2012 September 25

Dear Colleagues:

INADO Update #5

iNADO's List of Possible Code Commentary for NADOs/RADOs to make to WADA

This document suggests positions NADOs and RADOs may wish to take in comments to WADA on Draft 1.0 of the new World Anti-Doping Code. Please cut and paste into your own comments whichever positions you feel comfortable with, or adapt them as you see fit.

This round of comments on the Code is no later than due October 10, 2012. For instructions on how to comment, see: http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/Code-Review/Consultation-Process/

Code Draft 1.0 Proposals to Support

Reduce the Time Period for Whereabouts/Missed Tests

2.4: Reducing the time period in which three whereabouts failures of missed tests are an anti-doping rule violation is positive. It will allow NADOs to focus on real cheaters, and not on those athletes who are merely disorganised or from countries where updating whereabouts information is difficult. As Article 2.4 still states, missed tests or whereabouts failures can also be pursued as avoiding doping control if the evidence will support such assertions.

Two New Anti-Doping Rule Violations (ADRVs)

2.9 & 2.10: "Complicity" and "prohibited association" should be explicit ADRVs to better protect clean athletes. However, for obvious reasons, proposed Article 2.10 will have to be amended so that it does not apply to "association" with an athlete's parents or other immediate family.

Performance Enhancement is the Key List Criteria

4.3: Performance enhancement as the key criteria for the Prohibited List clearly states the reason for anti-doping. This is a positive change.

A Hearing is Not Needed in all Cases

Article 7: We support the changes made in the introductory comment of Article 7. This makes it clear that not all anti-doping rule violations require a hearing, for example where there is agreement for the athlete or other person to accept the consequences set out in the Code.

Mandatory Reporting is Not Required for Minors or in Cases of Substances of Abuse.

10.4.1.1 & 14.3.6: These are helpful additions to limit the negative impact of non-cheating forms of doping or those involving minors.

Payment of CAS Cost Awards Must be Completed before Return to Competition

10.13: This is only fair to clean athletes and to the NADOs which protect them and which have to incur legal costs prosecuting cheaters. But the proposal should include any cost awards imposed by any national anti-doping hearing body or disciplinary body, as well as by CAS.

More Four Year Bans

10.6: Broadening the circumstances in which a four year ban must be imposed sends a positive signal to clean athletes. It will allow NADOs to treat serious and deliberate doping more severely than doping due to stupidity or poor athlete support.

The ADO with Results Management Authority

Article 15.3 does not require further amendment. The current provisions work perfectly well, as USADA's handling of the Lance Armstrong matter demonstrates.

However, in Article 15.3.1, the additional phrase "or by WADA" seems misplaced or, at least, needs to be preceded and followed by commas.

Extending the Statute of Limitations

17: It is useful to extend the statute of limitations. This will permit investigations of "non-analytical positives" and of admissions made long after the fact to take place in circumstances where NADOs did not or could not know at the time that doping took place.

Mandatory Education about Whereabouts Requirements

Article 18.2: We agree with the addition to Article 18.2. We also believe that education should be a mandatory component of any anti-doping program, and that all sport organizations and personnel should receive education.

Automatic Investigations by NADOs

20.5.8: There should always be an automatic investigation into the athlete's entourage whenever the athlete commits an ADRV. But the same obligation should be placed on International Federations (Article 20.3) and on NOCs/NPCs (Article 20.4). And cooperation among ADOs in such investigations should be required.

The Definition of "Fault"

The new definition of "fault" should be supported. It will respond to the recent CAS decision in *Armstrong* (CAS 2012/A/2756, September 21, 2012) that suggests that "fault" has different content for different Code Articles.

Code Draft 1.0 Proposals to Change

Do Not Eliminate the B Sample

2.1.1 & 7: Eliminating the B sample analysis creates more issues than it solves. It is not clear that it will save much time in the doping control station or the laboratory or much money in equipment, transportation and analysis costs. (For example, fewer than 2% urine samples produce an adverse analytical finding and in many of these cases the B sample is not analysed. So the B sample analysis costs are not a major burden on ADOs.) Eliminating the B sample analysis would remove a useful safeguard and may reduce athlete, public and legal confidence in doping control and in sport arbitration. While the number is statistically insignificant, over the years there have been B samples that did not confirm the A sample. For those athletes, that outcome has been critical.

Require Offensive Conduct towards Doping Control Officials to be Punishable

Article 2.5: According to the Comment, offensive conduct towards doping control officials "should" be addressed in the disciplinary rules of sport organizations. We believe the wording ought to be "shall" rather than "should." Sport organizations must deal effectively with any offensive conduct towards doping control officials. WADA

should develop a standard template document which could be incorporated into sport organizations' code of conducts that relates to this issue.

