A new code for a new era in the fight against doping in sports

A summary of the main changes in the 2015 WADA Code

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Introduction[4]

The expansive media coverage of recent high profile cases has starkly revealed the depth and breadth of the problem of doping in sports. In addition, many of these cases, such as the Lance Armstrong affair, have demonstrated the important role that non-traditional sources of evidence can play in the pursuit of eliminating doping in sports, as well as the shortfalls of a brute force testing strategy focused on quantity rather than quality.[5] The new version of the World Anti-Doping Code (the Code or WADC) slated to come into effect on 1 January 2015 is expected to better arm stakeholders with the means to effectively combat these new realities of the anti-doping movement.

A more than two-year revision process of the Code, which relied heavily on comments and suggestions made by the World Anti-Doping Agency's (WADA) stakeholders, has recently come to a close. On 15 November 2013, the final day of the World Conference on Doping in Sport in Johannesburg (the Johannesburg Conference), the WADA Foundation Board approved the revised Code (the 2015 WADA Code)[6] and International Standards (IS).[7] This approval came amidst an unabashed outpouring of support, memorialized in a declaration of a shared renewed effort to intensify the fight against doping in sports in furtherance of its ultimate goal: the protection of the clean athlete.[8]

In this contribution, we will provide a summary of the main changes incorporated into the 2015 WADA Code during the revision process to improve and enhance the Code's effectiveness. While we do not intend to provide a comprehensive analysis of each of the amendments made,[9] we do hope to provide the reader with a sense of the impacts these significant changes might have on the anti-doping movement and give the reader a base from which to contemplate whether the 2015 WADA Code has adequately addressed the key issues that the anti-doping movement currently faces. We have grouped these main amendments under three revision goals:

1. smarter doping detection and prosecution, which discusses a new focus on intelligence and investigations and a shift away from a primary reliance on positive tests;
2. tackling the real problems, which discusses both the objectives of increasing the initial period of ineligibility for "*real cheats*" while providing "*more flexibility in sanctioning in other specific circumstances*"[10] and other enhancements made to cast a wider net in anti-doping; and
3. procedural enhancements, which addresses the main amendments that could impact the unfurling of doping disciplinary proceedings, both within the Anti-Doping Organizations (ADOs) and at the Court of Arbitration for Sport (CAS).

Smarter doping detection and prosecution

New focus on intelligence and investigations

WADA sent a clear signal to stakeholders of the importance of intelligence gathering and investigations under the 2015 WADA Code by expanding the title of both the IS for Testing, and art. 5 of the WADC to include "Investigations" in addition to "Testing." This augmented focus is also evident in the amendments made to both optimize the use of scarce resources and to develop an approach to anti-doping that does not primarily rely on simply testing, as was made clear by recent experiences, such as the almost exclusively intelligence-based Armstrong case. Some key new provisions are as follows:

- **creating ADO obligations regarding investigations and intelligence-gathering** (art. 5.8). The new art. 5.8 defines the obligations placed on ADOs in regards to the shifted focus on investigations and intelligence-gathering, with each of the sub-articles strengthening different parts of the doping control process. Art. 5.8.1 requires that ADOs "[o]*btain, assess and process anti-doping intelligence from all available sources*" to be used as a basis for developing smarter Test Distribution Plans, to "*plan* Target Testing, *and/or to form the basis of an investigation into a possible anti-doping rule violation(s)*". Art. 5.8.2 obliges ADOs to conduct investigations following *Atypical Findings and Adverse Passport Findings*. Finally, art. 5.8.3 introduces the far-reaching obligation for ADOs to "[i]*nvestigate any other analytical or non-analytical information or intelligence that indicates a possible anti-doping rule violation*".
- **part 3 of the International Standard for Testing and Investigations: Standards for Intelligence and Investigations.** In the 2015 ISTI, an entirely new section was added that sets forth the basic guidelines for intelligence gathering and investigations. Some highlights of the new obligations for ADOs include[11]:
  - do "*everything in their power*" to gather intelligence from "*all available sources*", which range from the Athletes themselves to the media, pharmaceutical companies, and everything in between (11.2.1);
  - put "*policies and procedures in place to ensure that anti-doping*

intelligence captured or received is handled securely and confidentially" (11.2.2);
- build capacity to assess relevance and reliability, collate, and analyze the intelligence gathered (11.3);
- take action based on the outcome of such analysis, either for the *Test Distribution Plan*, for *Testing*, or to create "*targeted intelligence files*" to be referred for investigation (11.4.1);
- build policies to conduct information sharing (when appropriate) with other ADOs, law enforcement officials, and/or other regulatory disciplinary bodies (11.4.2).

