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.

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. One 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 marihuana 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 Hale[1] 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 make-up 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 factor[7]; 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 11.7.18).
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.

a. *"The athlete has to establish how the specified substance entered his body"*; and
b. *"The athlete's degree of fault shall be the criteria considered in assessing any reduction of the period of ineligibility"*.[14]

Ad a: WADA felt that athletes could often get away with making little or no statements about their positive test, and thus leaving disciplinary bodies (i) in the blind about what actually happened regarding the ingestion of the specified substance, and thereby (ii) in a difficult situation concerning the evaluation of the facts (i.e. establishing whether or not there was any intention to enhance the sport performance). In the 2009 Code, WADA has decided to put more pressure on the athletes (and other persons accused of committing an anti-doping rule violation) by introducing this new element to article 10.4, and even more by introducing the new article 3.2.4.[15]

Ad b: The second new element was introduced to emphasize the caution that should be applied by every professional or elite athlete. This caution has been described in various CAS decisions (mostly concerning the use of nutritional supplements), and the new Code has translated this in the standard phrase *"the expected standard of behavior"*.[16]

Both additional provisions may prove to be significant hurdles for the athlete.

5. Especially in a case of contaminated nutritional supplements or a case concerning a recreational drug, athletes will face an uphill battle when trying to establish the source of their adverse analytical finding.

In these cases an athlete may not be able to offer any more evidence than his own word or statement.[17] The ensuing question then is whether the athlete has established how the substance entered his body in the view of the hearing body. This will depend on how the hearing body interprets article 3.1 of the Code on burdens and standards of proof. Regarding establishing how the specified substance entered an athletes body, article 3.1 requires the proof on a balance of probabilities.[18] Nonetheless, hearing bodies may have varying opinions on how an athlete should fulfil his burden of proof. An interesting example of this is the second Mariano Puerta case[19], even though that did not involve a substance that was specified at the time. In the first instance, the ITF tribunal ruled that Puerta did not meet the requirements of proof, and therefore ruled that he had not established how the substance entered his body. Consequently, the tribunal could not apply the "no (significant) fault or negligence rule".[20] However, in the appeal before CAS, the panel found that Puerta had in fact, on a balance of probability, established how the substance entered his body.[21] This was a key factor in the reduced sanction that was ultimately imposed.

6. The trick concerning the application of the reduction of sanctions in cases of the use (presence) or possession of specified substances, is that if an athlete cannot establish how the substance entered his body (obviously a situation that is by no means far fetched when contaminated nutritional substances or so called party-drugs are involved), the 'specified substance regime' does not apply, and instead the standard two year period of ineligibility will be imposed.[22] In short, whether or not an athlete has any chance of successfully calling upon the option of the reduction of the standard two year sanction, will often depend on whether the disciplinary body is willing to believe the athlete's (side of the) story.

The 2009 Code makes a special point of noting that specified substances *"are not necessarily less serious agents for purposes of sports doping... for that reason, an Athlete who does not meet the criteria under this Article would receive a two-year period of Ineligibility and could receive up to a four-year period of Ineligibility under Article 10.6"*.[23] This last point presents a rather scary scenario for athletes who cannot provide evidence regarding the origin of their positive test.

7. After the athlete has established the source of the adverse analytical finding, as well as the fact that he did not intend to gain a performance advantage, *"the athlete's or other persons degree of fault shall then be the criteria considered in assessing any reduction of the period of ineligibility"*.[24]

The wording *"any reduction"* suggests a restrictive application of any sanction reduction under article 10.4 of the 2009 Code. Combine this with the increase of the maximum ineligibility period in case of a first offence from one to two years, and one could wonder whether the position of the athlete has improved all that much. After all, by establishing how the prohibited substance entered his body, the athlete will in all likelihood admit to acting with some degree of fault. It is even possible that tribunals - from 2009 on - will impose periods of ineligibility that are closer to the one year period that has more or less become the standard for doping cases not involving specified substances in cases where the athlete established that he acted without significant fault or negligence (where at the moment, sanctions for specified substances are more in the warning to two month ineligibility range).

