

WORLD SPORTS LAW REPORT - TACKLING DOPING IN SPORT 2011
Twickenham Stadium, 16-17 March 2011

THE FUTURE OF ANTI-DOPING

Mr. Chairman, Friends and Colleagues,

Thank you for inviting me to address this important gathering.

It certainly creates an opportunity for me to share ideas with you, and in some ways to speculate on the future of anti-doping.

I have refrained on this occasion from using an electronic presentation. Although repetition is a well known method for ensuring that ideas and concepts eventually take hold, this is not an occasion for repetition. Many of you will have seen WADA presentations over the years and while the content does change, familiarity breeds contempt and therefore I am resorting to another power of persuasion, oral advocacy.

First I wish to speak on where WADA is at the present.

From humble beginnings in 1999 WADA has grown into a recognized international agency, responsible first for harmonizing all the variegated rules and regulations into a global Code, second for uniting Sport (private enterprise) with Governments (public authorities) in a unique partnership; third for collecting nearly all

its annual dues from Governments (and having their contributions matched dollar for dollar by the IOC) and then assisting UNESCO in the drafting and ratification of an international treaty in world record time.

Of more recent times the World Anti-Doping Code has been reviewed and revised, and will be subject to a further review process next year, culminating in the Fourth World Conference in Johannesburg in November 2013. The second compliance report on the Code and its adherence by our stakeholders is due in November 2011. Our RADO (Regional Anti-Doping Organizations) Program now encompasses 122 countries that prior to WADA did not even know the words "anti-doping". We have invested more than USD 50 million in scientific research, forged partnerships with Interpol and the International Federation of Pharmaceutical Manufacturers Associations, written models of best practice and appealed many cases to the Court of Arbitration for Sport (CAS). These advances continued even this week, with our having a meeting with the World Customs Organization in Montreal looking toward a future partnership.

So let's look more specifically at 2011 and where we are, before reflecting upon where we are going, or where we might go.

We all should know by now that the fight against doping in sport has reached the stage where science alone will not eradicate cheating or often even detect it. Sample collection and analysis is

getting more expensive. The rules appear to be getting more complicated. Laboratory directors and scientists in general continue to be conservative. Indeed it may be suggested that some err in favor of not returning adverse results for fear of the legal process and the time required to give evidence under attack. Indeed in general scientists do not enjoy the adversarial approach of lawyers. The cheating athlete on the other hand is becoming better at cheating, more sophisticated and funded extensively. That athlete might now be confidently of the view that he or she will avoid detection under the historical approach.

What has become more apparent now is that the mode of collection of evidence need not be simply nor solely through the means of testing. Indeed we have already moved far from being reliant only on such processes, to the discomfort and concern of many, but to the developing success of gathering evidence against those who have cheated with impunity. USADA has been to the forefront in exercises involving inquiries, commencing of course with BALCO but continuing to this day, and their model has been adapted and adopted by UKAD. Many other countries are similarly engaged, and I trust more will follow as soon as possible. This is certainly one example of the future of anti-doping.

One only has to remind people that Marion Jones competed for 7 years, was tested on many many occasions, was never found to have an adverse analytical finding but cheated throughout. She

insisted she was a clean athlete, “look at how many times I have been tested!!”. She even wrote it in her book and sued those who suggested otherwise. It was only the investigation process that led to her lying to a grand jury and the eventual charge of perjury against her, where she confessed all and went to prison.

Investigations must now form an integral part of any effective and efficient anti-doping program. There are of course ways and means of obtaining evidence through such inquiries. It need not engage an anti-doping organization in its own investigation work. There are many bodies also funded by government, already in place, needing strong laws to act on. WADA has been working on various protocols for the sharing of evidence gathered by investigations, in collaboration with many of these bodies and will progress this later in the next few months.

I turn now to some of the specific challenges we foresee or indeed are encountering now:

- 1.** The continuing and increasing engagement of the underworld in providing prohibited substances through trafficking and distribution. The incentive to do so remains high as of course in many parts of the world this is legal activity and the returns on initial investment are vast. For one hundred dollars one might get a return of anything between ten thousand dollars and one hundred thousand dollars. We need governments to recognize this intrusion; it

is a criminal matter if laws are in place and the police will act if there are compelling penalties (not a slap on the wrist with a wet bus ticket). The substances are from raw materials delivered from the East, and put together in “kitchen laboratories”, unregulated and non-sanitized. They do not just go to elite athletes or their entourage. They go to high school students who want to “look good”, to security agents, to armed forces. It is a matter of public health and should be of concern to governmental authorities. The criminal underworld makes money out of this activity, but it is also engaged heavily in other aspects of challenging the integrity of sport. WADA is well aware that the same people who engage in the distribution and trafficking of prohibited substances are involved in bribery, corruption, money laundering and betting. It is not simply illegal betting which can be isolated from the rest of these activities. Indeed even legal betting is subject to engagement by the underworld whether that simply be for money laundering purposes or otherwise. To confront this we need law enforcement. Already it is suggested that a large amount of world sport is “controlled” by the underworld. This is increasing, and we see the effects in anti-doping.