Smarter testing and analysis through risk assessment

The new Code reflects several amendments made in furtherance of formally requiring a "risk-based" approach for *Test Distribution Planning* and taking steps to make the *Testing* itself more attuned to the special characteristics of each individual sport, including the following:

- **sport-specific risk assessment for *Prohibited Substances*** (art. 5.4.1 WADC). WADA will create a Technical Document that will include a risk assessment identifying "which Prohibited Substances and/or Prohibited Methods are most likely to be abused in particular sports and sports disciplines".

- **"smarter" *Test* distribution plan** (art. 5.4.2 WADC). This new article requires ADOs to use this new Technical Document developed per art. 5.4.1 as a starting point to "*develop and implement an effective, intelligent and proportionate Test Distribution Plan that prioritizes appropriately between disciplines, categories of Athletes, types of Testing, types of Samples collected, and types of Sample analysis*". WADA may request a copy of these distribution plans.

- **Sport-specific testing menus** (art. 6.4 WADC.) Finally, even the most well designed testing plan will fail if the samples are not appropriately analyzed. Art. 6.4 supports a risk-based approach to the analysis portion of doping control as well, by defining *Sample* analysis menus (in the same Technical Document referenced in art. 5.4.1) specific to particular sports. ADOs will be permitted to request more extensive menus than required in the Technical Document (art. 6.41). Less extensive menus will require WADA's agreement. Laboratories are also given the option to conduct analyses beyond the applicable menu (art. 6.4.3), but at their own expense.

Instruments to strengthen the analysis process

In addition to the risk-based differentiated analysis menus, WADA has taken further steps to refine the sample analysis process to reflect some of the new focuses of the fight against doping, as well as to generally strengthen its functioning.

- **new Presumption of Scientific Validity** (art. 3.2.1 WADC). In addition to the existing paragraphs in art. 3.2 of the Code that place the legal burden of proof on the *Athlete* to establish procedural defects in the particular matter, the new art. 3.2.1 introduces the presumption that analytical methods and decision limits approved by WADA after consultation within the relevant scientific community and peer review are scientifically valid. Legal challenges against this presumption are subject to various procedural requirements, such as a compulsory notice to WADA and instructions to CAS panels on how to proceed in this situation.

- **focus on relevant positives**. A highly criticized and heavily debated aspect of the fight against doping in recent years has been the prevalence of doping violations linked to Cannabinoids used as a social drug, which have a dubious (at best) relationship to performance enhancement. Instead of altering the whole mechanism of the *Prohibited List* by making performance-enhancement a mandatory criterion, as initially contemplated, WADA, during the revision process, finally increased the decision limit for Cannabinoids to ten times the previous limit.[12] This drastic increase should have the effect of eliminating most violations involving Cannabinoids used as a social drug *Out-of-Competition* but detected *In-Competition*.

- **Simplifying the analysis process** (art. 6.5 WADC). In art. 6.5 WADC, the new Code introduces a cut-off point past which further analysis on the Sample is not allowed, neither by request of the ADO nor the *Athlete*. According to WADA, this amendment appropriately restricts re-*Testing* by laboratories (because they have an obligation to perform the analysis properly from the outset) and by *Athletes* (as Samples tend to degrade over time).[13] It also touts this amendment as ensuring equal treatment among the parties, but it is difficult to see exactly how. The cut-off point effectively acts to ensure that ADOs will be given the opportunity to make additional requests for analysis before the cut-off point, but the Code grants *Athletes* no similar opportunity to make additional requests that could assist their defense (e.g. a quantification of the *Prohibited Substance* or search for *Metabolites*).