8. Regarding additional discretion in the 2009 Code when non-specified substances are involved, the conclusion is that the increased flexibility in part is attributable to applying the *existing* options for discretion to more anti-doping rule violations.

The existing system itself increases flexibility by expanding the reduction for substantial assistance, and including the possibility of reduction in case of a (timely) admission by the athlete. Important note: The article that has been applied the most in case of any reduction (article 10.5.2: No significant fault or negligence) has in fact not been changed.

9. The question can be asked whether the "morally innocent athlete", as described by the authors, is better off in the 2009 Code. We refer here to the CAS decision involving the American athlete Torri Edwards.[25] This case involved one isolated case of inadvertent use in which the athlete undeniably was negligent, although with very innocent and limited (if any) consequences as far as unfair competitive advantage is concerned. The panel argued in her case that it was *"satisfied that she (Edwards) has conducted herself with honesty, integrity and character and that she has not sought to gain any improper advantage or to "cheat" in any way"*. This conclusion did not help Edwards, who received a two year suspension. As far as non-specified substances are concerned, the improved discretion under the 2009 Code will not help an athlete in a case like Torri Edwards, hence such an outcome will still be possible.

10. The fact that in the past as well as the present, several disciplinary bodies (mostly on the national level) have not applied the rules properly, has contributed to the current setting, where the Code does not allow the disciplinary bodies the discretion they could or perhaps should have. Due to the amount of decisions with an outcome that was not Code-compliant, WADA has felt it was necessary - also in the 2009 Code - to limit the discretion by establishing fixed or minimum sanctions, and to install some boundaries for evaluating and weighing exceptional circumstances. The side effect of these restrictions can be

14 Under the 2003 Code, some panels have used the degree of fault or negligence as a criterion, others have not.
15 Which allows a tribunal to draw an inference adverse to the athlete or other person in case that athlete or person refuses to appear at a hearing and refuses to answer questions from the tribunal or anti-doping organization.
16 See the comments to article 10.4 and 10.5.
17 WADA accredited laboratories do not usually analyse supplements for athletes who are involved in a doping case. Moreover, labs will need an unopened supplement from the same production batch in order to make any reliable kind of statement about contamination. Athletes usually cannot meet these requirements. When party-drugs are involved, athletes may not be able to find any (reliable) witnesses of their drug use.
18 See the comment to article 10.4 of the 2009 Code.
19 In 2003 tennis player Mariano Puerta tested positive for clenbuterol. In 2005, Puerta tested positive for etilefrine.
20 Article 10.5 of the Code is only applicable in cases where the athlete can establish how the substance entered his body.
21 CAS 2006/A/1025 Mariano Puerta v/ITF (consideration 11.3.8).
22 Unless the athlete can establish that there was no (significant) fault or negligence on his part, which (if one looks at CAS case law) will be difficult when the athletes attributes his positive finding to either contaminated nutritional supplements or party-drugs. It is important to note here that 10.5 only applies to specified substances when 10.4 does not apply (see comment to article 10.5). Hence, articles 10.4 and 10.5 cannot be applied at the same time to a case involving specified substances.
23 Comment to article 10.4.
24 Article 10.4 of the 2009 Code.
25 CAS arbitration N° CAS OG 04/003.

that capable, qualified and experienced disciplinary committees, panels or arbitrators may find themselves in a situation where they cannot come to a decision that takes all circumstances into account.

11. Another area of additional flexibility as detailed by the authors, is the definition of "athlete" and the possible consequences for TUEs. The changes to the definition of athletes provide flexibility towards the application of anti-doping policies to athletes who compete at a lower level. It is important to note here, that the 2003 Code did already, through article 4.4 on TUEs and the International Standard for Testing, allow some flexibility in this regard.[26] Several NADOs have already - to varying degrees - established specific TUE rules for lower or recreational level athletes.[27]

12. Regarding TUEs, the authors correctly point out that not all aspects of the Code need to be applied to lower level athletes. Their assumption that for some substances a letter from the prescribing doctor might be enough in the future, is not further substantiated and appears to be without merit. Until now, there has been no indication from WADA that a return to the past is at all likely in this regard.[28] The first draft of the revised International Standard for Therapeutic Use Exemptions contained some significant changes from the current procedures, but no indication was found that a departure from the current system of approval of therapeutic use is imminent.[29] The TUE procedures for lower level athletes may be altered, but will not go so far that they will allow a step away from the level of harmonization that has been established relating to TUEs.

