

financial documentation. However, such a demand is not readily granted.

There is only entitlement to compensation for the period that a player is actually being trained. A club is not entitled to training com-

pensation for the period of time where a player was on loan at another club. A club that has accepted a player on a loan basis is entitled to this compensation.

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Will The New WADA Code Plug All The Gaps? Will There Be By-Catch?

by John Marshall and Amy Catherine Hale*

A. Introduction

1. The World Anti-Doping Agency, WADA adopted substantial amendments to the WADA Code ("the Code") at its conference in Spain in mid November 2007. This paper looks at the new amendments which will be operational by 1 January 2009.
2. Before examining the changes to rules designed to catch drug cheats, it may prove interesting to reflect on what is meant by a drug cheat. Is a drug cheat:
 - (a) Someone who gains an advantage over fellow Athletes¹ by use of a substance/method which is illegal because of the health risks associated with its use?; or
 - (b) Someone who is in breach of the rules made by WADA?²

B. WADA and the Code

(1) Background

3. The World Anti-Doping Agency ("WADA") was established in November 1999 in Switzerland. On 5 March 2003 WADA adopted a document entitled the 'World Anti-Doping Code' ("the Code"). The Code envisaged that WADA would become the world's peak anti-doping body and that each international sporting federation ("IF") would be a Signatory to the Code. The Code also envisaged gaining worldwide acceptance by each National Anti-Doping Organisation ("NADO") signing the Code. That has come to pass.
4. The Code seeks to harmonise anti-doping rules and principles on a worldwide basis. It does this by having three elements being the Code itself, "International Standards" adopted by WADA and "Models of Best Practice". Of the International Standards the most important is the WADA Prohibited List.

(2) Impact

5. The impact of the Code and the WADA Prohibited List has been profound for the following reasons:
 - (a) most national governments support the Code and the WADA Prohibited List;
 - (b) the National Anti-Doping Organisations ("NADOs") of most

countries have become Signatories to the Code and have implemented WADA's objectives³;

- (c) most international sporting federations have adopted the Code which has had the consequence that national sporting federations affiliated with the international bodies (e.g. athletics) were required to comply with the Code and the WADA Prohibited List; and
 - (d) most national sporting federations have adopted WADA compliant Anti-Doping Policies ("ADPs").
6. Changes to the Code will affect all athletes and virtually all sporting organisations.

C. The Changes

7. There are an enormous number of changes.⁴ It is not possible to discuss them all or even to classify them all. For instance:
 - (a) There are changes which fix obvious gaps.⁵
 - (b) There are changes which clarify areas where doubt has been expressed⁶ or to confirm the result of particular CAS decisions⁷.
 - (c) There are changes which will assist in harmonisation: "all provisions are now mandatory in substance and must be followed": 2nd para of the Introduction.
 - (d) There is a new statement of Athlete responsibility which bolsters the strict liability principle underlying the Code: a new part to Art 2⁸ and new Art 2.2.1⁹.
 - (e) There are several changes which introduce greater flexibility in sanctions: see from para 9 below.
 - (f) There will be mandatory provisional suspension for a positive 'A' Sample: new Art 7.5.1 - see from para 37 below.
 - (g) Mandatory whereabouts requirements will be introduced: change to Art 2.4 - see from para 20 below.
 - (h) A new concept of an "Atypical Finding" will be introduced: replacement Art 7.3 - see from para 33 below. Centrebet is not issuing odds that this was prompted by the Ian Thorpe debacle.

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¹ Terms written in italics have a defined meaning in the Code.

² There are, of course, further alternatives based on the two above but with subtle differences. For example one variation recognises the difficulty in proving intention so, in effect, deems intention to gain an advantage by the circumstance that a Sample taken In-Competition contains a Prohibited Substance and calls this 'strict liability'.

³ E.g. the Australian Sports Anti-Doping Authority ("ASADA") was established for this purpose.

⁴ The extent of the changes can be seen from the mark up version which has all changes from the existing Code shown in tracking. This was available at http://www.wada-ama.org/rtecontent/document/WADA_Code_2007_Redline_3.0_to_2003.pdf at the time of preparing this paper.

⁵ Examples are:

- Art 2.2 which makes it clear that Use only applies to an Athlete;
- The amendment to Art 2.6 means the ADRV of Possession will now apply to stimulants or other In-Competition banned substances if possessed In-Competition; so Athletes in the Olympic village cannot any longer possess stimulants;

- A new last para of Art 4.4 (belatedly) gives an Athlete a defence if there is a TUE in place;
- There is an improved definition of In-Competition, which now is workable in all situations.

⁶ Amendment to Art 4.4 clarifies which TUEC has jurisdiction to issue TUEs. Amendment to Art 10.10.1 makes it clear an Athlete cannot train whilst under sanction.

⁷ Eg the addition to the comment to Art 4.2.1 confirms the result in the case of rugby player Wendell Sailor who tested positive for cocaine residues from mid-week Use: "Out-of-Competition 'Use' (Article 2.2) of a substance which is only

prohibited In-Competition is not an anti-doping rule violation unless an Adverse Analytical Finding for the substance or its Metabolites is reported for a Sample collected In-Competition (Article 2.1)."

⁸ "Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List."

⁹ "2.2.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body."

- (i) There is to be a new sanction for breaching an existing sanction: new Art 10.10.2 - see from para 39 below.
 - (j) There will be sanctions for teams, not just individuals: new Art 11.2 - see from para 41 below.
 - (k) There are new appeals: amendment to Art 13.2 and new Art 13.3 - see from para 43 below.
8. This paper will examine those which seem to be more important. The most important, which is dealt with first, is the increased flexibility.

