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INADO Legal Note #1

First Impressions of *United States Anti-Doping Agency v. Lance Armstrong* ("Reasoned Decision ... on Disqualification and Ineligibility")

The legal facets of the USADA Reasoned Decision on the Armstrong file: where to start? It is not possible in one short note even to begin to explore all of the important issues raised and addressed. So let me just extract a few.

As a preliminary comment, I would say that the Reasoned Decision is as important for anti-doping as the Dubin Report into the 1988 Ben Johnson positive at the Seoul Olympic Games, as the first WADA Code and as other seminal anti-doping documents. Its 202 pages must be required reading for every anti-doping practitioner.

Secondly, the Reasoned Decision is a model of advocacy and communication. The document was written not just for the individuals involved and their sport governing bodies, but also for the public audience. It seeks to tell a story as well as to justify its findings or determinations to those organisations who must now act on them. For example:

"Had Mr. Armstrong not refused to confront the evidence against him in a hearing, the witnesses in the case of *The United States Anti-Doping Agency v. Lance Armstrong* would have testified under oath with a legal duty to testify truthfully or face potential civil and/or criminal consequences. Witness after witness would have been called to the stand and witness after witness would have confirmed the following: That Lance Armstrong used the banned drug EPO. That Lance Armstrong used the banned drug Testosterone. That Lance Armstrong provided his teammates the banned drug EPO. That Lance Armstrong administered to a teammate the banned drug Testosterone. That Lance Armstrong enforced the doping program on his team by threatening a rider with termination if he did not dope in accordance with the plan drawn up by Dr. Michele Ferrari. That Lance Armstrong's doping program was organized by Dr. Ferrari. That Lance Armstrong pushed his teammates to use Dr. Ferrari. That Lance Armstrong used banned blood transfusions to cheat. That Lance Armstrong would have his blood withdrawn and stored throughout the year and then receive banned blood transfusions in the team doctor's hotel room on nights during the Tour de France. That Lance Armstrong surrounded himself with drug runners and doping doctors so that he could achieve his goal of winning the Tour de France year after year. That Lance Armstrong and his handlers engaged in a massive and long running scheme to use drugs, cover their tracks, intimidate witnesses, tarnish reputations, lie to hearing panels and the press and do whatever was necessary to conceal the truth.

"There will not be a hearing in this case because Lance Armstrong strategically avoided it. He voluntarily gave up the right to cross examine the witnesses against him. He abandoned his opportunity to testify (and avoided the prospect of being cross examined) under oath in response to USADA's witnesses. Therefore, the truth in this case is set forth in writing in this Reasoned Decision. The witnesses cited in this Reasoned Decision have testified under oath, through affidavits in which they have sworn to tell the truth under penalties of perjury. Lance Armstrong does not testify this way – because he did not want to testify – he wanted to walk

away and avoid the truth telling. However, his refusal to attend a hearing still speaks volumes.” (p. 15)

The Reasoned Decision reminds advocates who argue anti-doping cases that persuasion is more than just organising the facts and applying rules to them.

Thirdly, it contains a wealth of information on multiple aspects of anti-doping: not just on anti-doping rules and their application, but also on testing, on avoiding sample collection, on avoiding AAFs, on the science of anti-doping, on the culture of sport, on human psychology, on the reasons for doping, and on the lengths individuals will go to dope and to deny doping. Experts in all aspects of anti-doping will benefit from close study of the Reasoned Decision.

Of course, the Reasoned Decision is a treasure trove for anti-doping lawyers on a wide range of subjects. Here are a few:

- The standard of proof and the type or “means” of proof, including proof in non-analytical cases as recognised by CAS:

“The World Anti-Doping Code specifies that doping can be proved by “any reliable means.”²⁸ [28. Code, Art. 3.2.] This case was initiated by USADA based on evidence other than a positive drug test. It is not necessary for there to have been a positive drug test in order for a rule violation to have been established and many cases reflect this principle.²⁹ [29. *USADA v. Montgomery*, CAS 2004/O/645; *USADA v. Gaines*, CAS 2004/O/69; *USADA v. Collins*, AAA 30 1900000658 04; *ASADA v. Wyper* CAS A4/2007; *USADA v. Leogrande*, AAA No. 77 190 00111 08; *USADA v. Stewart*, AAA No. 77 190 110 10 USADA.] It could not be otherwise because at any given time there are many drugs and methods of doping on the prohibited list that are not detectable through laboratory testing.” (p. 14-15)

- The range of evidence that can and should be marshalled to prove a non-analytical case (including sworn evidence of witnesses, financial records and other documents, e-mail communications and corroborative scientific evidence). For example, concerning the evidence from further consideration of past analytical results:

“The core of USADA’s case against Mr. Armstrong is the witness testimony and documentary evidence described in the preceding sections. That evidence standing alone is overwhelming proof of Mr. Armstrong’s doping. This section describes analytical evidence which further corroborates USADA’s proof of Mr. Armstrong’s doping.” (p. 139)

