing and investigations body is not practical because testing and investigations should be intelligence based. And intelligence is generally localised and country specific, meaning an entity physically located in that country with personal from that country will typically be best situated to receive and develop that information.

In contrast, dispersing the authority to test elite athletes to the NADO in the home country of the athlete as occurs now is the best policy. Robust international oversight can be maintained over NADOs through WADA's Code compliance programme to guard against any fear of nationalism and to root out a corrupt or ineffective NADO should that occur again.

In short, the NADO model has proven effective. Many of the most significant anti-doping investigations and anti-doping advances in recent years have come from NADOs or from the national authorities with which they work. NADOs have become outspoken advocates for clean sport. Restrictions on the autonomy of independent NADOs would not improve, but would weaken the current global anti-doping system.

Beyond Testing

The term global or independent "testing authority" is in itself misleading. Currently, all areas of responsibility for anti-doping organisations under the Code fall to IFs, not just testing. This includes things such as:

- Developing anti-doping rules.
- Identifying pools of athletes that fall under its jurisdiction.
- Ensuring these athletes are informed of their rights and responsibilities.
- Anti-doping education and prevention.
- Processing TUEs.
- Collecting whereabouts.
- Developing TDPs consistent with the TDSSA.
- Collecting and analysing intelligence.
- Conducting investigations.
- Prosecuting potential anti-doping rule violations as the Results Management Authority.

With this in mind, it is more accurate and instructive to view the “independent testing authority” concept as a requirement to independently deliver and satisfy all of the anti-doping responsibilities of all IFs and their respective pools of IL athletes.

What does Achieving Anti-Doping Independence from IFs Mean?

Independence can be defined in multiple ways, for example:

- “the freedom from control and influence of others”
- “not subject to another’s authority or jurisdiction”
- “a state of being separate and autonomous”

As it relates to IFs externalising their anti-doping operations to make them “independent” of the IF (discussed below, such as the IF creating Independent Anti-Doping Units or the IF directly engaging with a ‘third-party’ collective entity), the term will have to be carefully defined by WADA in the anti-doping context, most likely through a revision to the World Anti-Doping Code. This might most effectively be done through the development of a new Code definition of “independence” in conjunction with adoption of a new WADA Independence Standard that outlines what anti-doping independence actually means for IFs (or indeed for any ADO, including for WADA as an ADO itself). The iNADO WADA Governance Proposals may also provide helpful insight into the notion of anti-doping independence. Familiar concepts from the world of corporate governance and institutional autonomy will no doubt inform the required definition as well. A precise definition of “independence” is not required for this White Paper. However, it is clear that “independence” and not a global testing bureaucracy is the most fundamental and needed area for reform in the current anti-doping system.

For the purpose of this White Paper it is proposed that the following indicia, at a minimum, might be relied on to flesh out the meaning of independence from an IF in the anti-doping context:

- A separate legal entity from the IF.
- A separate and autonomous governance structure from the IF. For example, a separate Board of Directors whose members have no links whatsoever (common membership or otherwise) to the IF, are not chosen by the IF or stakeholders within the sport, and who are 100% responsible for the conduct and operational and financial independence of the separate entity.
- Financial autonomy in budgeting/expenditure/reporting/audit from the IF (regardless of the source of the operating funds).
- Staff who do not have similar or parallel responsibilities at the IF.

It is important to note however that the delegation of an IF’s anti-doping responsibilities to an independent entity does not result in the IF avoiding operational and financial responsibility (or other responsibilities) for the ongoing anti-doping effort in that sport. IFs must continue to be held accountable for most of the anti-doping responsibilities set out in Article 20.3 of the Code. By way of analogy, this is fully consistent with an IF’s continuing operational and financial responsibility for sample collection costs if an IF were to externalize that function to a private sample collection company.

Though the IF’s anti-doping responsibilities may be externalised and accomplished through, say, an Independent Anti-Doping Unit, the IF (just as in the case of a National Olympic Committee (NOC) which

has anti-doping responsibilities alongside its NADO) must continue to invest financially in the anti-doping work being conducted on its behalf and, further, must adopt and implement anti-doping policies and rules which conform with the Code (Art. 20.3.1).

