

A Critical Analysis of Article 4.3 of the World Anti Doping Code*

By Steve Cornelius**

1. Introduction

Doping is as old as sport itself and the modern phenomenon of doping emerged as soon as modern sport emerged in the nineteenth century.¹ Initially doping seemed to be an acceptable and even necessary element of sport.² However, as reports of side-effects on the psychological, physical and physiological well-being of athletes began to surface, a steady call for measures to redress the problem began to arise. The International Amateur Athletics Federation³ was the first International Federation to address the problem of doping in sport when it adopted a simple rule against doping in 1928.⁴ However, the fight against doping only truly gained momentum after the deaths of cyclists Knut Jensen at the 1960 Olympic Games and Tommy Simpson during the 1967 Tour de France.⁵ In 1967 the International Olympic Committee (IOC) established a Medical Commission and approved a ban on doping the following year, in time to conduct the first tests on athletes at the 1968 Winter- and Summer Olympic Games.⁶ However, because of the inconsistency in measures to deal with doping from one sport to the next and from one country to the next, the World Anti-Doping Authority (WADA) was established in 1999 to harmonise and strengthen anti-doping actions and rules across all sports and countries.⁷ This resulted in the adoption of the World Anti-Doping Code (the Code) in March 2003.⁸ The legal status of WADA and the Code was elevated with the adoption of the International Convention against Doping in Sport 2005 (the Convention), which expressly refers to WADA and the Code.

The result is that athletes are now subject to the doping control measures of WADA and the terms of the Code on at least two grounds. In the first instance, any athlete participates in sport on the basis of a contractual relationship,⁹ the terms of which are derived from the constitution, laws, rules and regulations of the various bodies, unions, associations and federations which govern the particular sport. Secondly, in view of the express recognition which the Convention accords to WADA and the Code and the adoption and/or ratification of or accession to the Convention by most countries affiliated to the IOC, compliance with the Code and the authority of WADA also becomes matters of national and international law. In addition, many countries have adopted legislation to deal with the issue of doping in sport as envisaged in article 5 of the Convention. This also brings compliance with the Code and the authority of WADA into the sphere of national law.

This article provides a critical analysis of article 4.3 of the Code and questions whether the Prohibited List can be challenged on the grounds

that one or more of the substances or methods have been inappropriately classified in terms of article 4.3 and should therefore not be included on the Prohibited List. This article does not address issues relating to the prudence or desirability to include or not to include any particular substance or method on the Prohibited List. It merely highlights flaws in the drafting of article 4.3, warns of a potential basis on which WADA and the Prohibited List can be challenged and proposes ways to deal with this risk.

2. Prohibited List

In terms of the Code¹⁰ WADA must now revise and publish the Prohibited List of substances and methods which are prohibited as doping. A substance or method is considered for inclusion on the Prohibited List if WADA determines that it meets two of the following three criteria:

- a It is performance enhancing.
- b It is dangerous to the athlete's health.
- c It is contrary to the spirit of sport.

A substance or method can also be added to the list if WADA determines that it has the capacity to mask the use of other prohibited substances or methods.

In particular, article 4.3 provides:

4.3 Criteria for Including Substances and Methods on the Prohibited List

WADA shall consider the following criteria in deciding whether to include a substance or method on the Prohibited List.

4.3.1 A substance or method shall be considered for inclusion on the Prohibited List if WADA determines that the substance or method meets any two of the following three criteria:

4.3.1.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance;

4.3.1.2 Medical or other scientific evidence, pharmacological effect or experience that the Use of the substance or method represents an actual or potential health risk to the Athlete;

4.3.1.3 WADA's determination that the Use of the substance or method violates the spirit of sport described in the Introduction to the Code.

4.3.2 A substance or method shall also be included on the Prohibited List if WADA determines there is medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to mask the Use of other Prohibited Substances or Prohibited Methods.

4.3.3 WADA's determination of the Prohibited Substances and Prohibited Methods that will be included on the Prohibited List and the classification of substances into categories on the Prohibited List is final and shall not be subject to challenge by an Athlete or other Person based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport.