D. Harmonisation with Flexibility

9. The goal of harmonisation resulted in the original Code being a one size fits all set of rules that lacked flexibility. The most significant area of rigidity was the mandatory minimum 2 year suspension with limited defences and virtually no discretion in sentencing.¹⁰ The lack of discretion was strongly opposed by sports which had sophisticated ADPs and experienced tribunals pre WADA.
10. That has been addressed and is best explained by the comment to Article 4.2.2:
- “[Comment to Article 4.2.2: In drafting the Code there was considerable stakeholder debate over the appropriate balance between inflexible sanctions which promote harmonization in the application of the rules and more flexible sanctions which better take into consideration the circumstances of each individual case. This balance continued to be discussed in various CAS decisions interpreting the Code. After three years experience with the Code, the strong consensus of stakeholders is that while the occurrence of an anti-doping rule violation under Articles 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers) and 2.2 (Use of a Prohibited Substance or Prohibited Method) should still be based on the principle of strict liability, the Code sanctions should be made more flexible where the Athlete or other Person can clearly demonstrate that he or she did not intend to enhance sport performance. The change to Article 4.2 and related changes to Article 10 provide this additional flexibility for violations involving many Prohibited Substances. The rules set forth in Article 10.5 would remain the only basis for eliminating or reducing a sanction involving anabolic steroids, hormones, certain stimulants identified on the Prohibited List, or Prohibited Methods.]”
11. This is a very important change and one that is definitely in the right direction.
12. The change will be implemented primarily by a new Art 4.2.2 which deals with Specified Substances and makes all substances Specified Substances with these exceptions
- “... the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List
- ...”
13. Specified Substances will be sanctioned differently pursuant to new Art 10.4:
- “10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances
- Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:
- First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years' Ineligibility.
- To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The Athlete or other Person's degree of fault shall be the criteria considered in assessing any reduction of the period of Ineligibility.”

14. The effect is that for many substances there will be a discretion that can be applied so as to achieve an appropriate sanction. A clear example where this will make an important difference is that the well regarded international Australian footballer Stan Lazaridis almost certainly would not have received his 12 month suspension for use of finasteride.
15. As to so called 'party' drugs, much will depend on which stimulants will be 'so identified' on the Prohibited List in 2009. See from para 50 below.
16. Other measures to increase flexibility are:
- (a) Amendment to Articles 10.3.1 and 10.5.2 which widen the application of the 'No Significant Fault or Negligence' defence to all ADRVs.
 - (b) Amendment to Article 10.5.3 which widens the application of a reduction for Substantial Assistance.
 - (c) New Articles 10.5.4 and 10.9.2 which provide that admissions may be rewarded with a reduction up to 50% in certain limited circumstances.
 - (d) Amendment to Article 10.2 by which the standard two year ban is made subject to Articles 10.4, 10.5 and 10.6.
 - (e) New Art 10.5.5 which explains how the various potential reductions can work in combination to produce a maximum reduction no lower than 1/4 of the otherwise applicable sanction.
 - (f) New Art 10.6 which allows for an increased sanction where there are aggravating circumstances.
 - (g) New Art 10.7 which sets out a table that is designed to provide a commonsense way of dealing with multiple violations or second violations.¹¹
17. Another very significant change that will increase flexibility is the new definition of Athlete. All international-level and national-level competitors will be subject to all aspects of the Code, but there is this qualification:
- “Specific national rules may be established for Doping Control for noninternational-level or national-level competitors without being in conflict with the Code.”
18. It is clear that this means not all aspects of the Code will need to be applied below international-level and national-level competitors and that at least these two instanced aspects may be excluded:
- (a) TUEs (presumably in lieu a letter from the prescribing doctor would be enough, at least for some substances); and
 - (b) The requirement for whereabouts information.
- What is not clear is whether the fact the exceptions must be in “national rules” means the NADO will have to do this at a national level or whether national federations can do it themselves.¹²
19. There are at least two remaining areas of inflexibility (which could and should have been fixed):
- (a) Art 10.4 should also apply to the ADRV of administration. There seems no good reason why it does not and must be regarded as a gap created by oversight. It is just not fair (in any sense) for Athletes to have defences which are not available to support persons in exactly the same set of circumstances.
 - (b) Art 10.1.1 should be enabled if Art 10.4 applies.

E. Whereabouts Requirements

20. Art 2.4 has been rewritten as follows:
- “2.4 Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the International Standard for Testing. Any combination of three missed tests and/or filing failures within an eighteen-month period as deter-

10 The hair medication (finasteride) cases of Lund and Lazaridis illustrate this. In each case the decision was regretted: CAS in Lund saying it had “heavy heart”.

11 Although the table gives some flexibility more would have been better.

12 The better view is national federations can do it themselves as that is in keeping with the aim of increased flexibility in this area.

mined by Anti-Doping Organizations with jurisdiction over the Athlete shall constitute an antidoping rule violation.”