13. The additional flexibility resulting from the new definition of "athlete" applies to athletes who are neither international or national level athletes.[30] Hence, there will be no consequences of this change for elite athletes. The improved flexibility will mainly benefit those NADOs that are required, for instance by law, to also direct the doping control part of their anti-doping policies to recreational level athletes.

VI - Breach of a sanction[31]

1. The authors claim that the new rule to automatically restart the sanction from the date of the breach could operate harshly, and that there is a lack of fairness and equality in this: *"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"*.

One could take a different approach to this reasoning, by arguing that a less serious penalty for a breach of a sanction after a larger part of the period of ineligibility has passed, would lead to an increase in the number of violations.

2. Several points could be raised concerning the meaning and application of this new sanction, because it also applies to participating in competitions that have no relationship whatsoever with the Code or the Olympic Movement: *"No Athlete or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity... in Competitions authorized or organized by any professional league or any international- or national -level Event organization"*.[32]

a. In this regard, one could raise the issue whether anti-doping organizations can or should assume a role in which athletes are penalized for participating in sporting activities that do not fall within the scope or authority of these anti-doping organizations. Normally, the scope of the statutes of anti-doping organizations[33] is directed inwards: It applies to members, participants as well as individuals and legal entities with whom a contractual or other legally binding relationship has been established (which could be International and National Federations, regional federations, athletes, local teams, etc.). One could argue that once that relationship has ended, the member, participant, etc. operates outside the statutory scope of the anti-doping organization, and therefore is no longer subject to the rules of the anti-doping organization. That would mean that his actions cannot lead to a penalty of the organization he is no longer associated with.

Of course this is different when an athlete is still a member of his national federation or has other legal ties to the anti-doping rules of an anti-doping organization. When this is the case, he should abide by the applicable rules. However, article 10.10.2 does not make any distinction in this regard. That is why one can argue that individuals that are no longer part of the Olympic Movement or formally subject to the rules of a signatory to the Code, should be able to participate in activities outside of the Olympic Movement.

b. It is important to note here that as long as the athlete or other person does not breach the imposed period of ineligibility by participating in a competition organized under the auspices of his (inter)national federation or any signatory to the Code, he cannot and did not participate in any capacity in any sport, competition or event that can in any way be part of or associated with the Olympic Movement, which in essence means that (i) the sanction is still very much effective and intact, and he (ii) complied with the sanction to the extent that he did not (further) disturb the level playing field or engage in any actions that are unfair under the same set of rules that are based on the Code.

c. One has to take into account here that participating in another[34] league or competition is not by itself unethical or against the spirit of sport, nor does it imply that the athlete concerned is using prohibited substances or involved in any other anti-doping rule violation. Participation in sports is usually seen as something positive.

d. Another issue is that the athlete (or other person) does not receive any credit for the period of the suspension that he has actually served (since he was actually ineligible, hence not able to continue to compete or engage in activity as he was before his period of ineligibility commenced).

e. To punish an athlete again, for engaging in conduct that does not necessarily indicates or involve any kind of foul play or improper or undesirable behavior, needs careful consideration. Instead of an automatic sanction, it might have been beneficial to create an option of review for these kind of cases, where a tribunal evaluates the facts and the circumstances, before imposing any sanctions.

f. The 2009 Code could also have established the rule that any period of ineligibility will be suspended for the time that an athlete competes in competitions organized by any professional league or (inter)national level event organizations. This alternative would reach the same effect, yet seem less harsh.