Tackling the real problems

A major focus of the Code revision process was reworking the sanctioning regime to provide harsher penalties for "*real cheats*". While it could be assumed that these stricter penalties are intended as a stronger deterrence or more effective means to prevent recidivism, in the Overview, WADA only identifies a "*strong consensus*" among stakeholders, (especially *Athletes*) as a motivating factor to create a default initial four-year period of *Ineligibility* for intentional doping violations.1[4]

Harsher penalties for "real cheats"

Art. 10.2 and 10.3 set forth the basic framework of the sanctioning regime, defining four-year initial periods of *Ineligibility* for the following types of violations:

- "*intentional*" violations for the *Use, Possession, or Attempted Use* (art. 2.1, 2.2, and 2.6) of *Prohibited Substances* involving either Specified or non-*Specified Substances* (art. 10.2.1.1 and 10.2.1.2);
- all violations for *Tampering* (art. 2.5/art. 10.3.1); and
- all intentional violations of evading, refusing or failing to submit to *Sample* collection (art. 2.3/art. 10.3.1).

In addition to increasing the initial length of the period of *Ineligibility*, the "*prompt admission*" provision (art. 10.6.3) was reworded to cover only intentional violations, but also to make it more difficult for intentional dopers to reduce a period of *Ineligibility*. In the 2009 WADA Code, if an *Athlete* or other *Person* promptly admitted their violation their associated period of *Ineligibility* would automati-

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cally be capped at two years, no matter the violation nor the attending circumstances. Under the 2015 WADA Code, however, a reduction of the length of an otherwise applicable period of *Ineligibility* requires both the approval of WADA and the relevant ADO, and the amount of the reduction depends on both the severity of the violation and the degree of fault (which is likely to be rather high in the context of potentially intentional violations.)

Defining intentionality

The keystone of creating a sanctioning regime premised on differentiating "*intentional*" and "*non-intentional*" violations is coming to an acceptable definition of intentionality. This task is no small feat given that it is a legally-laden term, as it can refer to a wide range of mental states and holds slightly different connotations across each of the world's various legal cultures. The following is the definition that was included in the 2015 WADA Code (art. 10.2.3):

> *"As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance."*

At a first glance, one can legitimately wonder whether the WADA Code drafters attempted to compress too many aspects of a complex notion into one provision. Not only does it introduce new terminology (the concept of "cheating") without explicit interpretational guidance, but it also invokes certain nuanced aspects of criminal law, such as mistake of law, knowledge of the prohibited conduct, and the strength of the intention (e.g. "actual knowledge" or "recklessness") required. Another question is how it is envisioned to interact with the other long-standing *Fault*-based concepts incorporated into the sanctioning regime, such as *No Fault or Negligence* (art. 10.4), and *No Significant Fault or Negligence* (art. 10.5). It is clear that the CAS will play a key role in coming to a harmonized and fair understanding of the concept of intentionality.

Added flexibility in "other specific circumstances"

As proportionality remains the paramount concern in any sanctioning regime, the real challenge for WADA lay in creating a regime with harsher penalties that would nevertheless retain adequate flexibility to take into account the specific circumstances of a case.[15] The following changes were made in line with the objective of enhanced flexibility:

- **reworked provision for Specified Substances** (art. 10.5.1.1). In the 2015 WADA Code, the drafters abandoned the previous formulation of the *Specified Substances* provision (art. 10.4 of the 2009 WADA Code), which allowed *Athletes* to receive a reduction of an otherwise applicable period of *Ineligibility* if they could establish a lack of intent to enhance sports performance and the origin of the *Prohibited Substance*. The element of a "*lack of performance enhancing intent*" roused considerable debate,[16] which was more-or-less resolved by leaving it out completely in the 2015 WADA Code. Instead, the WADA Code drafters opted for a formulation where a reduction can be granted if an *Athlete* can establish *No Significant Fault or Negligence* (which includes establishing the origin of the *Prohibited Substance*.)[17] Given that, until now, the concept of *No Significant Fault or Negligence* has typically been interpreted as a more stringent element than a "*lack of performance enhancing intent*"[18] it is difficult to immediately see where the added flexibility will come from under the new art. 10.5.1.1. Again, CAS panels will be faced with the responsibility of interpreting and applying this provision in a manner in line with WADA's stated objective of adding flexibility.[19]