21. The sanction for breach will be “at a minimum one (1) year and at a maximum two (2) years based on the Athlete’s degree of fault” per amended Art 10.3.3.
22. This is a significant change. Previously there had to be “reasonable rules” and there was a 3 month sanction. In place of what a sport considered to be reasonable rules there is to be mandatory compliance with the many pages of whereabouts requirements set out in the current draft ‘version 3.0 October 2007’ WADA ‘International Standard for Testing’ (“IST”): see part II at pages 35-78 of that standard.
23. These requirements are onerous and involve a quarterly ‘Whereabouts Filing’. If a Whereabouts Filing is not lodged properly and accurately that amounts to a ‘Filing Failure’. To be compliant each quarterly Whereabouts Filing of an Athlete must
 - (a) Identify “where he/she will be living, training and competing during that quarter, so that he/she can be located for Testing at any time during that quarter”: per IST 11.1.3. This includes
 - (i) “the full address of each place where the Athlete will be residing (e.g. home, temporary lodgings, hotel, etc)”: per IST 11.3.1.d;
 - (ii) “the name and address of each location where the Athlete will train, work or conduct any other regular activity (eg school) during the following quarter”: per IST 11.3.1.e;
 - (iii) “the Athlete’s competition schedule for the following quarter, including the name and address of each location where the Athlete is scheduled to compete during the quarter and the date(s) on which he/she is scheduled to compete at such location(s)”: per IST 11.3.1.f;
 - (b) Provide a 60 min time slot everyday as follows “one specific location and one specific 60-minute time-slot during the day where the Athlete will be available and accessible for Testing at that location”: per IST 11.3.2; and (c) Contain “specific confirmation ... of the Athlete’s consent to the sharing of his or her Athlete Whereabouts Filing with other Anti-Doping Organizations having authority to Test him/her”: per IST 11.3.1.
- (c) See also para 29 below.
24. If the Athlete is not where he/she is supposed to be during the 60 minute slot that will be a ‘Missed Test’ by reason of IST 11.4.2. A Missed Test does not require that the Athlete be told of the appointment. If the Athlete had been told that alone would be an ADRV of refusal under Art 2.3.
25. Filing Failures and Missed Tests are generically called ‘Whereabouts Failures’. Three Whereabouts Failures in a rolling 18 months will be an ADRV under new Code Art 2.4.
26. To understand what this means for an Athlete try putting yourself in the boots of footballer Steven Gerrard: he is not likely to know from week to week if Liverpool will have him play EPL, Euro football, FA Cup qualifiers or Carling (League) Cup matches or whether the England team will need his services as vice captain.¹³
27. It has been suggested by one well placed and well informed sports official that an Athlete in a professional team sport would just not be able to comply with these whereabouts requirements and sports would face the likelihood of losing star athletes for 12 months for failing to provide information in circumstances where they cannot reasonably be expected to comply with the onerous requirements of the IST.
28. In order to better understand why WADA wants this data and whether the time and effort for Athletes to provide it and ADOs to check it is worthwhile, it would have been helpful to be given information as to:
 - (a) why a test on a half hour’s notice by telephone will be ineffective,
 - (b) how often ADOs actually do use the data to carry out no advance notice tests (which could not be carried out without the extensive data), and

- (c) how successful those tests have been in catching cheats.

WADA should publish this information or else accept its onerous requirements are not justifiable.

F. Privacy?

29. Relevant to the matter in para E.23(c) above, is new provision before Art 1:

“Each Signatory shall establish rules and procedures to ensure that all Athletes or other Persons under the authority of the Signatory and its member organizations consent to the dissemination of their private data as required or authorized by the Code ...”
30. No doubt this is to allow, per new Art 14.6, ADOs to “collect, store, process or disclose personal information relating to Athletes...”
31. Given the serious breaches of confidentiality that occurred within WADA affiliated organisations in the Ian Thorpe matter (and it was not ASADA who leaked), an Athlete may not wish to consent to personal information about his/her movements (eg under IST 11.3.1.c) being shared among WADA affiliated organisations. The information could also relate to medical conditions which are the basis of a TUE.
32. To require consent to information being shared as a condition of future participation is harsh indeed. Women tennis stars have been known to attract stalkers. Think how information as to the movements of an Athlete, if not guaranteed to be secure, could lead to very unfortunate consequences. WADA cannot guarantee security. WADA has not uncovered the culprit(s) in the Thorpe leak (assuming WADA investigated the matter). WADA has not created a sanction for where a sports official is proved to have leaked information. It would be a simple matter to draft an ADRV to deal with leaking confidential information not authorised by the Code. The sanction could be a 2 year suspension and a compensation payment to the Athlete of set general damages of say USD 20,000.¹⁴ Such provisions would likely prevent leaks in the future. One wonders whether WADA really thought this one through.

G. Atypical Findings

33. There is now a new concept, an Atypical Finding, which is defined as a report in relation to the analysis of a Sample “which requires further investigation”.
34. It no doubt arises as a result of the difficulty in interpreting results that show elevated levels of naturally produced substances, eg testosterone. Quite probably the publicly leaked circumstances relating to the Ian Thorpe test result has led to the proposed amendments.
35. An Atypical Finding is to be handled in accordance with rewritten Art 7.3:

“7.3 Review of Atypical Findings
As provided in the International Standards, ... the Anti-Doping Organization shall conduct the required investigation. After the investigation is completed, the Athlete and other Anti-Doping Organizations identified in Article 14.1.2 shall be notified whether or not the Atypical Finding will be brought forward as an Adverse Analytical Finding. The Athlete shall be notified as provided in Article 7.2.
7.3.1 The Anti-Doping Organization will not provide notice of an Atypical Finding until it has completed its investigation and decided whether it will bring the Atypical Finding forward as an Adverse Analytical Finding unless one of the following circumstances exist: ...”
36. This is a sensible procedure and compliance with it likely would have prevented the leak in the Ian Thorpe matter because ASADA would never have had to report to external bodies until it completed its investigation: see new Art 7.3.1.

¹³ Query whether an Athlete would be better off with a mobile phone that had a GPS locator in it.

¹⁴ Together with any special damages that could be proved.

H. Provisional Suspension after A Sample

37. New Art 7.5.1 requires that rules be created to ensure that Athletes are suspended provisionally upon the result of the A Sample:
“7.5.1 Mandatory Provisional Suspension after A Sample Adverse Analytical Finding.
Signatories shall adopt rules ... providing that when an Adverse Analytical Finding is received for a Prohibited Substance, other than a Specified Substance, a Provisional Suspension shall be imposed promptly after the review and notification described in Articles 7.1 and 7.2.”
38. The purpose is to prevent an Athlete from competing where there is a high probability that the Athlete will ultimately be suspended.