- 2.** The growing and encroaching black market for pharmaceutical products. While we have good and proper arrangements and agreements with the regulated pharmaceutical industry, part of the reason for that is to ensure that evidence of the black market supply is provided

to the industry and to the regulators. At present it is anticipated that at least 25% of the world's pharmaceutical products emanate from the black market. They are non-sanitary and potentially dangerous. Moreover, some are readily available through the Internet; some are "stolen" during research and development stages of the regulated industry. This latter aspect is of intense concern to the industry as it is actual theft of intellectual property.

3. On the other hand, there continues to be the "dumb" doper who is regularly caught through standard testing protocols, with a large number still risking in-competition testing. This doper effectively catches him or herself. On the other hand, there is an increasing sophistication of cheating at the high end of sport. Some might say the sophistication has expanded since the advent of WADA. Some might say that it has advanced even further through the introduction of the biological passport. Whatever the genesis, the fact of the increasing sophistication is undoubted. From micro dosing to manipulation, the clever doper, aided, abetted and considerably financed by clever entourage members, continues to evade detection through the analytical process. And we continue to be haunted by the impunity with which, for example, many treat human growth hormone.
4. The continuing vexed issue of costs (legal costs, testing costs, research costs, transport of samples costs and others) which does not need any further clarification or explanation.

However are we all providing value for service? Are the returns justifying the expenditure? This whole area of value for money deserves scrutiny and answers. What is the real prevalence of doping? Analytical findings suggest about 2-3% but recent studies suggest double digits. More work needs to be done in this area.

Faced with these challenges we pursue our regular activities but have looked carefully as to how these might be progressed.

A. Biological Passport. This project which was of course piloted by UCI has reached a situation where it must be advanced and enhanced. Our team is looking very closely at the experiences and information gained from the UCI program. There is more pressure from sport in particular to only include anti-doping activities if they are proven to be cost effective and efficient. Without dwelling on the economic situation, which as I have said already is of course obvious to everyone, it is also appropriate to look at the benefits of programs and rationalize from there the importance of such programs. The next months will be spent in looking at the passport and its advantages.

I must mention here the significant boost given to the Passport Project by the two recent decisions of the CAS in two UCI cases. Significantly the Court acknowledged the use of the Passport Program as being legally sustainable as proof of doping. There will be other cases before the CAS in the

coming months, but these decisions not only provide comfort to UCI, but also to the many other sports and anti-doping organizations that are embarking on Passport Programs.

While on this topic, I should mention blood collection. We are quite disappointed at the scarcity of samples collected for the purpose of blood analysis. We are aware of the issues relating to collection and transport of blood. However, going forward we must look at ways and means of ensuring that there are a certain number of blood samples collected in any anti-doping program. Some of the prohibited substances and methods can only be detected by blood analysis; these are all serious substances and very serious methods. Blood doping has been around for decades. Are we stopping it? Certainly it does not help if we are not even collecting blood.

B. ADAMS. This clearing house is a cornerstone of our work. It is one demanded of us by the Code and is one which requires the involvement of athletes. In brief, we now are continuing its development with the benefit of experience and input from stakeholders, so that it becomes the global system for all anti-doping organizations and all athletes. We are ensuring that the rules behind it observe privacy and data collection laws, although this remains an ongoing dialogue with European authorities. Challenges in this area remain.

C. Moving to something more controversial. How can the fight against doping in sport be enhanced? How can we provide incentives to anti-doping organizations to actually detect the cheating? Some have mentioned to us that it may be better if, for example, the French national anti-doping agency were mandated to test in Germany and the Germans in France, and so on. The point of that piece of devil's advocacy is to isolate and emphasize the fact that there is perhaps no incentive for a national anti-doping agency to detect doping, rather, there is incentive to paint a picture that their particular country is clean, and it is those across the border or across the seas where the problem exists. What can we all do to incentivize?

A similar scenario exists at the sport level. Sport however is subject to national programs where at national anti-doping agency level, testing can take place of those who are within international competence.

D. Education. Deterrence is one component of an anti-doping programs; prevention is a corner stone of any development of values among the youth of today. There are some who say all our education goes to those who wish to be educated. The bad guys just ignore it.

E. Legal challenges. Some of the current challenges include:

1. A challenge by athletes in Belgium against the jurisdiction of the Court of Arbitration for Sport. This has exhibited itself in several cases presently going through tribunals and courts within Belgium.
2. The extraordinary challenge by the representatives of Floyd Landis against the laboratory in Paris. This spread over 2 long hearings, with the appeal determining that there was no case properly advanced by Landis' lawyers. In fact the decision of the arbitrators went further, suggesting that many of the arguments were spurious and had no relationship to the actual facts of the case. In this part of the world, one may have anticipated some form of complaint to the Law Society about such inappropriate behaviour from litigating lawyers.
3. The debate about data protection and the right of privacy that I mentioned earlier.
4. The continuous battle to ensure there is a proper balance between the rights of the individual and the need to eliminate doping from sport. Proportionality is often used as the catch cry. Many of those who use it, however, are not aware of the very limited class of

elite athletes to whom some of the rules apply. Proportionality prevails. I want in particular to highlight a decision rendered on 24 February 2011 by the French State Council (the supreme administrative court in France) in which The Council rejected a challenge from FIFPRO against the whereabouts rules. In this decision the Council stated that whereabouts are justified by the general interest of the fight against doping and are proportional to that goal.