- **added provision regarding *Contaminated Products*** (art. 10.5.1.2). Recognizing the prevalence of anti-doping violations arising from contamination and a lack of flexibility in the 2009 WADA Code for addressing these situations, a new provision for *Contaminated Products* was added. The new provision (art. 10.5.1.2) is structured almost identically to the new *Specified Substances* provision (art. 10.5.1.1), as it also requires the Athlete to establish *No Significant Fault or* Negligence (which includes establishing the origin of the *Prohibited Substance*), with the additional element that Athletes must establish that the substance originated from a *Contaminated Product* according to the freshly minted definition set forth in Appendix 1:

  > *"A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search."*

Clearly tailored to situations involving contaminated supplements, it will be interesting to see how this definition will be interpreted by CAS panels in the context of other types of contamination, such as meat products or environmental contamination that don't always come with a readily available "product label". The requirement to perform a "reasonable" internet search also might give CAS panels a pause, given the different levels of access to the internet world wide and the varying degree of computer savviness of individual *Athletes*.

- **added flexibility for Cannabinoids** (Appendix 1). A significant addition to the 2015 WADA Code is the following Comment to the definition of *No Significant Fault or Negligence* in Appendix 1:

  > *"For Cannabinoids, an Athlete may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance."*

As previously stated, the treatment of violations regarding Cannabinoids is a hot topic in anti-doping, and this added provision will likely be well-accepted by the members of the anti-doping community that have been repeatedly calling for special treatment of these types of substances.

- **modified definition of *No Fault or Negligence/No Significant Fault or Negligence*** (Appendix 1). Another

added area of flexibility is that Minors are no longer required to establish the origin of the *Prohibited Substance* in the revised definition of *No Significant Fault or Negligence*. While this amendment appears to be inspired by some recent CAS decisions[20], it is somewhat at odds with the repeated confirmations made by CAS panels and the Swiss Federal Supreme Court that establishing the origin of the substance is necessary for assessing the *Athlete*'s degree of *Fault*.[21] While this added flexibility will certainly be welcome, it creates privileged treatment based on the sole criterion of the *Athlete*'s status as a *Minor*. One wonders why others who likewise cannot determine the exact source of the substance but can clearly show that it is not doping related (using evidence such as the nature of the substance, the presence of only trace amounts, hair tests, etc.) should not be afforded a similar exception.

- **more flexibility in the interpretation of *No Significant Fault or Negligence* in the context of *Specified Substances* and *Contaminated Products*.** In the Comment to art. 10.4 in the 2015 WADA Code, the general elimination or reduction ground of *No (Significant) Fault or Negligence* in art. 10.4 and 10.5.2 is limited to "*exceptional*" cases. In contrast, neither the *Specified Substance* nor the *Contaminated Product* provision contained in art. 10.5.1 are subject to this same limiting language, opening the concept of *No Significant Fault or Negligence* within these provisions to a less restrictive interpretation.

Expanding the scope of the fight against doping in sports

In addition to the restructured sanctioning regime, the 2015 WADA Code reflects several changes aimed at expanding the scope of the fight against doping to include more direct and indirect legal mechanisms to reach the *Athlete's* entourage, which can play a critical role in facilitating doping in sports. These amendments include the following:

- **expanding the jurisdiction and effectiveness of ADOs** (art. 20.3.5, 20.3.10, and 20.5.9). Under art. 20.3.5, International Federations are now obligated to ensure that their respective National Federations establish rules so that "*all* Athletes *and each Athlete Support Personnel who participates as coach, trainer, manager, team staff, official, medical or paramedical personnel*" are bound by their anti-doping rules and submit to their results management authority. In addition, both International Federations and NADOs are now bound to investigate *Athlete Support Personnel* when anti-doping violations involve a *Minor* or "Athlete Support Personnel *who has provided support to more than one Athlete found to have committed an anti-doping rule violation*" (art. 20.3.10 and 20.5.9).