WADA publishes a revised version of the Prohibited List at least once per annum. The 2012 Prohibited List contains an elaborate list of substances and methods across 15 categories.

To act lawfully and be compliant with article 4.3 of the Code, WADA must, in deciding which substances and/or methods should be included on the Prohibited List, apply its collective mind to the matter and in good faith make a determination which meets the standards set in the Code.¹¹ This means that in respect of each substance

* This article is based on a paper presented at a conference on Doping in Sport hosted by the South African Institute for Drug Free Sport at the South African Doping Control Laboratory in Bloemfontein on 7 May 2012.

** Professor in Private Law, Director of the Centre for Intellectual Property Law and Co-director of the Centre for Sports Law, Faculty of Law, University of Pretoria.

1 Sheehan "Doping in Sport - A Deadly Game" *The Athlete* (available at <http://www.theathlete.org/doping-in-sport.htm> accessed on 2 May 2012).

2 Woodland *Dope: The Use of Drugs in Sport* (1980)

3 As it then was. Now it is the International Association of Athletics Federations.

4 Brown (ed) *IAAF Medical Manual* (2009)

chapter 15.

5 "History of Performance Enhancing Drugs in Sport" available at <http://sport-sanddrugs.procon.org/view.resource.php?resourceID=002366> accessed on 2 May 2012.

6 Brown (2009) ch 15.

7 *Idem*.

8 *Idem*.

9 *Jockey Club of South Africa v Transvaal Racing Club* 1959 1 SA 441 A 446F, 450A; *Turner v Jockey Club of South Africa* 1974 3 SA 633 A; *Jockey Club of South Africa v Forbes* 1993 1 SA 649 A 645B, 654D; *Natal Rugby Union v Gould* 1999 1 SA 432 SCA 440F; *Rowles v Jockey Club of SA and others* 1954 1 SA 363 A 364D; *Johannesburg Country Club v Stott and another* 2004 5 SA 511 SCA.

10 Article 4.1.

11 *Feinstein v Taylor* 1961 4 All SA 366 W.

or method included on the Prohibited List, WADA must consider whether the substance or method is performance enhancing and/or harmful and/or whether its use is contrary to the spirit of sport, alternatively, whether it could mask the use of a prohibited substance or method. But the Code does not confer on WADA a discretion to determine which substance or method WADA deems performance enhancing or harmful.

The drafters of the Code sought to make the process of determining which substances and/or methods should be included on the prohibited list, more transparent by providing objective standards according to which the determination must be made. These standards are mostly scientific. Both article 4.3.1.1 and article 4.3.1.2 require WADA to consider scientific or medical evidence or pharmacological effect to determine whether a substance or method is or could be performance enhancing or harmful, as the case may be. This seems somewhat tautologous as both medicine and pharmacology are also sciences and evidence on these grounds would also constitute “scientific evidence”.

In other words, the Code imposes a duty on WADA to determine whether there is medical or other scientific evidence, pharmacological effect or experience which indicates that the substance or method is or could be performance enhancing or harmful. Article 4.3 of the Code therefore imposes on WADA a duty to make a determination in accordance with the relevant evidence, rather than a discretionary competence to weigh the various factors and make up its own collective mind on the matter.

There is an apparent problem with this formulation. Even though we live in the golden age of science and we strive towards the discovery of exact scientific conclusions through the application of proper scientific method, medicine and pharmacology, like the law, are not certain and precise. Scientific and medical evidence relating to the impact which substances and methods have on the human body, are often inconclusive and sometimes contradictory. There are innumerable variables that could at different times and in different studies impact in various ways on the eventual results. Vagelos and Galambos¹² explains this succinctly when they recall

[m]edicine, I suddenly realised, is not an exact science. It could not be learned and applied by rote, even from a body of knowledge as comprehensive as Loeb's. Once the disease was understood, the physician could treat the patient in a variety of ways, using similar drugs and solutions on the basis of the blood sugar level, the amount of dehydration, the concentration of certain salts in the patient's blood, and so forth. Harvard medicine was different from Columbia medicine in that it was more flexible and left more to be determined by a thoughtful physician. It required more intellectual input. I was free to think, to use my understanding of the basic disease process, and to explore the 'art' of medicine.