VII - No more gaps

The authors pose the question whether the 2009 Code has plugged all the gaps. Unfortunately, they do not further address this specific issue in their article. We are of the opinion that it would be unrealistic to assume that the 2009 Code will plug all the gaps, if only for the reason that the process of revising the Code was not per se directed at plugging any existing gaps. A more realistic - and from a practical point of view equally interesting - question is whether the 2009 Code will provide solutions for the problems that have risen during the last years. We will discuss some of these issues.

VIII - Privacy

1. Regarding privacy, WADA has recently made strides as far as data protection is concerned. Over the years, the protection of personal

26 IST article 4.3 (Registered Testing Pool), article 4.5 (Test Distribution Planning).

27 These rules could for instance allow the retroactive approval of the therapeutic use of a prohibited substance, based on the requirements and criteria in the TUE Standard.

28 In the era before the Code, the acceptance of doctors notes was common practice in doping regulations.

29 The TUE Standard contains standard and abbreviated procedures (only for certain substances) for the approval of therapeutic use of prohibited substances. The standard procedure involves an evaluation and approval process, carried out by a TUE committee. This process is different for the abbreviated procedures. However, in these cases therapeutic use still has to be reported through required forms, is still evaluated based on the TUE Standard and results in an approval form. There is a possibility that the abbreviated procedure may be dropped in favour of the standard procedure being carried out retroactively for these substances.

30 The last draft version of the 2009 Code applied the flexibility also to "national level athletes". However, this conflicted with other sections of the definition and apparently was an omission, because WADA changed it in the final version.

31 Article 10.10.2 of the 2009 Code.

32 Article 10.10.1 of the 2009 Code.

33 For instance: International Federations, NADOs, National Olympic Committees and major event organizers.

information has been one of the most overlooked key areas in anti-doping. Even though the testing of urine and blood samples leads to anti-doping organizations collecting large amounts of (medical and thus sensitive) information, and the TUE process obviously does as well, data protection and the possible risks involved (when not offering proper safeguards) never garnered much interest. Despite national and international law dictating them to do otherwise, some anti-doping organizations saw no problem in making sensitive personal data publicly available.

2. WADA has addressed this issue in general terms in article 14.6 of the 2009 Code, but most improvements will be produced by the new International Standard on the Protection of (Data) Privacy that WADA is currently drafting. This standard will provide the much needed increase of the protection of athletes' data and raise it to a level that is close to the one prescribed in the Directive of the European Union on this subject.[35] Although it will take time for anti-doping organizations to fully comply with this standard, WADA should receive credit for undertaking the development of such a mandatory international standard.

3. However, WADA's endeavours regarding data protection will not stop another developing discussion on the privacy subject, namely the influence that the new whereabouts and missed test rules will bring to bear on an athlete's personal life and control (or restrict) his freedom of movement.[36]

IX - Open List

1. Common sense would have an athlete assume that those substances mentioned on the Prohibited List are prohibited, whereas those substances not included on the Prohibited List are not prohibited. Unfortunately for athletes, (their) life is not that simple. A closer look at the List reveals that some categories of substances are followed by the phrase: *"and other substances with (a) similar chemical structure or similar biological effect(s)"*.[37] This phrase has, or is intended to have, the effect that all substances with either a similar chemical structure or a similar biological effect should in fact be considered prohibited as if they were actually specifically mentioned (included) in the Prohibited List. These kind of (prohibited) substances are often dubbed "related substances".

2. The relevance of and need for a provision on the list that it includes related substances, is:

a. The wish not to exclude any newly developed substances from the Prohibited List. The prime example here is THG, also known as 'The Clear', made famous by the BALCO scandal (and athletes like Tim Montgomery, Dwain Chambers, among others). The 'open' element basically provides a safety net against those who try to beat the system by developing new performance enhancing substances or methods, and new masking agents;
b. The fact that it is difficult to include a limitative list of all possible substances per category on the Prohibited List. The List only includes the most relevant substances per category. The main example here is Modafinil (and the American athlete Kelli White).[38]

3. Although these are plausible arguments for the 'open' element of the List, and some major doping scandals have been based on this "related substance" clause, they do not automatically negate the significant side-effect of this clause: 'Catching' athletes who did not and could not know that they were ingesting or using a substance that WADA considered part of the Prohibited List. There is a legitimate question about whether an athlete can be penalized for ingesting a substance that neither he nor his NADO nor his National Federation knows is prohibited. This question deals with a basic principle of law: There has to be a clearly established rule before there can be a violation. The principle can be found in national constitutions and international (human rights) conventions.