- **punishing the "unjustified" use of *Prohibited Substances by Athlete Support Personnel*** (art. 21.2.6). Citing the fact that *Athlete Support Personnel* often serve as role models for *Athletes*, this new provision provides that "Athlete Support Personnel *shall not* Use *or* Possess *any* Prohibited Substance or Prohibited Method *without valid justification*". This provision can be seen as part of a trend in the 2015 WADA Code to encourage disciplinary sanctions under applicable rules, rather than to introduce new anti-doping rule violations. While one can certainly see that, for example, a steroid-using weight lifting coach, would not provide the most credible spokesperson for avoiding prohibited substances in sports, the other circumstances that this broadly drafted provision could encompass are not so clear-cut. Taken to the extreme, such as calling on *Athlete Support Personnel* to justify their personal use of products for embarrassing medical conditions, it is clear that this provision can be interpreted in a manner that would require time and resources to be spent on activities that clearly are ancillary to curbing doping use in sports. Accordingly, this provision highlights yet another area where a prudent application and interpretation is essential to ensuring that the new Code will serve to enhance rather than detract from the true objectives of the anti-doping movement..

Procedural enhancements

This final category of amendments include those that are intended to enhance the different procedural aspects of anti-doping either by bolstering components of the Code that implicate due process issues or generally improving their effectiveness.

Improved collaboration among ADOs

One clear theme of the revision process was better defining roles and encouraging collaboration among ADOs.[22] The following amendments were made in this regard:

- **refining the definition of *Athlete* in the context of *Testing*** (Appendix 1). In line with the objective to create "smarter" test distribution plans, the revised definition of *Athlete* makes it clear that special circumstances may apply to the *Testing* of lower-level *Athletes* (i.e. neither *International-Level* nor *National-Level*), including possibly individuals involved in fitness activities without competition, by explicitly stating that for these types of *Athletes*, ADOs may "*conduct limited* Testing *or no* Testing *at all; analyze* Samples *for less than the full menu of* Prohibited Substances; *require limited or no whereabouts information; or not require advance TUEs*". However, if an anti-doping rule violation is established, the *Consequences* of the WADC apply in full.

- **clarification of responsibilities for *Event Testing*** (art. 5.3). The 2015 WADA Code newly limits the application of the *Event Testing* provision to those *Tests* conducted at an *Event Venue* (whereas *Event Testing* in the 2009 WADA Code covered all *Testing* done during an *Event Period*). It remains the case that the ruling body of an Event may request that ADOs wishing to Test outside of an *Event Venue* during an *Event Period* coordinate its activities through the ruling body. In addition, the new provision clarifies that all *Testing* carried out at *Event Venues* by an ADO other than the ruling body shall be deemed *Out-of-Competition*, unless otherwise specified. Finally, art. 5.3.2 also provides that WADA's decisions regarding *Testing* authority at an *Event Venue* and during an *Event Period* are final and not appealable.

- **clarification of results management authority regarding *Testing* tasks delegated to NADOs** (art. 5.2.6 and 7.1). The new art. 5.2.6 provides that NADOs that receive delegated authority to conduct *Testing* may, at their own expense, "*collect additional* Samples *or direct the laboratory to perform additional types of analysis*". Art. 7.1 clarifies that a NADO collecting additional samples will assume results management authority for these samples. If the NADO

simply orders additional analyses on the samples, the results management authority rests with the ADO that delegated the authority.

- **streamlining the process for obtaining international recognition for nationally-issued TUEs** (art. 4.4). The heavily reworked art. 4.4 of the 2015 WADA Code attempts to create a more streamlined process for *National-Level Athletes* who transition to *International-Level* competition. Under the 2015 WADA Code, a TUE issued at the *National-Level* (by NADOs) must be recognized at the *International-Level* (by International Federations), if it meets the criteria set out in the *International Standard for Therapeutic Use Exemptions* (ISTUE) (art. 4.4.3.1). If the TUE is considered inadequate by the International Federation, the *Athlete* has 21 days to appeal the decision to WADA for review. If *Athletes* miss this 21-day window, the TUE becomes invalid at both the National- and *International-Level.* The amendments do reduce the imbalance between International Federations and NADOs in TUE matters, but the overall regime still implies that a greater value is attributed to TUEs granted at *International-Level.*