Molzone¹³ also explains that the interface between medicine and pharmacology, where clinical trials are conducted to determine whether any particular substance or method has a favourable effect, no effect or an adverse effect, is equally uncertain. Most often, substances do not provide miraculous results. Their effects are often much more subtle and often difficult to qualify and quantify. Substances may have various effects on the human body by relieving symptoms, altering clinical measurements and influencing physiological processes. Because of differences in physiological make-up, different people react differently to the same substance. Furthermore, the reaction which an individual may have towards a particular substance may also differ from time to time. In addition, the so-called “placebo-effect” means that the ability of a substance to enhance performance depends also on psychological factors, which in turn are affected by the socio-economic and cultural environment.¹⁴ Scientific and medical evidence, therefore, seemingly pro-

vides an inadequate standard for determining whether a substance or method should be included on the Prohibited List.

The standard of pharmacological effect is no less problematic. The pharmacological effect of a substance depends on various factors, including the exact composition of the preparation or solution which contains the substance, the mode of ingestion, genetic and biological variables, as well as the medical history and history of drug use of an individual.¹⁵ The amount of a substance which is ingested and the period over which it is ingested, could also have an impact on the pharmacological effect. For example, in small quantities below 60 micrograms ingested over a short term, clenbuterol is a decongestant and bronchodilator. If you increase the dosage somewhat and it is used over a longer period, clenbuterol becomes a nonsteroidal anabolic and metabolic accelerator which improves muscle protein synthesis. In doses above 120 micrograms, the stimulating and thermogenic effects of clenbuterol often cause trembling, headaches and dizziness. In addition, after prolonged use without interruption, the pharmacological effect of clenbuterol dissipates so that it eventually has no effect.¹⁶

Because the science seems to be so uncertain, WADA would apparently be hard-pressed to justify the inclusion of any substance or method on the Prohibited List. It is arguably for this reason that the drafters of the Code added an alternative standard for determining whether a substance or method meets the requirements in article 4.3.1.1 and/or article 4.3.1.2. WADA may also rely on “experience” which shows that a substance or method is or could be performance enhancing or harmful. This is a misguided attempt at resolving the difficulties relating to scientific, medical and pharmacological evidence. This alternative standard poses many questions: Whose experience is considered? How is the experience established? How much or how little experience is required? Etcetera. Molzone¹⁷ warns that

[d]rawing a conclusion about whether a medication or other treatment works based on anecdotes is logically flawed. The reason is that there are numerous alternatives, other than the treatment, that could explain anecdotal findings (these are called ‘confounding variables’).

If called upon to justify the inclusion of a substance or method on the Prohibited List based on this standard, WADA would be even more hard-pressed to find convincing arguments.

As a result, the way in which article 4.3 of the Code is drafted, it leaves no discretion and demands that WADA make a determination based on evidence, which could be medical, scientific, pharmacological or anecdotal. This could expose WADA to attack and lead to challenges of the Prohibited List. For instance, category So in the Prohibited List refers to non-approved substances and provides:

Any pharmacological substance which is not addressed by any of the subsequent sections of the List and with no current approval by any governmental regulatory health authority for human therapeutic use (e.g drugs under pre-clinical or clinical development or discontinued, designer drugs, veterinary medicines) is prohibited.

However, article 4.3 of the Code only allows WADA to consider “a substance or method” for inclusion on the list; Article 4.3 does not allow WADA to list categories of substances or methods. As a result, the inclusion of this blanket category is *ultra vires*. Furthermore, on what medical or other scientific evidence, pharmacological effect or experience could WADA possibly have relied to determine whether any particular substance within this category should be included in the Prohibited List when, at least at the time when WADA made its determination, it would have been impossible to compile a comprehensive list of these substances? As a result, WADA did not adhere to Article 4.3 of the Code when it included category So in the list of Prohibited Substances. Clearly, then, the inclusion of category So in the Prohibited List would not survive judicial scrutiny if it should be challenged in court.