“USADA collected nine blood samples from Armstrong between February 13, 2009, and April 30, 2012. The WADA database, ADAMS, contains results from another 29 Armstrong blood samples collected by UCI between October 16, 2008 and January 18, 2011. At USADA’s request, these blood test results were examined by Professor Christopher J. Gore, Head of Physiology at the Australian Institute of Sport. Prof. Gore observed that a cluster of five Armstrong samples during the 2009 Tour de France and his two samples during the 2010 Tour de France contained an unusually low percentage

of reticulocytes. ... Collectively, the grouping of low reticulocyte percentage during the 2009 and 2010 Tours de France, coupled with his unusual decrease in calculated plasma volume during the middle of the 2009 Tour de France, build a compelling argument consistent with blood doping.” (pp. 140-141)

- The adverse inferences to be drawn from Armstrong’s refusal to contest the USADA assertions at a hearing as established by CAS jurisprudence:

“In addition to the above evidence, Article 3.2.4 of the Code provides for an adverse inference to be imposed against an individual fails or refuses to testify on any relevant matter on which USADA seeks to question him. Long before Article 3.2.4 was adopted in the 2009 version of the Code, CAS Panels recognized the propriety of imposing an adverse inference against a respondent in an anti-doping case who invoked the Fifth Amendment to avoid testifying or otherwise failed to appear and respond to the charges against the respondent. For instance, in the case of *Lazutina v. IOC* an athlete failed to appear and, as a result, the panel drew the adverse inference that she had intentionally ingested the prohibited substance found in her blood. The panel held:

Ms. Lazutina did not give evidence and there has been no explanation from her as to how that prohibited substance came to be in her blood. In the light of that failure to explain, the Panel concludes that the prohibited substance was in Ms. Lazutina’s blood as a result of the intentional exogenous ingestion by her.

Lazutina v. IOC, CAS 2002/A/370 ¶ 9.10.

“In addition to the overwhelming evidence of Lance Armstrong’s doping it should not be forgotten that Lance Armstrong refused to confront the evidence against him in an in-person hearing in front of neutral arbitrators. Armstrong’s refusal to testify and his refusal to confront the evidence against him leads to a strong inference that Armstrong doped exactly as charged by USADA.” (pp. 87-88)

- The operation of a limitations period: under U.S. law (according to CAS domestic law can be used to interpret application of this limitation period) the 8 year limitation period under Article 17 of the Code was suspended by Lance Armstrong’s fraudulent concealment of his doping and other wrongful acts (pp. 154-155)

“The eight-year statute of limitation found in Article 17 of the Code is not absolute. As the CAS panel in CAS 2005/C/841 CONI found, the “interruption, suspension, expiry or extension of such [eight-year] time-bar . . . should be dealt with in the context of the principles of private law of the country where the interested sports authority is domiciled.” (CONI, ¶ 78) As the anti-doping organization conducting results management, USADA is the “interested party” in this case. Thus, the statute of limitations issue should be analyzed according to U.S. law. Under U.S. law, the running of a statute of limitation is suspended when a person has fraudulently concealed his conduct: “one who wrongfully conceals material facts and thereby prevents discovery of his wrong . . . is not permitted to assert the statute of limitations as a bar to an action against him, thus taking advantage of his own wrong, until the expiration of the full

statutory period from the time when the facts were discovered or should, with reasonable diligence, have been discovered.” (*Pacific Electric Co.*, 310 F.2d 271, at 277 (quoting 34 Am.Jur. 188)) As detailed in Section VII above, Mr. Armstrong fraudulently concealed his doping from USADA in many ways, including lying under oath in the SCA case; lying in the 2000 French judicial investigation; intimidating witnesses; and soliciting false affidavits. Mr. Armstrong cannot benefit from the running of a statute of limitation when a violation would have been asserted by USADA earlier but for his fraudulent concealment.” (pp. 154-155)

- USADA results management authority under Article 15.3 of the Code is discussed at length at pages 156-163. Here is a taste:

“The USOC, USADA and UCI are signatories to the World Anti-Doping Code and bound by its provisions. Article 15.3 of the Code provides that “results management and hearings shall be the responsibility of and shall be governed by the procedural rules of the Anti-Doping Organization that initiated and directed Sample collection (or, if no Sample collection is involved, the organization which discovered the violation).” Under this plain language, the Code gives results management responsibility for non-analytical violations to USADA in any case where it “discovered the violation” by a U.S. Athlete.” (p. 156)

“If there were any doubt concerning USADA’s responsibility for results management, it is removed by WADA’s interpretation of Article 15.3. In a letter from WADA’s Director General, David Howman, to UCI dated August 7, 2012, WADA explained, “there seems to be no question that the [anti-doping organization] which discovered the violations is USADA.” WADA concluded, “Therefore, USADA’s results management procedure (i.e., the ‘USADA Protocol’) is controlling.”⁸³⁵ [835. August 7, 2012 letter from WADA Director General, David Howman to UCI President Pat McQuaid, provided in Appendix E.]” (p. 159-160)

iNADO will look for ways to explore the Reasoned Decision in detail and to provide practical advice to NADOs and RADOs on what it means for your anti-doping programmes.

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