I. Breach of a Sanction

39. New Art 10.10.2 is to deal with athletes who breach a sanction. What happens is the sanction restarts from the date of the breach.
“10.10.2 Violation of the Prohibition of Participation During Ineligibility.
Where an Athlete or other Person who has been declared Ineligible violates the prohibition against participation during Ineligibility described in Article 10.10.1, the results of such participation shall be Disqualified and the period of Ineligibility which was originally imposed shall start over again as of the date of the violation. The new period of Ineligibility may be reduced under Article 10.5.2 if the Athlete or other Person establishes he or she bears No Significant Fault or Negligence for violating the prohibition against participation. The determination of whether an Athlete or other Person has violated the prohibition against participation, and whether a reduction under Article 10.5.2 is appropriate, shall be made by the Anti-Doping Organization whose results management led to the imposition of the initial period of Ineligibility.”
40. Whilst there should be a deterrent to an athlete breaching a sanction, the automatic restarting from the date of the breach could operate harshly. It certainly operates arbitrarily: a violation in week 1 of a 2 year ban will be virtually unpunished yet the same violation in the last week of a 2 year ban will attract a further 2 year ban. There is no “fairness and equality” in this, contrary to the statement of the primary purpose of the Code at the outset of the Code.

J. Sanctions on Teams

41. Article 11.2 will be amended as follows:
“11.2 Consequences for Team Sports.
If *more than two members* of a team in a Team Sport are found to have committed an anti-doping rule violation during an Event Period, the ruling body of the Event shall impose an *appropriate sanction* on the team (e.g., loss of points, Disqualification from a Competition or Event, or other sanction) in addition to any Consequences imposed upon the individual Athlete(s) committing the antidoping rule violation.”
(italics added)
42. This means that sports will have to devise some rules providing appropriate sanctions. Possible rules are as follows:
11.2.1. If more than two Athletes in a team are found to have committed an Anti-Doping Rule Violation during an Event, the team may be subject to disqualification or other disciplinary action as set out below.
11.2.2. If it is established that three or more Athletes in the same team have committed More Serious ADRVs in respect of the same Competition in the one Event, the ruling body has a discretion to impose a sanction on the team, which sanction may include:
(a) as the usual minimum (unless there is a good reason not to¹⁵), loss of competition points in respect that particular Competition if that particular Competition was in the equivalent of a round robin phase, or
(b) cancellation of the result of that particular Competition, if that particular Competition was during a knock-out phase (eg quarter final).
11.2.3. If it is established that four or more Athletes in the same

team have committed More Serious ADRVs in respect of the same Event, the ruling body has a discretion to impose a sanction on the team, which sanction may include:

- (a) as the usual minimum (unless there is a good reason not to¹⁶), loss of competition points equal to the number of Athletes found to have committed More Serious ADRVs multiplied by what would be earned in a win in a single Competition in that Event¹⁷, and
(b) in a most extreme case, disqualification from the Event.
11.2.4. In exercising the discretion, the ruling body may have regard to such factors as it considers appropriate but shall at least have regard to the total number of Athletes comprising the team. This is because it is necessary to consider the ramifications to innocent Athletes in the team of any sanction; thus a high proportion of innocent Athletes in the team will militate in favour of a lower team sanction (and vice versa).
11.2.5. Before a sanction can be imposed on a team under the above rules, the ruling body must afford the team natural justice and at a minimum must
(a) afford the team a hearing that accords with the principles in Art 8 of the Code (adapted to the extent necessary to accommodate the fact that it is a team sanction hearing and not a hearing of an ADRV against an individual)
(b) afford the team a right of appeal; and
(c) comply with appropriate procedural rules of the ruling body relating to team sanctions.

In the absence of existing procedural rules the procedural rules of the relevant International Federation (and failing that CAS) shall be deemed to apply *mutatis mutandis*.

11.2.6. In this Article ‘More Serious ADRV’ - means an ADRV where the period of Ineligibility actually imposed was longer than one year.

K. New Rights of Appeal

43. There are new rights of appeal which essentially give greater rights to WADA and International Federations at the expense of NADOs and Athletes.
44. Amendment to Art 13.2 creates these two new rights to appeal from “a decision by an Anti-Doping Organization not to bring forward an Adverse Analytical Finding or an Atypical Finding as an anti-doping rule violation” or
“a decision not to go forward with an anti-doping rule violation after an investigation under Article 7.4”
45. There is also new Art 13.3:
13.3 Failure to Render a Timely Decision by an Anti-Doping Organization
Where, in a particular case, an Anti-Doping Organization fails to render a decision with respect to whether an anti-doping rule violation was committed within a reasonable deadline set by WADA, WADA may elect to appeal directly to CAS as if the Anti-Doping Organization had rendered a decision finding no anti-doping rule violation. If the CAS panel determines that an anti-doping rule violation was committed and that WADA acted reasonably in electing to appeal directly to CAS, then WADA’s costs and attorneys fees in prosecuting the appeal shall be reimbursed to WADA by the Anti-Doping Organization.
46. These are essentially appeals from the results management decision of an ADO not to take a matter further, eg because of lack of evidence. There is no equivalent appeal known to the general law. It is far from clear how those appeals will operate, what standard of proof would be involved¹⁸ and whether the Athlete will need to be a party.

15 A good reason possibly might be that the Athletes were only substitutes and played a very minimal part in the Competition.

16 A good reason possibly might be in say a basketball Event (that takes place over a season made up of matches over many

months) say 2 ADRVs were in the early matches and the 3rd ADRV was in the final ie the last match of the Event.

17 So if say 4 Athletes were involved and a win was worth 2 points there would be a loss of 4 x 2 = 8 points.

47. These appeals potentially apply at every step of the results management process.
- For example, if at any step in the process the ADO formed an opinion that it would not take the next step because of insufficient evidence (or that the latest evidence received negated any ADRV) there could be an appeal available to an International Federation or WADA.
48. The form of relief that CAS could award in relation to a successful appeal is unclear but presumably some order in the nature of mandamus would be needed so as to compel an ADO to assert that an anti-doping violation has been committed.
49. It is suggested that a better rule would have been for an International Federation or WADA to have the ability to itself prosecute an allegation.