3. Can the Prohibited List be Challenged?

It seems that WADA may have anticipated challenges to the Prohibited List and sought to pre-empt any challenge by providing in article 4.3.3 that WADA's determination that a substance or method should be included on the Prohibited List cannot be challenged. However, this

12 *Medicine, Science and Merck* (2004) 27.

13 In O'Donnel and Ahuja *Drug Injury: Liability, Analysis and Prevention* (2005) 61.

14 Hanson, Venturelli and Fleckenstein *Drugs and Society* 11 ed (2011) 1, 155.

15 Hanson, Venturelli and Fleckenstein (2011) 1, 5, 155 *et seq.*

16 <http://www.clenbuterol.net> accessed on 6 May 2012. See also Kearns *et al* “Chronic administration of therapeutic levels of clenbuterol acts as a repartitioning agent” 2001 *Journal of Applied Physiology* 2064.

provision may not be as effective as it may appear at first glance to prevent challenges to the Prohibited List.

Where the Code is binding by virtue of adoption and/or ratification of or accession to the Convention, or by virtue of national legislation to give effect to the Convention, clause 4.3.3 may be subject to scrutiny under the national laws of the countries concerned.

For instance, section 34 of the Constitution of the Republic of South Africa, 1997, provides:

34. Access to courts. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

A provision, such as article 4.3.3 of the Code, which seeks to exclude the jurisdiction of courts or other dispute resolution mechanisms would therefore be unconstitutional and invalid in South Africa.

Furthermore, courts in South Africa have always maintained that they have an inherent power of judicial review derived from common law.¹⁸ To withstand judicial scrutiny, the board making the determination must apply its mind to the matter and a determination must be lawful, made in good faith and not be grossly unreasonable.¹⁹ In *Lengene v Johannesburg City Council*²⁰ the court held that where a statutory power must be exercised

[t]his is not an unfettered discretion that can only be attacked on the narrow grounds available on review in such cases. The official must be 'reasonably satisfied' ... Where his finding must be purely one of fact with merely some discretionary latitude as to his methods of enquiry, his findings would, on review be almost as fully open to attack as they would have been on appeal.

And even where a limitation of the right of access to the courts is allowed, such a limitation is interpreted narrowly. In *Stanton v Minister of Justice*²¹ Jansen J held that a provision which precluded any appeal against or review of certain decisions by the Minister of Justice, did not prevent a court from determining whether the actual decisions had been made in good faith.

In addition, article 6 of the European Convention on Human Rights provides that everyone, whether in a civil or criminal case, is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In *Golder v UK*²² the European Court of Human Rights held that by implication article 6 also enshrines the right of access to a court. Rozakis²³ explains²⁴ that

the right of access concerns both the factual circumstances of a case and its legal substratum. In other words, a person within the jurisdiction of a State-party to the Convention must have effective access to a court to settle his grievances on arguable civil claims. The Court does not make a distinction between impediments to this right deriving from factual difficulties and those stemming from legal regulations. Furthermore, as far as effectiveness is concerned, a person must have the facilities to vindicate his right before the courts and be able to enforce a decision determining that right.

The right of access to a court may be limited, provided that the limitation does not impair the very essence of the right,²⁵ the limitation pursues a legitimate aim and there must be some proportionality between the aim sought to be achieved and the means of limitation employed to achieve that aim.²⁶

In *R v Medical Appeal Tribunal ex parte Gilmore*²⁷ Lord Denning explained that a determination can only be final if the determination is made lawfully. A determination will only be lawful if there are sufficient grounds to make that determination. In *Pearlman v Keepers and Governors of Harrow School*²⁸ Lord Denning also held that a statutory provision which expressly provided that a decision is final and conclusive, merely excluded the possibility of an appeal on the merits, but it did not exclude the possibility of judicial review. Furthermore, in *Anisimic Ltd v Foreign Compensation Commission*²⁹ Lord Reid explained that a statutory provision which provided that a determination shall not be called into question in any court of law, only applied in the event of a valid determination being made. As a result, the provision did not

prevent the court from establishing whether a valid determination had in fact been made. In addition, in *R v Secretary of State for the Home Department, ex parte Fayed*³⁰ Lord Woolf held that even where a statutory provision expressly provided that a decision could not be taken on appeal or review, a court could still review a decision on procedural grounds to ensure that the decision was arrived at after following a fair and proper procedure.