4. Another downside of this 'open' element is that athletes are actually more punished for using a nutritional supplement (which turned out to be contaminated with a related substance) than for using a prohibited substance. The use of supplements itself does not constitute an anti-doping rule violation. However, between WADA's stance that related substances should be treated as if they are expressly mentioned on the Prohibited List, and CAS case law that using supplements equals not applying proper caution (and thus negligent behavior[39]), the discussion about legality gets lost, and those unknown related substances lead to a standard sanction when they are ingested via the use of a nutritional supplement.

5. The way the "related substances" clause works in practice, is the following. WADA establishes and updates a list of substances that, per category, have a similar chemical structure or similar biological effect(s), and distributes this list among the WADA accredited labs.[40] This list is not an official part of the Prohibited List, and WADA does not communicate it to all anti-doping organizations. It is not clear whether all WADA accredited laboratories screen samples taken from athletes for all the substances on this unofficial list. Case law actually points out that when labs find a related substance, they often first ask WADA if the detected substance is really prohibited.

The strange reality that athletes are thus faced with, is that they are persecuted for the ingestion or use of a substance that their governing body (which can be either the International Federation, the NADO or their National Federation) did not know is prohibited.[41] Even more so, based on this premise, the lab authorized by the anti-doping organization to scan samples for prohibited substances is not even sure about the status of these "related substances". Nonetheless, the strict liability principle is fully applied, also to these cases.

6. Despite the issue with the legality of the "related substances" clause, this clause seems justified in cases where an athlete is acting with intent, willingly searching for unmentioned substances that will have the same performance enhancing effect as a substance expressly mentioned on the List. However, when such intent can not be established, or is obviously absent, the question is not only whether the substance is in fact prohibited (from a legality point of view), but also whether an athlete can be held accountable for ingesting such a substance. Even if the substance is (i) declared prohibited and (ii) the strict liability rule is upheld, still (iii) the athlete could be considered to have acted without fault or negligence.[42] Curiously enough, concerning related substances, case law does not always attempt to distinguish between athletes acting with intent, and those who did not. Only one CAS decision is known where the "related substances" clause itself is discussed.[43]

To summarize, it seems opportune to combine the "and other substances" provision with:

a. More clarity and transparency concerning the process of designating a substance as "related";
b. More and better communication about these substances to athletes and anti-doping organizations;
c. A more exhaustive list of prohibited substances, including all the "related substances" that are already so designated by WADA.

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34 With which we refer to leagues or events that are not part of the Olympic Movement and/or do not operate under the rules of the Code.

35 Directive 95/46/EC of the European Union and of the Council on the protection of individuals with regard to processing of personal data and on the free movement of such data.

36 The current International Standard for Testing is undergoing major changes, and will include a comprehensive and detailed system on gathering whereabouts information and registering filing failures and missed tests.

37 Or the reference: "including but not limited to:".

38 Legislation on illicit drugs may contain wording that is more or less comparable to the "other substances" wording on the Prohibited List. However, the wording and application is more restrictive (i.e. directed at the chemical structure and at people that act with intent).

39 Unless the athlete meets certain requirements: CAS 2005/A/847 Hans Knauss v/FIS.

40 The term "apparently" is used, because there is no formal rule on how the "related substances" clause is applied. Rather our description is based on WADA statements in relevant CAS-decisions.

41 WADA in fact confirmed this conclusion by stating in the Dubin case (CAS 2005/A/834) that: "The substance is clearly indicated as (a) prohibited substance by several anti-doping agencies and international federations" (our emphasis).

42 Although in that case, no period of ineligibility would be imposed (or below a year), it would still lead to disqualification of individual results, and mean that the athlete committed an anti-doping rule violation.