Fair hearings and due process

The opportunity for a fair hearing is the most important aspect of ensuring that parties to anti-doping proceedings are afforded an adequate protection of their rights. The organization of the hearing process is left to the ADO, subject to minimal standards in the WADA Code. In the 2015 WADA Code, art. 8.1 was revised such that the bulleted list of requirements for a fair hearing that appeared in the 2009 WADA Code was replaced with the following statement:

> *"For any Person who is asserted to have committed an anti-doping rule violation, each Anti-Doping Organization with responsibility for results management shall provide, at a minimum, a fair hearing within a reasonable time by a fair and impartial hearing panel. A timely reasoned decision specifically including an explanation of the reason(s) for any period of Ineligibility shall be Publicly Disclosed as provided in Article 14.3."*

The Comment to art. 8.1 references the fact that similar principles are set forth in art. 6.1 of the European Convention on Human Rights (ECHR) without providing any clear guidance as to what level of authority this reference should hold. While the addition of a reference to the ECHR is of strong symbolic importance, it is not clear that replacing the former list of concrete safeguards with a condensed statement and a vague allusion to a European instrument will effectively communicate to all stakeholders worldwide what elements must be included for anti-doping proceedings to be considered a "fair hearing." The fact is that most "first instance" doping decisions are rendered by bodies that are not in a position to comply with art. 6 of the ECHR, since they can in any event not be regarded as "tribunals" within the meaning of this article.

"Intrusions" into CAS proceedings

One very interesting aspect of the 2015 WADA Code revision is the series of amendments that either directly or indirectly attempt to influence CAS procedures. Apart from the questions these amendments raise in terms of enforceability and the legal interaction between the CAS and WADA, each of these amendments have significant consequences on the anti-doping proceedings themselves. The key amendments are as follows:

- **WADA right of intervention and CAS duty to appoint experts in cases challenging the scientific validity of analytical methods or decision limits** (art. 3.2.1). In the event that the scientific validity of an analytical method or decision limit is challenged, WADA grants itself the right to intervene as a party in the CAS proceedings. In addition, "[a]*t WADA's request, the CAS panel shall appoint an appropriate scientific expert to assist the panel in its evaluation of the challenge*". While it is fully acknowledged that experts can be extremely useful, if not indispensable, in reaching a conclusion as to the scientific validity of a method or decision limit, these amendments leave open a number of questions with respect to their interplay with the rules on third party intervention and the taking of evidence under the Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (CAS Code). Other unresolved issues include responsibility for the costs of the expert and WADA's actual rights in the proceedings.

- **possibility of a single hearing before the CAS** (art. 8.5). This amendment allows for a hearing concerning an anti-doping rule violation held at the CAS in the first instance, upon consent of the *Athlete*, the ADO with results management responsibility, WADA, as well as the applicable IF and NADO. The rationale for this provision is set forth in the Comment to this article: to avoid the potentially substantial cost of unnecessarily holding two separate hearings, one at the ADO level and a second at the CAS. While it is certainly true that in some cases this amendment might avoid the substantial cost of an initial hearing, it is not completely clear that the overall cost savings would also be significant. Currently, the CAS provides free of cost hearings for international disciplinary appeals of ADO decisions (art. R65 of the CAS Code). It is unclear whether these first instance hearings at the CAS as contemplated under art. 8.5 would also be considered an "appeal"[23] and thus be free of charge, or whether the parties to these types of arbitration would be subject to the rather high price-ticket attached to "ordinary" arbitration proceedings before the CAS.

- **possibility to bring cross appeals and other subsequent appeals** (art. 13.2.4). Contrary to the CAS Code, which has removed the possibility for cross appeals in its most recent versions, the 2015 WADA Code includes a new provision specifically granting the right for "*any respondent named in cases brought to CAS under the Code*" to bring "[c]*ross appeals and other subsequent appeals*". The Comment to this new article states specifically that this provision was added in response to the perceived gap in the CAS Code. The main concern raised by this article is its enforceability in practice, namely whether CAS panels are legally bound to apply this provision, and if not, whether they would nevertheless voluntarily apply it. While this question implicates interesting principles of international arbitration law, such as party autonomy and superiority of applicable rules, the definitive answer will only be found in future CAS awards.