In other words, in spite of article 4.3.3 of the Code, a court could still in appropriate circumstances review whether WADA has made a valid determination in terms of article 4.3 of the Code and whether WADA had sufficient grounds in terms of article 4.3 of the Code to include a substance or method on the Prohibited List.

The matter is no different where the Code is binding by virtue of the contractual relationship between the athlete and the various sports authorities. A term in a contract which purports to exclude the jurisdiction of the courts, is contrary to public policy and therefore void.³¹ In *Sasfin (Pty) Ltd v Beukes*³² one of the issues related to a term in the contract which provided that a certificate of indebtedness constituted the sole memorial of the indebtedness of the debtor. Smalberger JA held³³ that the clause concerned

purported to oust the Court's jurisdiction to enquire into the validity or accuracy of the certificate, to determine the weight to be attached thereto or to entertain any challenge directed at it other than on the ground of fraud. As such they run counter to public policy.

English law similarly does not allow any term in a contract which would have the effect of ousting the jurisdiction of the courts. In *Scott v Avery*³⁴ Wightman J explained that the

question in this case is, whether the effect of the 25th rule of the association, referred to in the policy, is to withdraw the cognizance of the whole cause of action from the courts of law, and to oust them of their jurisdiction, or only to impose upon the assurer a condition preliminary to his right to sue for a loss, that the amount of the loss shall be ascertained by arbitration. It may be that if the effect of the 25th rule would be to oust the courts of law of their jurisdiction, ... that rule would be bad.

This was further explained in *McGowan v Summit at Lloyds*³⁵ where Lord Reid held that

[c]ourts possess jurisdiction by the operation of law. One of the powers which jurisdiction confers is the power to decide whether or not to exercise that jurisdiction in the sense of allowing a case to proceed. ... A jurisdiction clause is relevant to the exercise of that power ... but it cannot and does not oust the jurisdiction from which that power is derived.

Similarly, Waller J held in *The Glacier Bay*³⁶ case that the court will not allow a term to stand which precludes the party from enforcing the right by an action in court. Such a term would be repugnant giving the right by one hand and taking it away with the other and/or is an ouster of the jurisdiction of the court and unenforceable for that reason. Even if the contract limits, as opposed to completely ousts, recourse to the court, that term may be unenforceable depending on the extent of the ouster.

He explains³⁷ further that

- | | |
|--|--|
| 17 In O'Donnel and Ahuja (2005) 62. | 28 2 QB 56. |
| 18 <i>Mahmood v Secretary for the Interior</i> 1974 2 All SA 495 C 501. | 29 2 AC 157. |
| 19 <i>Feinstein v Taylor</i> 1961 4 All SA 366 W. | 30 [1997] 1 All ER 228. |
| 20 1958 1 SA 647 T. | 31 <i>Bristown Municipality v Beunderman (Pty) Ltd</i> 1967 1 All SA 36 C 395. |
| 21 1960 3 All SA 208 T. | 32 1989 1 All SA 347 A. |
| 22 (1979) 1 EHRR 524 par 28 <i>et seq.</i> | 33 358. |
| 23 "The Right to a Fair Trial in Civil Cases" 2004 <i>Judicial Studies Institute Journal</i> 96. | 34 10 ER 1121. |
| 24 98. | 35 2002 SC 638. |
| 25 <i>Philis v Greece</i> (1991) 13 EHRR 741. | 36 <i>West of England Shipowners Mutual Insurance Association (Luxembourg) v Cristal Ltd ('The Glacier Bay')</i> 1995 CLC 242. |
| 26 <i>Ashingdane v UK</i> (1985) 7 EHRR 528 par 57. | 37 250. |
| 27 1 QB 574. | |

the question of ouster is said to be a question of public policy, I ought to address a point made by Mr Gross QC. He has submitted that this is an international contract and that thus English public policy really has no application, That point is in my view not well taken for the following reasons.