43 CAS 2005/A/726 Calle Williams v/IOC.

X - New rights of appeal

1. The authors state that *"there are new rights of appeal which essentially give greater rights to WADA and International Federations at the expense of NADOs and Athletes"*. However, they do not explain how or why the changes to the appeal section of the 2009 Code improve the possibilities for IFs and decrease them for NADOs. Perhaps the authors are referring to the comment to article 13.3, which explains:

"Nothing in this Article prohibits an International Federation from also having rules which authorize it to assume jurisdiction for matters in which the results management performed by one of its National Federations has been inappropriately delayed".

What is clear, is that WADA obtains far greater powers in the new Code, at the expense of ADOs. Since IFs are also ADOs, in theory the position of the IFs is also affected by the increased powers of WADA. But of course, as has always been the case, IFs have greater rights than National Federations (NFs) based on their authority over the member national federations. This was already the case under the 2003 Code, and is actually not affected by the revision of the Code.

2. The different roles and responsibilities between IFs and NADOs have been the subject of much debate over the years. NADOs may on the national level have a position similar to the one IFs have on the international level. This means that NFs sometimes at the same time have to comply with the rules of both their NADO and their IF. In cases that differences exist between these rules, there is a potential problem. Various NADOs have argued that when such cases involve doping issues, the Code gives more rights to IFs, and that in this sense the Code protects the position of the IF at the expense of the NADO. In this sense, it has been argued that the Code establishes two types of ADOs, and assigns a different (lower) status to NADOs.

3. It is important to note here that the Code contains a provision that is supposed to ensure that signatories to the Code recognize and respect each others decisions when these comply with the Code:

"Subject to the right to appeal provided in Article 13, Testing, therapeutic use exemptions and hearing results or other final adjudications of any Signatory which are consistent with the Code and are within that Signatory's authority, shall be recognized and respected by all other Signatories" (article 15.4.1).

Such a provision is important in order for the Code to fulfil its purpose: Harmonization.[44]

4. However, several IFs have not incorporated this provision in their anti-doping regulations. While others do, they do not apply it to decisions taken on the national level. Of course, article 15.4.1 applies to signatories only, and because NFs are not signatories to the Code, decisions by NFs will never be applicable to mutual recognition based on article 15.4.1. This is different for NADOs, as they are signatories to the Code. However, considering the IF-NF relationship, and how the authority is distributed in that relationship, it will not come as a surprise that IFs are not eager to being forced to recognize any decisions taken on the national level (by NADOs or by NFs). Their position as the governing body in a specific sport will always make the mandatory application of mutual recognition under the Code difficult for IFs.

5. Concerning mutual recognition, WADA gives TUEs a special status. Despite the fact that one of the main objectives of the Code is to establish harmonization, WADA has basically abandoned this objective when it comes to TUEs:

a. WADA allows each ADO to establish additional requirements for TUE applications, meaning that even within a sport different rules apply to the same athlete depending on whether he applies to his NADO or his IF for a TUE;
b. TUEs granted by NADOs are not subject to article 15.4.1, even when they are granted in compliance with the Code and the TUE Standard.

Now, we understand that IFs may have strong reservations concerning handing over the final 'say so' in TUE matters (that possibly directly relate to IF competition) to the NADOs. But for WADA to confirm this reluctance in the 2009 Code, despite the detrimental effect it will have on harmonization, is remarkable.

6. WADA explains this special status by claiming that NADOs do not have authority (jurisdiction) to grant TUEs to international level athletes. We feel this explanation is too simplistic and does not take the provisions of the Code into account.