Testing all Samples for all Prohibited Substances is Not Intelligent Testing

6.4: The requirement to test for all prohibited substances in all samples is contrary to intelligent testing and a complete waste of resources. Why test a Boccia athlete who has cerebral palsy for the full range of prohibited substances and practices (such as blood doping). Why collect blood samples and conduct the athlete biological passport on athletes within the sport of curling? Does it make sense to be analyzing urine samples for EPO within weightlifting? Should NADOs collect both urine and blood samples from all athletes in every doping control test? There will simply be insufficient resources available to operate testing programs of this nature.

We fully support the notion of intelligence-based testing. Such an approach needs to include reduced analytical screens that are the most appropriate and effective based on certain sports but also dependent upon the level of athlete, risk factors for the athlete, current intelligence on the athlete, etc. This approach would be consistent with intelligence-based testing and would be much more cost effective. We suggest amending the wording to include the phrase "using the most effective analytical methods available".

Do Not Prohibit Training during a Provisional Suspension

7.2: We do not support the amendments to the definition of "Consequences of Anti-Doping Rule Violations" with respect to Provisional Suspensions. Athletes may successfully challenge ADRVs and should not be prohibited from training while their case is pending. The Code should enable athletes to return to competition as soon as possible where a successful challenge is made. Taking away an athlete's rights to train (by adding the words "or activity" to the definition) is at odds with new changes to Article 10.10.2. Why should athletes who have been found guilty of an ADRV be allowed to train while ineligible but athletes who are yet to have a violation recorded against them be stopped from training? We suggest that such a provision is not proportional and the existing Code wording should be retained.

Treat Whereabouts Failures More Leniently than Deliberate Doping

10.3.3: Change the proposed wording for the sanction range for athlete whereabouts violations. The minimum sanction range of 1 year should be reduced to reflect the amendments made at the beginning of the Code in relation to proportionality and human rights. Should someone who associates with a banned doctor who distributes steroids really receive a lesser sanction than someone who legitimately forgets to change their whereabouts 3 times and thereby ends up with 3 missed tests?

Clarify the Treatment of Nutritional Supplements as Specified Substances for Sanctioning Purposes

10.4.1: The policy of the Code is to discourage the use of nutritional supplements. The policy is also to make it harder for nutritional supplement users to secure any reduction of the period of suspension when their ADRV is caused by their nutritional supplement, whether or not the Prohibited Substance is a specified substance. Article 10.4.1 of the Code does not in a useful way distinguish between specified substances and the products that may contain them. When an athlete intends to take a nutritional supplement product to enhance performance (which is not explicitly prohibited), this makes it difficult to assess whether the athlete also or automatically intended to take a prohibited substance (found in that nutritional supplement) to enhance performance. One result is the contradictory decisions of CAS Panels in *Oliveira* and *Foggo*.

The proposed new Comment to 10.4.1 fails to clearly set out the policy of the Code. It is recommended that the Comment read: "…where an Athlete of other Person Uses or Possesses a nutritional supplement product to enhance sport performance…". Then other "products" such as food, drink, vitamins (consistent with the Comment

to Article 10.5.1 which distinguishes between vitamins and nutritional supplements), etc. would not be automatically excluded from consideration under the Article. WADA could also seek an advisory opinion from CAS to resolve the disagreement between the CAS Panels in *Oliveira* and *Foggo*. Based on the CAS opinion, Article 10.4.1 could be (re)drafted to best reflect.

Definition of "International-Level Athlete"

Draft 1.0 proposes to broaden the definition of "International-Level Athlete" from those designated in an IF RTP (to be called the "High Priority Athlete Pool" or HPAP) to those "who participate in sport at the international level as defined by each International Federation." This is an unworkable and unwarranted weakening of NADO authority over its nationals. It does not serve the interests of athletes.

Unworkable because "participation in international sport" is not defined. A literal definition (any athlete who competes in any international competition sanctioned by an IF even if just once) would greatly increase the number of athletes in this category whether temporarily or longer term. But even now, many IFs do not demonstrate the capacity to administer RTPs, whereabouts systems and TUE systems for the "International-Level Athletes" they already have. Many IFs, despite being judged "Code-compliant," do not properly administer or even publish their RTPs, or are not able without problems to issue TUEs sought by athletes who qualify for international competition for the first time or just before an event.

Unwarranted because dozens of NADOs already effectively provide TUE, education and testing programmes to athletes who participate at the international level occasionally. It would not be in the interests of athletes to discourage or prevent their NADOs from providing them with these anti-doping services.

At the very least, until there are draft rules to be used by IFs for defining those "who participate at the international level" this proposal cannot be properly considered. Until that time, the current practice of focussing IF authority on HPAP athletes should remain. Let capable NADOs continue to service occasional international competitors. If a capable NADO or RADO does not exist, IFs can adjust their HPAPs accordingly to capture athletes who compete internationally on an occasion basis and who lack a national programme.

Additional Proposals for Code Draft 2.0

Substantive Rules Should Not Be in the Comments

In a number of places, Comments to Code Articles contain substantive provisions. These should be moved into the text of the Articles themselves. The entire draft needs to be reviewed. Here are four examples:

- The Comment to Article 2.2.2 (Use or Attempted Use) begins: "*Demonstrating the "Attempted Use" of a Prohibited Substance requires proof of intent on the Athlete's part.*" This sentence is substantive and should be part of Article 2.2.2.