- **new provisions concerning de Novo hearings** (art. 13.1.1 and 13.1.2). The new art. 13.1.1 reads as follows:

  "The scope of review on appeal includes all issues relevant to the matter

and is expressly not limited to the issues or scope of review before the initial decision maker."

It appears that the new art. 13.1.1 could be interpreted to cover two unique scenarios. The reference to *"issues"* seems to limit the ability of an Athlete to argue, for example, that a CAS Panel must limit itself to the subject matter of the initial decision, and the *"scope of review"* appears to merely confirm the cornerstone CAS principle of conducting a full review of the facts and law for each case. The new art. 13.1.2 (and Comment) reads as follows:

"In making its decision, CAS need not give deference to the discretion exercised by the body whose decision is being appealed." (Comment to art. 13.1.2: *"CAS proceedings are de novo. Prior proceedings do not limit the evidence or carry weight in the hearing before CAS."*)

While its wording (i.e. the CAS need not give deference) makes this provision somewhat light on actual constraints placed on CAS panels, the provision itself appears to be directed at avoiding a situation that arose in the *Hardy* award, where CAS panels would defer to an assessment of proportionality made by the lower hearing body when determining the severity of a sanction.[24] The significance of this provision is likely to be limited, since CAS panels have in the meantime established a clear line of decisions that considerably attenuates the findings in *Hardy*.[25] It is also unclear how the new provision will interact with the panel's discretion, newly introduced in art. R57 of the CAS Code, to exclude evidence that could have been presented in earlier proceedings.

Conclusion

The amendments described in this contribution were chosen with the aim to provide the reader with a sense of the key changes made to address the shortfalls in the current Code illuminated by recent anti-doping experiences and to generally create a smarter, clearer and fairer document. One trend repeatedly identified in this contribution is the center stage role that CAS panels will take in ensuring that these amendments are afforded both a fair and harmonized interpretation. The manner in which CAS panels will perform this job will determine whether the WADA objectives of a new, more intelligent and effective era of anti-doping in sports will be attained.

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4 All capitalized and italicized terms in this article represent defined terms in the 2015 WADA Code or in the 2015 International Standard.

5 According to Lance Armstrong, he was tested 500-600 times and never returned a positive test (*Armstrong v. United States Anti-Doping Agency*, Civ. Action No. 1:12-cv-00606-SS, para. 16 (W.D. Tex. 2012)). While the exact number has been debated as has the question of whether he truly never has returned a positive result, it remains clear that his negative tests by far outnumbered any potential positive tests by a factor of hundreds to one, despite a career long love-affair with performance enhancing drugs.

6 The final version 4.1 of the 2015 WADA code is available at: www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/Code%20Final%20Draft/WADC-2015-final-draft-EN.pdf.

7 The final version 3.0 of the IS is available at: www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/Code-Review/IS-Version-3-0.

8 This renewed declaration of support was embodied in the Johannesburg Declaration, also adopted on 15 November 2013 by the World Conference on Doping in Sports, and is available at: www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/WADA-Jburg-Declaration-FINAL-20131115-EN.pdf ("The Johannesburg World Conference on Doping in Sport reaffirms the ultimate objective of the fight against doping in sport is the protection of all clean athletes and that all concerned parties should commit all required resources and resolve to achieve that objective by intensifying the fight.")

9 This article is intended as a brief overview of the key changes made in the 2015 WADA Code, and is to some extent a summary of our more comprehensive analysis found in two of our recent articles: Antonio Rigozzi, Marjolaine Viret, and Emily Wisnosky, "Does the World Anti-Doping Code Revision Live up to its Promises?", *Jusletter*, 11 November 2013, available at www.lk-k.com/data/document/rigozzi-viret-wisnosky-wadc-revision-11-november-2013.pdf (hereinafter referred to as the "Survey Article") and Antonio Rigozzi, Marjolaine Viret & Emily Wisnosky, "Latest Changes to the 2015 WADA Code – Fairer, Smarter, Clearer... and not quite Finished [Addendum to the Article: "Does the World Anti-Doping Code Revision Live up to its Promises? A Preliminary Survey of the Main Changes in the Final Draft of the 2015 WADA Code", Jusletter, 20 January 2014, available at www.lk-k.com/data/document/rigozzi-viret-wisnosky-latest-changes-the-2015-wada-code-jusletter-20-january-2014.pdf.