a. The Code's definition of international level athlete is: *"Athletes designated by one or more International Federations as being within the Registered Testing Pool for an International Federation"*. The issue here is that many IFs have either not established any registered testing pool (RTP), or have included only a very limited amount of athletes in their RTP. This means that the majority of the athletes that compete at the international level, will still only be included in the national RTP, as established by their respective NADOs.
b. Athletes that are only included in the national RTP, fall under the NADO's authority, and can consequently obtain a TUE from their NADO, in accordance with the TUE provisions established by the 2009 Code: *"Each National Anti-Doping Organization shall ensure, for all Athletes within its jurisdiction that have not been included in an International Federation Registered Testing Pool, that a process is in place whereby Athletes with documented medical conditions requiring the Use of a Prohibited Substance or a Prohibited Method may request a therapeutic use exemption"*.[45]
c. If we then return our focus to article 15.4.1 on mutual recognition, we find that: *"therapeutic use exemptions…of any Signatory which are consistent with the Code and are within that Signatory's authority, shall be recognized and respected by all other Signatories"*. As (i) NADOs are signatories and (ii) athletes who are only included in the NADO's RTP fall under that NADO's authority, there can be no question or confusion about the fact that IFs have to recognize TUEs granted by NADOs to these athletes.
d. The complexity starts when one looks at the Code's provisions for TUEs for international level athletes: *"Each International Federation shall ensure, for International-Level Athletes or any other Athlete who is entered in an International Event, that a process is in place whereby Athletes with documented medical conditions requiring the Use of a Prohibited Substance or a Prohibited Method may request a therapeutic use exemption"*.

This section indicates that the IFs' scope of responsibility is wider than merely the international level athletes (meaning athletes in the IF's RTP). This scope applies also to athletes that participate in IF competitions. When we take this into account, WADA's comment to article 15.4.1[46] is meant to explain that (i) NADOs do not have authority to grant TUEs to athlete that participate in IF competitions and/or (ii) that national TUEs are not valid in international competition.[47]

e. However, in this regard WADA overlooks the fact that the NADO section in article 4.4 of the 2009 Code establishes the authority of NADOs to grant TUEs to all athletes "*that have not been included in an International Federation Registered Testing Pool*". This authority is not limited by participation of athletes in international events. This section of the Code creates an overlap in authority between IFs and NADOs:
   - IFs have authority to grant TUEs to (i) athletes who are included in their RTP, and (ii) athletes who are entered in an international event (but are not part of the IF's RTP);
   - NADOs have authority to grant TUEs to all athletes who are not included in the RTP of any IF.

44 According to the introduction of the Code: "To ensure harmonized, coordinated and effective anti-doping programs".

45 Article 4.4 of the 2009 Code.

46 There has in the past been some confusion in the interpretation of this Article with regard to therapeutic use exemptions. Unless provided otherwise by the rules of an International Federation or an agreement with an International Federation, National Anti-Doping Organizations do not have "authority" to grant therapeutic use exemptions to International-Level Athletes.

47 The section of article 4.4 that applies to IFs could have been clarified by adding the reference "are scheduled to participate in an international event", because that is how this article is applied in practice by IFs.

f. The conclusion can therefore only be that the authority of NADOs to grant TUEs to athletes in their RTP, is limited to those athletes that are not included in the RTP of any IF. This is however the only limitation established by the Code. Only athletes expressly included in an IF's RTP fall outside of the authority of NADOs. Once an athlete is not included in the IF's RTP, the authority of a NADO concerning TUEs is *not* limited by the participation of an athlete in an international event. Hence, participation in international events does not affect the NADO's authority to grant TUEs. As this authority is then in force also when an athlete participates in an IF competition, article 15.4.1 is fully applicable and the national TUE of such a participant should be recognized and respected by the IF.

g. Of course, IFs can easily sidestep this issue by establishing the rule in their regulations that all athletes that are participating or scheduled to participate in an IF competition are part of the IF's RTP for this duration. Some IFs have already taken this approach. The consequence of such an approach is that IFs then have exclusive jurisdiction over these athletes when it comes to TUEs.

Doping As a Crime?

The Policy Issue Concerning the Choice of Method to Deal with Doping

by **Julia Völlmecke***

I. Introduction

Doping in sports has become popular within the past few years. The Tour de France scandals in 1998 and recently in 2007 or the BALCO affair in 2003[1] are only a handful of examples of how doping infractions seriously hit the news' headlines. More and more athletes are going to use performance enhancing drugs. Doping seems to have become an integral characteristic of sports competitions, despite the diverse side-effects the use of prohibited substances may have.