L. 'Party', 'Recreational' or 'Illicit' Drugs

50. Almost every substance on the Prohibited List is illegal in most countries without a prescription, so the term 'illicit' is not helpful in distinguishing what drugs one is talking about. The term 'party drug' is not much better. What is usually meant are stimulants (eg 'ecstasy' and cocaine) used other than to enhance sport performance and not on race/match day. The issue really is the 'recreational' use of drugs, not the use of 'recreational' drugs.
51. With these drugs the Code still sits on the fence. They are prohibited but only In-Competition. This means possession and use of these not on race/match days is not prohibited. The new Code is only concerned with the use of stimulants for performance enhancement. The performance enhancing characteristics of stimulants generally has resulted in them being included in the WADA Prohibited List and Samples which are collected In-Competition are analysed for traces of stimulants. WADA explains the position this way in the new comment to Art 4.2.1 of the Code: "Out-of-Competition "Use" (Article 2.2) of a substance which is only prohibited In-Competition is not an anti-doping rule violation unless an Adverse Analytical Finding for the substance or its Metabolites is reported for a Sample collected In-Competition (Article 2.1)."
52. Thus (at least by implication), so far as WADA is concerned 'recreational' use by Athletes of stimulants to get 'high', ie as 'party drugs' is a matter for others to regulate.
53. However, there is a glitch. Because the analysis carried out by WADA laboratories is for traces of Metabolites, residual fragments of molecules that a human body has processed can be detected for at least several hours and sometimes more than a week after use, depending on the drug and the human involved. Until a better means of analysis is developed, use not in connection with a Competition will be caught as the tests presently available cannot determine how far back in time an Athlete used the substance.
54. This means that the 'recreational' use of a stimulant may be caught and punished as if it was an attempt to use the stimulant for performance enhancement to cheat fellow Athletes. The reason is that presence of Metabolites is equally consistent with cheating as it is with recent partying. This leads to a type of by-catch. The rationale is that if WADA let Athletes get off if they said "sorry I partied

with that stuff yesterday", every guilty Athlete could use the same excuse. WADA must regard it as better that guilty Athletes are able to be caught and punished even if some non-cheats are too, because even if not cheats, they have disregarded sports rules and engaged in criminal activity.¹⁹

55. There is a second glitch. Whilst stimulants generally can be used for performance enhancement²⁰, two particular stimulants, cocaine and 'ecstasy', are misused antisocially by the general population and also by Athletes²¹. There is debate about the performance enhancement abilities of cocaine²² and 'ecstasy'. By reason of their chemical properties they would appear to be capable of being used for performance enhancement. There are also anecdotal reports of such use.
56. The properties of cocaine are such that it is more likely to be detectable longer than other stimulants hence more likely to lead to by-catch. One suspects that the high profile cocaine cases of international rugby player Wendell Sailor and tennis great Mats Wilander were by-catch.
57. The problem is that by inclusion of these particular substances in the WADA Prohibited List the potential to catch their 'recreational' use is high. Hence the debate rightly becomes whether the consequential by-catch can be justified for these substances, given the lack of hard evidence of actual use for performance enhancement.
58. WADA has created a means to lessen the impact for these substances from 1 January 2009 as WADA will then have the ability to treat them as Specified Substances with the potential for a lesser sanction as low as a warning. Whether WADA does so will not be known until publication of the 2009 List in late 2008.

M. Conclusion

59. The effect of the Code, its endorsement by the Paris UNESCO Convention of October 2005, the subsequent governmental ratifications, the web²³ of interlocking identical contacts created²⁴, all with mutual recognition provisions²⁵ and all enforced through arbitration by CAS, has been to create a close replica of a law made by a sovereign parliament binding on its subjects²⁶ that is enforced by a supreme court.
60. For this reason the significance of the Code has grown and now the changes to it must be carefully considered.
61. Most of the earlier gaps have been plugged²⁷ and the new flexibility is to be applauded, but there are new areas that will be created where compliance with the Code will be difficult and costly.
62. Returning to the question posed in para 2 above, the first alternative (a) is supported by sound reasoning based on catching cheats and to level the playing field. To compete at the top level Athletes should not have to risk their health to beat a lesser Athlete prepared to take substances that can seriously affect health when used for performance enhancement. In this respect it is akin to grand prix race cars having some safety features even though the extra weight will slow the car down. Unless mandated some drivers would take the risk, win most every race and mean other drivers would be forced out of the sport or give in to the safety risk. No one wants Athletes (young or old) to be faced with the analogous choice in relation to drugs that are illegal because they are harmful.²⁸

18 Art 3.1 cannot operate to assist given its terms.

19 So this type of by-catch is (by implication) not deserving of release if it means losing the whole catch.

20 As to amphetamines see Avois et al British Journal of Sports Medicine 2006; 40.

21 Mostly football and tennis players (perhaps because of the cost) but there are no doubt others who have not been caught.

22 Again see Avois et al British Journal of Sports Medicine 2006; 40.

23 The term web is used because it is more than a hub and spoke arrangement. WADA is certainly the hub of a wheel

with spokes going to each Signatory but there is more because each spoke is joined by a contractual term requiring mutual recognition.

24 The contracts are in the form of Anti-Doping Policies which must be agreed to by Athletes and others: see new Art 20.3.3, 20.3.5 and 20.4.5.

25 Code Art 15.4.

26 The subjects are virtually all Athletes and sporting bodies.

27 One not fixed is the very short 21 day time limit for an Athlete to appeal. It should be extended and also should not run until the Athlete is furnished with a written statement of reasons and notification of appeal rights including the time limit for pursuing those rights. This is one of the subjects of a separate article:

Unilateral Unappealable Doping Sanctions by the author and Ms Amy Catherine Hale published [2007] ISLR 39.

28 In this regard certain comments, that perhaps Athletes should be allowed to take steroids, published in the wake of the Marion Jones admission if not tongue in cheek to provoke debate were ill considered. It would be wrong for sports to approve use of steroids as it would involve a breach of the criminal law by Athletes and health risks. Given steroids are male hormones, can it be seriously

suggested that young female Athletes should be permitted to use them? They are drugs that alter a fundamental difference between men and women. The performance enhancement capability of their use by women is massive: no clean female Athlete would stand a chance. Female swimmers and runners outside the top 100 can become world beaters on stanozolol. In a sport like swimming, where many female swimmers are minors, open slather on drugs would force them to give up as never being competitive or choose to take male hormones and become criminals in the process. This must be loudly denounced.