... Third, in any event, the public policy is not just to see that English people can come to an English court, but it is a policy to ensure that any person can get to some court. It is not thus a parochial or insular concept.

Williston³⁸ indicates that in the various jurisdictions in the United States the right of an injured party to legal redress is jealously guarded by the courts.

In *Central Contracting Co v Maryland Casualty Company*³⁹ the Third Circuit of the United States Court of Appeals held that while private parties may not by contract prevent a court from asserting its jurisdiction or change the rules of venue, nevertheless, a court in which venue is proper and which has jurisdiction should decline to proceed with the cause when the parties have freely agreed that litigation shall be conducted in another forum and where such agreement is not unreasonable at the time of litigation.⁴⁰

The judgment of the Iowa Supreme Court in the case of *Wallace v Brotherhood of Locomotive Firemen and Enginemen*⁴¹ is quite informative. Mitchell J held⁴² that

[i]f the provision in the constitution [of the Brotherhood] is construed as appellee contends, then it is void as far as it attempts to oust jurisdiction of the courts.

The Iowa court in the case of *Prader v Nat'l Masonic Accident Ass'n*, 95 Iowa 149, 63 N.W. 601, 605, said: 'A general provision by which the parties to an agreement in terms bind themselves to submit to arbitration all matters of dispute which may thereafter arise, and making the arbitration final, will not deprive the courts of their appropriate jurisdiction, nor be enforced by them.'

In *Goodwin v Mut Ins Co*, 118 Iowa 601, 92 N.W. 894, 895, we said: 'A litigant cannot be expected to consent that his case shall be tried to his antagonist in person or by agent.'

'One of the oldest and most [salutary] maxims of law is that no man shall be a judge in his own cause.'

'The judicial mind is so strongly against the propriety of allowing one of the parties ... to be judge or arbitrator in its own case, that even a strained interpretation will be resorted to if necessary to avoid that result.'

The reason for the above quoted rule is sound. The courts are open for the redress of injury done to person or property. To permit parties to agree before a dispute arises to submit their differences to the adjudication of one of the parties to the agreement is against public policy. Appellee rather agrees with this proposition but claims it has no application to a mutual benefit certificate which creates no liability, it says upon the occurrence of the disability but only upon the approval of the claim by the appropriate officer of the company. With this we cannot agree, for it gives to some officer of the defendant company a right to say whether or not the appellant can recover. It gives to the appellee the right to be judge in its own case. This is against public policy. The practice of permitting one of the parties to a dis-

pute to be the judge, it just as vicious, whether one of the parties is a mutual benefit society or not.

In Australia also, a clause in a contract which purports to exclude the jurisdiction of a court, is contrary to public policy and therefore void.⁴³ In *Hi-Fert Pty Ltd v Kuikiang Maritime Carriers Inc*⁴⁴ Tamberlin J explained:

The common law doctrine that the jurisdiction of the Court should not be ousted is based on public policy that the access of citizens to the courts should be preserved. This public policy as applied by the courts overrides the intentions of the contracting parties who insist on such a provision in their contract. However, the principle is not one which is concerned to delimit the power of the legislature. The principle does not, and indeed cannot, prevent the legislature from permitting specified types of dispute or differences to be referred to and determined by arbitration where certain conditions are satisfied.

As a result, article 4.3.3 of the Code is not only a misplaced attempt to avoid scrutiny of the substances and methods included on the Prohibited List, but it may also turn out to be a futile attempt in the end.

In final analysis, article 4.3.3 of the Code also does not accord with the spirit with which the Court of Arbitration in Sport (CAS) was established. Just as WADA was established to provide more consistency in the fight against doping, so CAS was also established to provide a uniform dispute resolution mechanism which could avoid the inconsistencies that would arise if sports federations were faced with legal action in different countries with different legal systems.⁴⁵ By inserting article 4.3.3 in the Code, which is clearly unlawful in many countries, WADA runs the risk of destabilising the uniform international sports law order which CAS has been developing over the past twenty years.