To this end, notwithstanding the fulfillment of the IF's anti-doping responsibilities by an independent ADO acting on behalf of the IF, the IF must continue to:

- Require as a condition of membership in the IF that the policies, rules and programs of their National Federations and other members are in compliance with the Code (Art. 20.3.2).
- Require that Athletes, Athlete Support Personnel and others be bound by anti-doping rules in conformity with the Code as a condition of participation in the sport (Arts. 20.3.3, 20.3.4, 20.3.5, 20.3.15).
- Require robust investigation and prosecution of anti-doping rule violations (Art. 20.3.10, 20.3.14).
- Require cooperation with the independent ADO in the sport and other ADOs (Arts. 20.3.6, 20.3.13, 20.3.14).
- Take appropriate action to discourage non-compliance with the Code (Arts. 20.3.7, 20.3.9, 20.3.11).
- Promote and conduct anti-doping education and prevention (Art. 20.3.12).

Additionally, IFs (like NOCs currently) will need to commit to respect the autonomy of the independent ADO administering anti-doping operations within its sport (see Art. 20.4.3 – requirement of NOCs to respect autonomy of the NADO in its country).

Two Options Presented

1. Independent Anti-Doping Units (Sport Specific)

Some IFs such as UCI and IAAF have already moved to externalize their anti-doping programs. Other IFs may be inspired to structure their affairs in a similar fashion. These IFs should be commended for their efforts to establish an independent anti-doping operation within their sport.

Just as NOCs have successfully established and relied on NADOs, in principle the establishment by an IF of a fully independent anti-doping organisation within its sport has the potential to be highly effective. With respect to any such organisations, as with all ADOs, it is important that WADA be permitted to assess their independence in accordance with the standards discussed above.

WADA (not the IF) must be the final arbiter of whether an IF's choice for externalising and making independent its anti-doping operations through an Independent Anti-Doping Unit is truly independent from the IF and in full compliance with the Code. Such an approach is not dissimilar to how governments and NOCs exercise their anti-doping responsibilities by way of creating and funding independent NADOs.

It is envisioned that relatively few IFs will elect to create Independent Anti-Doping Units within their sport.

2. Collective Anti-Doping Organisations (Multi-Sport)

Alternatively, a collective approach could be utilized by IFs that may not want to establish their own Independent Anti-Doping Units. Such an approach would be voluntary and could be referred to as

participating with a Collective Anti-Doping Organisation (or CADO). A CADO would allow voluntarily participating IFs to pool their resources and work with a single independent organisation (in existence or to be created) as described above that could service all their collective anti-doping responsibilities. A current example of this approach is the Sport Accord Drug Free Sport Unit (DFSU).

A CADO could, acting on behalf of the IF, provide services to fulfil all the anti-doping responsibilities of the IF (or many IFs). Multiple CADOs could be formed. The required form of contractual arrangement between an IF and a third-party entity is in place today (as a fee-for-service model that addresses some responsibilities of the IF such as sample collection, testing, etc.) and is widely used, well understood and accepted. In this option, the CADO's mandate would simply be expanded to include full responsibility for performing all the IF's anti-doping responsibilities.

Benefits of a CADO

Each CADO would be specifically designed to ensure independence from those IFs that it serves. As with the Independent Anti-Doping Units, it must be WADA that is the final arbiter in this regard. Depending on the number of interested IFs that might wish to join a CADO, developing and operating such an organisation could become a major undertaking. In every case, the operational goals of every CADO must be to avoid duplication, drive efficiencies and minimise the expenditure of scarce resources. Below are some strategies that could assist in thinking about how a CADO could realize these goals:

- A single set of anti-doping rules (in all respects fully Code-compliant) could be developed by the CADO and thereafter adopted by all IFs that may wish to join the CADO. Once adopted by an IF the CADO rules would be binding on the IF's members and athletes. This would avoid the unnecessary duplication involved with each IF having its own set of slightly different (though still Code-compliant) anti-doping rules.
- The jurisdiction of the CADO would cover the most elite athletes in all participating IFs. The CADO's jurisdiction should include at least the top 10 to 20 athletes in each sport and each discipline for each participating IF. While this would be considered a minimum, the CADO will need to work with each IF, WADA and the respective NADOs to determine the necessary depth of the IL pool for each participating IF. Care must be taken in designing the CADO's jurisdiction in each sport to not inadvertently create a 'gap' in anti-doping coverage between the elite athletes that are the responsibility of the IF and the ability of other ADOs to assume responsibility for athletes inside their jurisdiction. This would enable the CADO to focus primarily on the most elite athletes in the world, established on a sport by sport basis.
- A common quality benchmark (beyond what is detailed in the Code) could be established across all participating IFs for appropriate risk assessment and testing on these athletes inside CADO's jurisdiction. This would immediately assist in 'raising the bar' across many IF anti-doping programs and allow for enhanced quality and consistency.
- All athletes in the CADO jurisdiction could be included in one international RTP.