63. On the other hand, alternative (b) in para 2 above, apart from being circular, can lead to real difficulties if the rules are complicated and impractical to comply with.
64. The Code's net is cast so wide and has such tight mesh that many athletes and support people will be caught who are not cheats, have not gained an advantage but are just bad at paperwork (and paperwork is not why most athletes choose a sporting career). That some morally innocent athletes have been and will continue to be caught by this system seems (at least implicitly) to be treated by WADA as an acceptable level of by-catch in the fight against doping. But why is any level of by-catch acceptable? And why

- should by-catch be acceptable if better drafting could avoid it?
65. That morally innocent athletes have been caught by this system is an undeniable fact. That morally innocent athletes will continue to be caught by this system seems inevitable.
66. What is also clear is that more cheats will be caught as a result of the new Code.
- That is provided that not too much time, effort and expense is wasted on checking how well athletes fill in forms and chasing down athletes for substances that many astute medical advisors believe should not be on the list.

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Analyzing the New World Anti-Doping Code: A Different Perspective

by Steven Teitler and Herman Ram*

I - Introduction

Observations regarding the World Anti-Doping Code can often be divided in two distinct categories. On the one hand, there are those that defend the doping regulations, stressing the necessity of the described elements of the anti-doping programs and policies. On the other hand are those observations that detail the unfairness of these programs and policies, or the Code's disregard for the privacy and other interests of (professional) athletes.

Marshall and Hale have written a more neutral analysis of the provisions in the new, 2009 Code, pointing out the major changes and offering a critical view to various aspects of the 2009 Code. Our contribution will take the analysis and views of Marshall and Hale as a starting point, offering additional insights and opinions concerning the 2009 Code and the way this set of rules will work out in practice.

II - Who are cheats?

1. Doping is a many-sided phenomenon. This also applies to anti-doping rule violations. The Code distinguishes eight different kinds of violations, but it will come as no surprise that per violation a wide range of variation exists on how these violations may actually take place. This is especially true when it comes to use of prohibited substances:

- An athlete may for instance use a prohibited substance for therapeutic reasons, but without the required Therapeutic Use Exemptions (TUE).
- Another athlete may enter into a sophisticated doping program, using several drugs, following a well prepared scheme which is designed to avoid being caught, with the help of a number of people who provide the necessary knowledge and facilities.
- Another athlete may act on his own, by purchasing a prohibited substance without any outside help or knowledge, while being keenly aware of the nature of his actions.
- Yet another athlete may look for something extra by using supplements, without being aware of the possible risks involved or even checking whether or not any of the contents are mentioned on the Prohibited List.
- A fifth athlete may buy a nutritional supplement, read carefully what ingredients it contains, double check with the manufacturer and his federation that indeed no prohibited substances are mentioned or included, and still be faced with an adverse analytical finding due to contamination.
- A sixth athlete may abuse the asthma medication for which he has received a TUE for performance enhancing purposes.

- A seventh athlete may take a few puffs of marijuana during a party, with no intention of gaining any performance enhancing advantage and without ever being aware that his behaviour involves the use of a prohibited substance.

2. The sports community, the press and the general public make distinctions between these different kinds of violations (to which more examples could easily be added). Some of these violations are not always seen as doping or as abuse of substances with the intent to gain an advantage over other athletes. Consequently, opinions may vary about how the different violations as described above should be treated. Usually there are rather strong feelings about the penalties that should (or should not) follow such behaviour. To many, at least one or two of our imaginary seven athletes should not be considered cheats, and should therefore not be punished.

3. However, for the understanding of how the Code works, it is fundamental to recognize that it intends and is designed to catch all the athletes that are mentioned in our examples. As the intention of the Code is to 'to catch them all', all these athletes are considered to be cheats and should be punished. Under the Code, there is no such thing as a 'by-catch'. In our opinion, this basic principle has to be acknowledged in any discussion about the Code. Therefore, our article is based on the idea that under the Code, there is no by-catch and in this respect our opinions are clearly different from the approach that Marshall and Hale have chosen.

4. Of course, once this basic principle is acknowledged, there are numerous questions that should be asked and addressed, with one of the most important questions being: Is it relevant to the Code that the use of any prohibited substance or method was intentional, and if this distinction is indeed relevant, how does the Code deal with this issue? And a directly related important question is: Is performance enhancement in the Code a central characteristic of doping or is it not? Marshall and Hale¹ have focussed on these issues as well, analyzing the way that the Code deals with 'recreational use'. But by describing something that they call 'by-catch of morally innocent cheats', the authors reach different conclusions than we do. The assessment of other issues, for instance the question whether or not the 2009 Code is more flexible than the 2003 Code, is dependent on the fundamen-

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¹ Hereafter referred to as "the authors".

tal approach that is chosen, and the opinions of the authors may therefore differ from ours.

III - Recreational use

1. The question whether or not the World Anti-Doping Agency (WADA) and the Code deal with the use of 'recreational drugs' or the 'recreational use' of (certain) drugs highlights one of the most fundamental issues of the fight against doping. This issue centres around the question which substances and methods should be included on WADA's Prohibited List. No topic, maybe with the exception of sanctions, has been the subject of more debate within the world of anti-doping.