4. The Way Forward

It is clear from the way in which article 4.3 of the Code has been drafted, that the drafters either did not have an adequate understanding of the law in so far as it would relate to determinations by WADA or they showed a blatant disregard for the law. Secondly, the drafters also clearly did not understand the legal nature of the function which WADA would fulfil in determining the substances and methods which should be placed in the Prohibited List.

In exercising its functions in terms of article 4.3 of the Code, WADA is an administrative agency in much the same way as a licensing authority or an urban planning council is an administrative agency. Weber⁴⁶ explains that a body is an administrative agency if

[t]here is an obligation to obedience only within the sphere of the rationally delimited jurisdiction which, in terms of the order, has been given to him.

The following may be said to be the fundamental categories of rational legal authority:

- (1) A continuous rule-bound conduct of official business.
- (2) A specified sphere of competence (jurisdiction). This involves:
 - (a) A sphere of obligations to perform functions which has been marked off as part of a systematic division of labor.
 - (b) The provision of the incumbent with the necessary powers.
 - (c) That the necessary means of compulsion are clearly defined and that their use is subject to definite conditions. A unit exercising authority which is organized in this way will be called an 'administrative organ' or 'agency'....

There are administrative organs in this sense in large-scale private enterprises, in parties and armies, as well as the state and the church.

As an administrative agency, WADA is called on to perform certain administrative functions in terms of the Code. The performance of these functions requires that WADA exercise an administrative discretion.⁴⁷ WADA should merely determine which substances or methods should or should not according to certain guidelines be included in the Prohibited List. The Code should not require that WADA should make a scientifically unassailable finding that a particular substance or method is or is not performance enhancing or harmful and therefore WADA should not have to show that there are incontrovertible or even com-

38 Williston on Contracts - Forms 4 ed (2011) § 15F:19.

39 367 F2d 341. See also *AC Miller Concrete Products Corporation v Quikset Vault Sales Corporation* 309 F Supp 1094.

40 For some examples, see also *Whirlpool Corporation v Certain Underwriters at Lloyd's London* 662 NE 2d 467 (Illinois); *Haakinson and Beaty Co v Inland Insurance Co* 344 NW 2d 454 (Nebraska); *Appliance Sales and Service Inc v Command Electronics Corporation* 115

NC App 14 (North Carolina); *Eads v Woodmen of the World Life Insurance Society* 785 P 2d 328 (Oklahoma).

41 300 NW 322.

42 325 - 326.

43 *Compagnie des Messageries Maritimes v Wilson* 94 CLR 577 at 585-586; *Brooks v Burns Philp Trustee Co Ltd* 121 CLR 432.

44 75 FCR 583.

45 *Blackshaw Sport Mediation and Arbitration* (2009) 151.

46 *Economy and Society* (1978) 218.

pling scientific, medical or pharmacological evidence that a substance is indeed performance enhancing and/or harmful.

An administrative agency considers the evidence and arguments at its disposal and makes up its own collective mind to make a particular determination. An urban planning council deciding on the construction of a new road is often confronted with evidence and opinions that are contradictory. It considers the evidence and submissions from opposing parties and makes a determination which will always in some way or another conflict with some of the evidence or opinions. So therefore, even if the scientific evidence may not be certain and sometimes even contradictory, the discretion as to whether or not a substance or method should be included in the Prohibited List should be WADA's and WADA's alone. A court or other tribunal cannot usurp that function merely because it would have reached a different conclusion. A court or tribunal can only determine whether a determination has been validly made. And to be valid, a determination must be made in good faith, the agency must apply its collective mind in making the determination, it must be done in accordance with the procedures and guide-

lines which prescribe how the determination must be made and it must be rational in the sense that, based on the evidence and arguments at its disposal, the determination is not grossly unreasonable.⁴⁸

The way in which article 4.3 of the Code has been drafted, could complicate matters for WADA, as it seems to suggest a procedure in terms of which WADA may only make the determination if it finds medical or other scientific evidence, pharmacological effect or experience that a substance is or could be performance enhancing and/or harmful.