- One international TUEC could be developed through existing IF TUECs. This would be far more efficient than each IF having its own TUEC.
- An international tribunal based on national tribunals could be assembled to hear first instance hearings for all participating IFs. This would replace the need for each IF to either constitute an internal hearing panel or consider appearing before CAS, as permitted in Code Article 8.5.
- A single investigative and testing function could be developed that could source intelligence, conduct investigations and carry out targeted testing across all participating IFs.

Cross Border Collaboration with Independent ADOs

In the pursuit of anti-doping independence, whether an IF elects to create an Independent Anti-Doping Unit or decides to associate itself with an independent CADO, there is a great deal of efficiency to be gained by cooperating and collaborating with the many experienced and credible ADOs that are now in existence. This is particularly important given IL athletes do not fall exclusively under the jurisdiction of IFs; they also fall under the jurisdiction of NADOs where in many cases significant anti-doping activity is occurring. At the moment, WADA has no 'quality assurance' certification for ADOs beyond mere Code-compliance (or not). And private service providers are not directly bound to the Code. However, it is well known and understood that certain ADOs are exceptionally capable, independent, well governed and competent. These existing anti-doping resources can and should be utilized by IFs as much as possible to avoid unnecessary duplication and wasted resources.

Where a credible, capable and independent ADO exists, the Independent Anti-Doping Unit or the CADO should consider contracting with such ADO to manage some or all of the following for the IF:

- Sharing TUE information.
- Adding athletes to a national RTP, collecting and sharing whereabouts information.
- Developing appropriate test plans for the IF's athletes.
- Collecting and managing intelligence for all the IF's athletes, including analytical data.
- Where necessary, cooperating with investigations that may be relevant to these athletes.

Such a collaborative approach using existing resources and expertise will greatly reduce the workload on the IF's Independent Anti-Doping Unit or the relevant CADO. This approach, whereby experienced and capable ADOs will directly assist the IF to perform the IF's anti-doping responsibilities (as is now commonly done on a limited scale), will permit the Independent Anti-Doping Unit or the CADO to focus their efforts on certain sports and/or on certain areas of the world where there are not credible and independent ADOs who are able or willing to assist. An example of this approach occurred prior to the Rio 2016 Olympic Games whereby FINA partnered with a number of NADOs. These NADOs ensured comprehensive testing was occurring on their own swimming athletes, which enabled FINA to focus its efforts on those IL athletes from countries with less developed NADOs.

Financial Responsibility

All IFs must continue to meet their responsibilities set out in the Code. All IFs shall remain financially responsible for implementing a Code-compliant anti-doping program. The only revision being contemplated in this White Paper is that such a Code-compliant anti-doping program must be made independent from the IF. However, the IF must continue to be required to financially support their sport's meaningful and effective anti-doping program.

At a minimum, an IF's level of investment for its anti-doping program during 2016 must be considered an absolute 'floor'. It is well known that effective anti-doping is growing increasingly complex, expensive and time consuming. Incremental increases to this 'base-line' level of investment by the IF for drug free sport, as warranted in consultation with WADA and the independent entity responsible for discharging the IF's anti-doping responsibilities, remains the sole responsibility of the IF.

Conclusion

Significant improvements in the global anti-doping system can be made without implementing a massive new, top down, global testing bureaucracy. Rather, the most efficient, effective and practical path forward relies upon implementation of the fundamental principle of "independence" in anti-doping programs and regional and global collaboration among existing and "to be developed" independent anti-doping organisations.

As we have briefly attempted to set out above, there are significant benefits to be gained in addition to the primary goal of merely achieving anti-doping "independence" from the IF. This laudable goal could be achieved many ways. The White Paper identifies two sensible options for consideration and discussion. No doubt there are others.

More importantly, concurrently with the desired independence from IFs other benefits will certainly accrue. With the avoidance of duplication, with greater efficiency and with a willingness to rely on pre-existing expertise and capacity, meaningful and effective anti-doping work on a global scale can likely be performed in a less costly fashion. In addition, permitting the responsible parties in the various independent entities to maintain a priority focus on sport and/or nations that are relatively deficient in the discharge of their anti-doping responsibilities is a significant collateral benefit. Furthermore, a stronger matrix of independent anti-doping organisations will provide capacity to support or substitute for those ADOs with Code-compliance issues and avoid a repeat of anti-doping vacuums as was created in a number of countries found to be non-compliant. This is precisely what is needed to advance anti-doping globally and to facilitate a 'rising tide' of harmonization and broader compliance with acceptable minimum standards.