5. The continuing issue of selection criteria in some countries. The BOA for example still has a lifetime ban on selection for Games teams for athletes who test positive. An appeal process has seen all but Dwayne Chambers successfully overcoming it. Any double jeopardy? The reason I raise this issue is that we are asked about it frequently. We say that this is a selection issue and within the province of the BOA, but we are then asked why is it an extra penalty to an athlete on top of the sanction imposed pursuant to the World Anti-Doping Code. We are not in a position to answer this, only a court or tribunal of competent jurisdiction can do that.
6. The IOC has introduced a rule forbidding entry to the Games to any athlete who has been sanctioned for an

anti-doping rule violation and received a suspension of more than 6 months if that sanction was imposed in the 4 years prior to the Games. Is it an eligibility issue or an entry condition and not a doping sanction?

These latter two issues might both be subjected to legal scrutiny before London. WADA is aware of Jessica Hardy, a U.S. swimmer, who would currently be stopped from going to London as a result of a sanction imposed shortly after Beijing. She is seeking redress and tried to include it in her appeal hearing. We are now aware that the USOC and the IOC have agreed to obtain an advisory opinion from the CAS in the case of Merritt.

7. There are some cases presently pending which will engage tribunals in considering or determining factual claims such as food contamination and the vexed issue on how appropriate sanctions can be handed down in cases involving specified substances. There are a number of recent cases involving the specified substance methylhexamine for example.
8. We in the law are all challenged by the way in which the Court of Arbitration is operating. There are significant costs involved where an appeal to CAS

emanates from a national decision. Whereas there are very limited costs involved where the decision appealed from comes from an international federation. Access to CAS should be readily available and inexpensive for athletes.

9. Finally, a word in relation to athletes and athlete groups. We are essentially a body looking after the clean athlete. Sport relies on athletes for its survival. These groups are most important in terms of representation of athletes. There are many areas in which appropriate representation can lead to proper voices for athletes. Sport must be very aware of its athletes and must take careful steps to ensure they are engaged. The upcoming review of the Code will give all that opportunity as far as WADA is concerned.

F. Entourage. We must realize that, in most cases, it is not athletes acting alone who defeat everything for which they should stand. They are assisted, counselled, sometimes tricked and occasionally forced into the downward spiral of cheating. Coaches, trainers, medical doctors, scientists, sports administrators – even some misguided parents - all of whom ought to know better, make a mockery of their responsibilities and trivialize the years of training and dedication of the trusting athletes whom they betray.

One of our missions at WADA is to make sure that it is not only the athletes who are sanctioned for doping offences. Athletes are, of course, the instruments in which the doping occurs, but often they are less to blame than the coaches, doctors, lawyers, agents, trainers and others around them.

We still do not really have an appropriate and consistent way of ensuring that the athlete entourage, when responsible for aiding and abetting, persuading and supplying, can be sanctioned.

We must all work together to ensure that the entourage can be sanctioned. Sport may not always be able to do so, but governments can.

We must continue to search for ways and means of globally achieving this.

What have we all learned over the last 5 or 6 years? Have we developed or are we entrenched in ways that are historically cemented? Where is the lateral thinking? Where are the energetic leaders? Do we have a future based on leaders and thoughts?

The protection of the integrity of sport is one of the chief foundations of our activities. It is quite obvious now that sport's integrity is being challenged in other areas. Illegal betting, bribery and corruption are the major challenges. When one realizes that the money that is obtained by the underworld in trafficking prohibited substances is then "laundered" by the use in

the illegal betting sphere, then the link between all four is seen. How will sport and how will governments react to these challenges remains to be seen. The IOC however has taken the initiative in convening a small group in Lausanne on 1 March 2011. There will now be a working group established to advance the issue relating to illegal betting. This is an opportunity which might be appropriately expanded in the way I have earlier suggested and it may well be that WADA provides a model for expansion, enhancement or replication. Whatever occurs requires some thought. However bribery of doping control officers is not unknown. Others have already attempted to corrupt individuals connected with the accredited laboratories.

So what is the future for anti-doping? There are two ways of looking at this question in view of the matters I have raised in this talk. The first is rather rudimentary and bureaucratic. The rules will continue to be reviewed and revised, the programs will be altered according to issues such as intelligence and finance. Sample collection will continue but blood sampling must increase. The Passport should be enhanced and more should be using it. We must have more information on the prevalence of doping and not simply rely on positive test results. That might simply be the top of an iceberg.

We must confront complacency and ensure there is long-term commitment from all. The challenges that I have mentioned need to be confronted and dealt with directly. With a proper mix of

prevention and deterrence, and a hopeful growth of the regard that our youth has to the values of sport will result in a more level playing field. Let's not forget however the encroachment of the criminal underworld into sport itself.

The future is yours for the taking.

Thank you.