- The Comment to Article 10.3.2 (Ineligibility for Other Anti-Doping Rule Violations) begins: "*Those who are involved in doping Athletes or covering up doping should be subject to sanctions which are more severe than the Athletes who test positive.*" This sentence is substantive and should be moved to the start of the introductory sentence of Article 10.3.2.

- The Comment to Article 10.5.4 (Admission) ends with a new sentence: "*The amount by which Ineligibility is reduced should be based on the likelihood that the Athlete or other Person would have been caught had he/she not come forward voluntarily.*" This sentence is substantive and should be part of Article 10.5.4.

- The Comment to Article 13.2.2 reads: "*An Anti-Doping Organization may elect to comply with this Article providing for the right of appeal directly to CAS*." This sentence is substantive and should be part of Article 13.2.2.

Expand the Laboratory Presumption to Cover all the Elements of the ISL and the Technical Documents

The presumption in article 3.2.1 regarding WADA-accredited laboratories only concerns "analysis and custodial procedures", and not all the laboratory procedures as described in the International Standard for Laboratories. While this presumption only covers part of the ISL, an athlete might rebut this presumption by showing that any departure from the ISL occurred. This departure might be directed at an element of the ISL that falls outside the scope of the presumption in article 3.2.1. CAS has addressed this issue by expanding the laboratory presumption to other elements of the ISL in recent case law (see CAS 2009/A/1752 (*Vadim Devyatovskiy v/IOC*), CAS 2009/A/1753 (*Ivan Tsikhan v/IOC*)). The presumption in article 3.2.1 should be expanded to include all elements of the ISL.

Recognise National TUEs for International Competition

4.4: It remains wrong that the default position is that a TUE issued at the "national level" becomes invalid the moment an athlete becomes "international level". This is extremely unfair, particularly on athletes who may receive a late call up to competition. It is also unrealistic as many IFs continue to fail to make clear which are their "international level athletes" and which NADO TUEs they will recognise. And it is contrary to the principle of mutual recognition of Article 15.4. TUEs should remain valid until a sound reason to invalidate them is provided. Furthermore it must be made clear how long the "international level" status remains post competition.

Give NADOs the Authority to Make Domestic TUE Rules for Lower-level Athletes

4.4: Amend Article 4.4 to give NADOs the ability to make their own rules in relation to athletes below international and national level. Currently there is a clear intent for different rules for lower level athletes, but the grammar of Article 4.4 suggests that any application for a TUE by a lower-level athlete must be assessed in accordance with the International Standard for Therapeutic Use Exemptions. We suggest amending the sentence, "…All therapeutic use exemption requests shall be evaluated in accordance with the International Standard for Therapeutic Use Exemptions…" to read "… All therapeutic use exemption requests shall be evaluated in accordance with the International Standard for Therapeutic Use Exemptions, except those requests by athletes participating in sport at levels below the national level where the NADO has determined a different process …".

How a Prohibited Substance Entered the Body Need not be Proven in all Specified Substance Cases

10.4.1: Athletes must still show how a specified substance entered his/her body. But there are many occasions when this is genuinely a complete mystery and yet all the other circumstances are consistent with inadvertent use. It should be possible for an athlete to be given leave to convince a Tribunal e.g. by the amount present, or its inapplicability to the athletes event or circumstances that there was no intent to enhance performance even if the method of ingestion is unclear.

Reduced Sanctions for "Contaminated Products" Requires a Definition of that Term

10.4.3: The proposal for a range of sanctions for ADRVs involving a "contaminated product" needs a definition of what is such a product. The last sentence of the proposed Article seems to suggest that a product could be regarded as contaminated if it contained a substance that was not on the label, website or in published information. It is already the case that many supplement manufacturers will disguise or not report the contents to allow athletes to evade detection when purchasing, transporting and storing substances. If an athlete can now claim that because there is nothing on the label, website or in published information which discloses that it contains a steroid this fact means it is "contaminated," intentional cheating will become easier and virtually impossible to punish even when caught.

Also, the proposed Article 10.4.2 seems inconsistent with the Article 10.4.1 commentary which excludes the reasoning in *Oliveira* case.

Do Not Permit an Admission to Avoid a Longer Sanction for Aggravating Circumstances

10.6.3: An athlete or other person can still avoid an increased sanction under article 10.6.1 by admitting the anti-doping rule violation promptly after being confronted with it. It is inappropriate and undesirable that an athlete or athlete support personnel can avoid the consequences of committing a serious violation by a simple quick admission. Furthermore, an admission in a case of a violation of article 2.1 (Presence) would be meaningless. An athlete could 'admit' that there were indeed two prohibited substances in his sample, and consequently avoid the application of article 10.6.1. This should not be the case.