2. First of all, the Code does not use terminology like 'recreational use' or 'recreational drugs'. There is only one official Prohibited List which declares substances to be prohibited. In addition, there is a group of specified substances, and that's it. So far, it appears to be clear and simple. So, why are things not as simple as they appear to be:

- a. Some substances on the Prohibited List have a different status than others;²
- b. There is much debate about whether some substances belong on the List, because their ability to enhance sport performance is questioned;
- c. Some substances that WADA considers prohibited, are not actually included on the List, yet lead to the standard sanctions when they are detected in the athlete's body.³

In article 4.3.1, the Code establishes three criteria for including a substance or method on the Prohibited List: (i) potential health risk, (ii) performance enhancing potential, and (iii) violation of the "spirit of sport". The Code then adds a fourth criterion in the following article (article 4.3.2): The masking potential of a substance or method. In a previous article (article 4.2), an additional insight can be found. This article describes performance enhancing potential and the potential as a masking agent as the key factors in any evaluation for including a substance or method on the List. The comments to this article refer to the premise that there are certain agents that no one that considers himself an athlete should use. In summary, one can conclude that the criteria of the List are in itself quite clear, but that there is an ongoing debate about how these criteria should be interpreted, applied and prioritised.⁴

3. The fact that there is no mention of either 'recreational drugs' or 'recreational use', does not mean that they are not an issue in the world of anti-doping. On the contrary, they are the subject of continuing discussions between governments, International Federations, national anti-doping organizations (NADOs) and WADA. Opinions vary greatly in this regard:

- a. Some are in favour of removing all recreational drugs from the Prohibited List, because their use is not sport related, and the sports organizations should therefore not want to regulate their use.
- b. Some feel that recreational drugs should be treated the same as steroids (for instance from a formal standpoint, but also from a social, moral and an athletes-as-role-models point of view).
- c. Some argue that all substances should not only be treated equally, but should also be prohibited both in and out of competition. Their view is that training, especially in team sports, also has a competitive element. Hence, why should some substances only be considered performance enhancing in competition (and consequently only be prohibited in competition).
- d. Others have the stance that only substances that are performance enhancing should be included on the list.

There has been no agreement on this subject, nor on the List criteria as mentioned above. The Code currently presents a compromise between the stakeholders. Views may vary from country to country, between International Federations (IFs) and NADOs, but also between NADOs, governments, etc. amongst themselves.

4. The Code purposely stays away from the discussion about whether drugs are recreational drugs, and whether or not they are

used for recreational purposes. Instead, it focuses on the bottom line: Does the presence, use, possession, administration, etc. of a substance or method constitute an anti-doping rule violation or not. In this sense, the authors' statement that as far as WADA is concerned, the use of stimulants as 'party drugs' is left to others to regulate, is not accurate. It disregards the fact that the reason that any athlete has, or claims to have, for the use of doping is hardly relevant in terms of the determination whether an anti-doping rule violation occurred. If an athlete can prove that he has not taken a substance with the intention of enhancing his performance, he will - under the strict liability rule - still be guilty of having violated anti-doping rules.

5. Only after the anti-doping rule violation has been established, do the rules allow the particular circumstances of the case to be taken into account. It is at this point that the time of use, possession, etc. (namely, in or out of competition, in other words the possible recreational element) and the nature of the use come forward. In this regard, the Code indeed applies to recreational use and/or recreational drugs. The Code has, through the rules of specified substances, created a different status for this kind of substances, for purposes of establishing (i.e. reducing) the period of ineligibility that is to be imposed.

6. The complex set of rules and criteria that determine the makeup of the Prohibited List also has consequences on the authors' question regarding what is meant by a drug cheat.

IV - By-catch of morally innocent cheats?

1. The authors describe the Code as rules that are "designed to catch drugs cheats". They continue by posing an interesting question: "What is meant by a drugs cheat?"

2. A year ago, then WADA president Dick Pound offered the following view to the cheat/drug cheat discussion: "The overwhelming majority of doping cases are planned and deliberate, and are carried out with the full knowledge that it is cheating, with the specific objective of gaining an unfair advantage over other competitors".⁵ Interestingly enough, WADA testing statistics at that time showed that the majority of the positive results in fact involved specified substances.⁶

3. The authors rightly point out that the 2009 Code places more emphasis on the issue whether or not an athlete (or other person) intended to enhance his sport performance. Widening the scope of application of the specified substances rule to all substances except anabolic agents, hormones and a restricted amount of stimulants and hormone antagonists and modulators, certainly seems to indicate that WADA's view of "drug cheats" is leaning more towards athletes (and others) who use, administer, etc. prohibited substances for performance enhancing purposes. Considering Pound's statement, this development appears to indicate a significant change from the past.

4. It is however important to note that this increased emphasis on whether or not an athlete's sport performance was enhanced, only applies to the persecution process. It does not apply to the Prohibited List, because:

- a. Three of the four criteria for including a substance or method on WADA's Prohibited List do not include performance enhancement as a factor⁷; and
- b. The lack of performance enhancement is at the core of the "elimination or reduction of the period of ineligibility for specified substances under specific substances" rule.⁸

Therefore, substances do not need to have performance enhancing

2 This applies not only to the in/out of competition element and the specified substances group, but also to the threshold substances, and the different procedures regarding application for a therapeutic use exemption, and the introduction of the "atypical finding" in the 2009 Code.

3 See paragraph IX.

4 Take nicotine for example: Nicotine is unhealthy, it enhances the sport performance (especially in mind sports), and since it is related to smoking it also

falls in the "spirit of sport" category. Despite qualifying for all three criteria, nicotine is not included on the Prohibited List.

5 WADA 2006 Annual Report.

6 Test results indicated a large amount of adverse analytical findings for anabolic agents. However, more than half of these findings were elevated T/E ratios that were not declared actual positive results.

7 The four criteria are, in short: (1) health risk, (2) performance enhancement, (3) spirit of sport, (4) masking potential.

potential in order to be included on the List, and the intention of enhancing the sport performance is only discussed in the process of determining if a period of ineligibility should be imposed (and if so, how long).⁹

5. The complexity of (i) the way the Prohibited List is comprised, (ii) the application of the specified substances rule, and (iii) distinguishing between intentional cheating and inadvertent use, is also reflected in the decisions of disciplinary bodies and arbitration panels in doping cases.