5. Conclusion: Proposed Amendments

The difficulties which I have highlighted in this paper can all be adequately addressed with careful amendments of the Code. I propose that the article 4.3 should be amended as set out in the table. The aim of the amendment would be to emphasise that WADA has a discretion to determine which substances or methods should be included in the Prohibited List. Crucially, the proposed amendment only requires WADA to consider the relevant scientific, medical, pharmaceutical and other evidence before it applies its collective mind to determine whether a substance or method should be included in the Prohibited List. But unlike the current article 4.3, the proposed amendment does not require WADA to determine that there is indeed scientific, medical, pharmaceutical and other evidence that the substance or method is or could be performance enhancing or harmful.

⁴⁷ Barry and Whitcomb *The Legal Foundations of Public Administration* (2005) 9.

⁴⁸ *Feinstein v Taylor* 1961 4 All SA 366 W.

| Current text | Proposed amended text |
|--|---|
| <p>4.3 Criteria for Including Substances and Methods on the Prohibited List WADA shall consider the following criteria in deciding whether to include a substance or method on the Prohibited List.</p> <p>4.3.1 A substance or method shall be considered for inclusion on the Prohibited List if WADA determines that the substance or method meets any two of the following three criteria:</p> <p>4.3.1.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance;</p> <p>4.3.1.2 Medical or other scientific evidence, pharmacological effect or experience that the Use of the substance or method represents an actual or potential health risk to the Athlete;</p> <p>4.3.1.3 WADA's determination that the Use of the substance or method violates the spirit of sport described in the Introduction to the Code.</p> <p>4.3.2 A substance or method shall also be included on the Prohibited List if WADA determines there is medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to mask the Use of other Prohibited Substances or Prohibited Methods.</p> <p>4.3.3 WADA's determination of the Prohibited Substances and Prohibited Methods that will be included on the Prohibited List and the classification of substances into categories on the Prohibited List is final and shall not be subject to challenge by an Athlete or other Person based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport.</p> | <p>4.3 Criteria for Including Substances and Methods on the Prohibited List</p> <p>4.3.1 WADA shall, after considering the available scientific, medical, pharmacological and other relevant evidence and any submission made to WADA, determine whether to include a substance or method on the Prohibited List if WADA finds that the substance or method meets at least two of the following criteria:</p> <p>4.3.1.1 The substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance;</p> <p>4.3.1.2 The Use of the substance or method represents an actual or potential health risk to the Athlete;</p> <p>4.3.1.3 There is a risk that the substance can be abused by Athletes because of its performance enhancing qualities or perceived performance enhancing qualities.</p> <p>4.3.1.4 The Use of the substance or method violates the spirit of sport described in the Introduction to the Code.</p> <p>4.3.2 A substance or method shall also be included on the Prohibited List if WADA determines that the substance or method has the potential to mask the Use of other Prohibited Substances or Prohibited Methods.</p> <p>4.3.3 In performing its function in terms of article 4.3.1 or article 4.3.2, WADA may also determine that a category of substances or methods shall be included on the Prohibited List.</p> <p>4.3.4 WADA's determination under article 4.3.1, article 4.3.2 or article 4.3.3 is final and can only be reviewed by a panel constituted by the Appeals Arbitration Division of the CAS if it can be shown that WADA did not follow a fair procedure in making such determination or if such determination was not made in good faith or is grossly unreasonable.</p> <p>4.3.5 If the CAS finds that WADA did not follow a fair procedure in making a determination under article 4.3.1, article 4.3.2 or article 4.3.3, or if such determination was not made in good faith or is grossly unreasonable, the CAS may instruct WADA to reconsider the determination within a set period or the CAS may annul the determination with prospective effect only.</p> <p>4.3.5 An Athlete or other Person may not challenge the validity of WADA's determination under article 4.3.1, article 4.3.2 or article 4.3.3 in a hearing on an anti-doping rule violation and a hearing panel may not take cognisance of any challenge to the validity of WADA's determination in terms of article 4.3.4 or otherwise.</p> |