Fortunately, governments seem to have recognised the alarming development of doping cases. The USA, for example, used to be very reluctant in restricting domestic professional sports by imposing drug laws to sports.[2] To ensure a sustainable successful economy, the government deferred decision-making to private organisations. Since government regulation was seen as potentially profit limiting, restrictions should only have been imposed if necessary.[3] The attitude changed significantly when steroids in sports became a national issue and began to make headlines in the news on a regular basis.[4] Most importantly, the US government recognised the effect steroid use can have on youths and amateur athletes[5] and now sees regulation as a necessary step to address the issue. The Clean Sports Act of 2005 has been introduced to keep teenagers and youths away from performance enhancing drugs by eliminating their use by professionals in the US. [6] The bill provides for the uniform adoption by the four major American sports leagues of rules similar to the strict Olympic enhancement policies in order to eradicate steroid and enhancement use in competitive professional athletics.[7] Some European countries also have implemented anti-doping laws including criminal provisions to combat doping infractions. France, Spain, Belgium and Italy are only a few countries to mention here.[8]

Switzerland, for example, adopted a dual doping sanction system where sanctions can be imposed by sports governing organisations or by public authorities.[9] The Federal Act on the Advancement of Sports of 2002 provides criminal sanctions in order to expand the sanctions of sports organisations.

This year, Germany finally introduced an Anti-Doping Law. The government recognised that doping tends to destroy ethnical-moral values of the sports world and took it as its obligation to protect society's health.[10] Since 66 percent of all adults living in Germany participate in sports regularly and see professional athletes as their heroes, politicians assumed that the fight against doping would have a positive effect on society's health.[11] Whether the new Anti-Doping Law can be seen as innovative in the fight against doping is still contested. Opponents still question whether the government should get involved in the combat against doping and face the difficulties the introduction of such legislation entails.

The policy issue concerning the choice of method to deal with doping is not over yet.

II. The Situation in Germany

In Germany, both the sport itself and the state are dealing with doping. Whilst the sport and its authorities are primarily controlling and sanctioning athletes, the state is more reluctant in regulating doping issues. This might have changed within the past few years.

The state has become seriously concerned about the increase of doping incidents.

Consequently, it has been thinking of extending its legal provisions to profoundly regulate anti-doping violations. By this time, the State is already processing a so called Anti-Doping Law[12] which expands existing regulations.

Before the new law was introduced by the German government, the debate of whether to interfere in sports regulations through governmental legislation, and criminal sanctions in particular, had been broad and controversial. Since the new Anti-Doping Law is not satisfying for many opponents, the discussion is still ongoing.

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1 For the whole story see Mark Fainaru-Wada and Lance Williams *Game of Shadows, Barry Bonds, BALCO and the Steroids Scandal that Rocked Professional Sports* (Gotham Books, New York/USA, 2006).

2 Colin Leitner "Steroids and Drug Enhancements in Sports: The Real Problem and the Real Solution" (2006) 3 DePaul J Sports L & Contemp Probs 192, 204.

3 Ibid.

4 Ibid.

5 Ibid 210.

6 Ibid 212.

7 Ibid.

8 See Rainer T Cherkeh and Carsten Momsen "Doping als Wettberwebsverzerrung? - Möglichkeiten der Strafrechtlichen Erfassung des Dopings unter bsonderer Berücksichtigung der Schädigung von Mitberwerbern" NJW 2001 Heft 24, 1747.

9 Christoph Gasser and Eva Schweizer "Switzerland: Doping Santions System" ISLR 2005, 4 (NOV), 94.

10 Entwurf eines Gesetzes zur Verbesserung der Bekämpfung des Dopings im Sport (30.05.2007) Deutscher Bundestag, http://dip.bundestag.de/brd/2007/0223-07.pdf > (at 13 September 2007).

11 Ibid.

12 Entwurf eines Gesetzes zur Verbesserung der Bekämpfung des Dopings im Sport, above n 10.