- a. Some disciplinary committees will focus only on the List. In a recent case, a Spanish football (soccer) player was suspended for two years, despite the fact that the substance at hand (finasteride) was declared a specified substance by the time the decision was rendered. In similar cases, disciplinary committees took this change in status concerning finasteride into account by taking a more lenient approach to this kind of positive cases.
- b. In various cases the panels have placed the fact that the athlete violated the rules at the centre of their deliberations, also in case of specified substances. Even though there was no intention to enhance the sport performance, the deliberate use of a prohibited substance justified the imposition of a period of ineligibility, according to these panels.
- c. Possibly depending on the background of the members of the disciplinary committee panel, the focus of the decision can in some cases almost solely be on the question whether any performance enhancement was intended. In these cases, athletes have then received a warning and a reprimand for a positive test involving a specified substances like cannabis, sometimes without actually having to establish on a balance of probabilities that their use was not intended to gain a performance advantage. A mere statement that they used the substance at a party was sufficient.
- d. Panels often wrestle with the issue of how to 'classify' an athlete who has tested positive, because it is so difficult to establish the exact circumstances of a specific case. This can especially be the case when athletes test positive for substances that are not expressly mentioned on the Prohibited List.¹⁰

6. As explained in paragraph II.1, according to the Code no such thing as a by-catch exists. The Code does not differentiate between various kinds of cheats. All adverse analytical findings are intended and should be treated (persecuted) as legitimate anti-doping rule violations. If one looks at how the rules are interpreted and applied, it becomes clear that in the view of many hearing panels there actually is a phenomenon that can be called a "by catch", even though panels hesitate to go into this kind of deliberation. Here is an example of how a CAS panels tries to come to grips with a case it considers a by-catch:

"But the problem with any 'one size fits all' solution is that there are inevitably going to be instances in which the one size does not fit all...It is argued by some that this is an inevitable result of the need to wage a remorseless war against doping in sport, and that in any war there will be the occasional innocent victim".¹¹

WADA obviously does not want to create or contribute to a discussion whether some substances or some cases involving inadvertent use, should be considered a by-catch in the fight against doping in sports. Considering the lack of consensus concerning the Prohibited List, it will not be possible to define which substances or cases should be called by-catch. And since WADA and the Code have been established to achieve harmonization in the field of anti-doping policies, any formal approach towards formulating which doping cases constitute a possible by-catch is out of the question.

7. The inability to reach an agreement on which substances should be considered more important or more serious as doping agents, has led to the situation that all substances and methods should in principle be treated the same. It is our belief that this is exactly why WADA retained the rule that the in-competition detection of any substance or method in connection with a competition leads to the automatic disqualification of all individual results obtained in said competition, also in case of a specified substance violation where the athlete established that he did not intend to enhance his sport performance.

8. The inability to get a clear read on which athletes are "intentional cheaters" and which athletes are "innocent victims" has created the strict liability rule. As far as establishing an anti-doping rule violation is concerned the strict liability rule has not been the subject of discussion, at least not among anti-doping organizations. However, WADA has sought to increase the focus on distinguishing between the different kinds of cheaters by:

- a. Remodelling the specified substances rule;
- b. Widening the scope of application of this rule to more substances;
- c. Applying the no (significant) fault or negligence to all anti-doping rule violations except article 2.4;¹² and
- d. The new article on aggravating circumstances (article 10.6 of the 2009 Code).

9. An area that has not been addressed in the 2009 Code is the test result management and persecution of cases where (i) because of the circumstances, such as the substance involved or the timing of the adverse analytical finding, it (ii) is unlikely that any period of ineligibility will be imposed. These kind of cases may under the 2009 Code still be treated the same way as cases involving steroid or EPO users. Despite their likely outcome, these cases will still have to go through the entire test result management process and hearing process (including public disclosure) at a significant expense: Possibly disproportionate impact for the athlete, as well as claiming a significant amount of anti-doping organization's resources. Resources that many feel should be directed at different areas of fight against doping.

V - Additional flexibility

1. The authors argue that in the 2003 Code there was not enough discretion, citing the standard two year sanction and the lack of defence options for the athlete, as the main culprits. Even though there is truth in this statement, little or no complaints were ever made regarding the discretion that this version of the Code allowed in sanctioning the use of specified substances. As mentioned before, the majority of positive tests involve specified substances, which according to the 2003 Code *"are particularly susceptible to unintentional anti-doping rule violations because of their general availability in medicinal products or which are less likely to be abused as doping agents"*. The 2003 Code also mentions the term 'inadvertent use' in this context.¹³

2. The authors explain that the effect of the changes in the Code is that *"for many substances there will be a discretion that can be applied as to achieve an appropriate sanction"*. With *"many substances"* the authors refer to the increase in the number of specified substances. Since the 2003 Code already contains a system concerning specified substances that provides substantial discretion, it would have been more accurate if the authors had stated that the 2009 Code does not increase the discretion itself, but applies this discretion to a significantly increased amount of prohibited substances.

3. The authors do not include the important clarification that the 2009 Code has actually introduced additional criteria for the reduction of a sanction for the use of a specified substance, which will quite possibly make it more difficult for athletes to see the period of ineligibility reduced.

4. Since WADA was not satisfied with the 'liberal' manner in which some disciplinary bodies applied the specified substances rule, some new elements are introduced in the 2009 Code. The 2003 Code's only requirement to get the standard two year sanction reduced in case of a specified substance, is that the athlete has to establish *"that the use of such a substance was not intended to enhance sport performance"*. The 2009 Code introduces two additional provisions:

8 This is the header of article 10.4 of the 2009 Code.

9 This discretion only applies to specified substances.

10 For instance: CAS 2005/A/726 Calle Williams v/IOC, CAS 2005/A/834 Dubin, Österreichischer Behindertensportverband & Austrian Paralympic Committee v/IPC.

11 CAS 2006/A/1025 Mariano Puerta v/ITF (consideration II.7.18).

12 Article 2.4 of the 2009 Code concerns the failure to file required whereabouts information and missed tests.

13 2003 Code article 10.3, including the comment.