10 Coinciding with the publication of version 4.0 of the 2015 WADA Code, WADA published an overview document "Significant Changes Between the 2009 Code And the 2015 Code, Version 4.0" in which it grouped the key amendments under seven revision themes, the first of which was to *"provide for longer periods of ineligibility for real cheats, and more flexibility in sanctioning in other specific circumstances"* (hereinafter referred to as the Overview), available at www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/Code%20Final%20Draft/WADC-2015-draft-version-4.0-significant-changes-to-2009-EN.pdf.

11 See Section 1.2.A of the Survey Article *supra* note 5.

12 WADA Laboratory Committee, *Decision limits for the confirmatory quantification threshold substances of 11 May 2013*, Technical Document TD2013DL.

13 See Other Miscellaneous Changes in the Overview, *supra* note 6 at p. 8.

14 See Theme 1 in the Overview, supra note 6 at p. 1-2. Another focus of the revision process was making the Code *"clearer and shorter"* (See Theme 7 in the Overview, *supra* note 6 at p. 6).

15 See Theme 1 in the Overview, *supra* note 6 at p. 1-2.

16 The conflicting interpretations underlying the two sides of the debate are described in the following cases: CAS 2010/A/2107, *Oliveira v. USADA*, 6 December 2010, paras. 9.13-9.15; CAS A2/2011, *Foggo v. National Rugby League*, 3 May 2011, paras. 46-47. The debate concerns whether the *Athlete* intended to enhance performance by taking the product in which the *Specified Substance* was contained, regardless of whether the *Athlete* knew of its presence (the Foggo interpretation); or whether the Athlete intended to enhance performance by taking the *Specified Substance* itself (the Oliveira interpretation), regardless of the medium through which it entered.

17 Note, under the new definition of No Significant Fault or Negligence, minor Athletes do not have to establish how the substance entered.

18 See, e.g., CAS 2012/A/2747, *WADA v. deGoede*, 15 April 2013, para. 7.12 ("In particular, the

conditions for qualifying for a reduction of the standard sanction in art. 10.4 WADC were intended to be more lenient than the ones in art. 10.5.2 WADC").

[19] See below discussion of the lack of restrictive language regarding the interpretation of No Significant Fault or Negligence in the context of Specified Substances and Contaminated Products as a potential source of added flexibility.

[20] See, e.g. CAS 2010/A/2268, I. v. FIA, 15 September 2011 where the Panel reduced the standard *Ineligibility* period to eighteen months, despite the fact that the *Athlete* could not explain the origin of the *Prohibited Substance*. The new amendment goes even farther than this CAS decision, which explicitly limits its precedential value in light of its exceptional circumstances (i.e. the *Athlete* had been competing only in Events for in the under-fifteen age category).

[21] Id. at paras. 121 et seq. See also, Decision of the Swiss Federal Supreme Court, 4P.148/2006, *WADA & UCI v. Danilo Hondo et al.*, 10 January 2007, para 7.3.1: "*On ne voit d'ailleurs pas très bien comment un coureur cycliste pourrait démontrer son absence de négligence ou de négligence significative s'il n'est pas en mesure d'établir de quelle manière la substance interdite s'est retrouvée dans son organisme.*"

[22] See Theme 6 of the Overview, *supra* note 6 at p. 5-6.

[23] Note one possibility to direct these types of cases to the appeals division of the CAS might be for the ADO with results management authority to issue a formal "decision" setting out the anti-doping rule violation and sanction requested so that the *Athlete* could then appeal this decision and properly fall under the category of cases in art. R65 of the CAS Code that are free of charge.

[24] CAS 2009/A/1870, *WADA v. Hardy*, 21 May 2010, paras. 130-139.

[25] See e.g. CAS 2012/A/2804, *Kutrovsky v. ITF*, 3 October 2012, para. 9.2.

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