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Article 1

Not proven? The curious case of the contaminated steak: A study of the Alberto Contador case and its implications for the 2015 World Anti-Doping Code

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Abstract

Following his victory in the 2010 Tour de France, cyclist Alberto Contador was revealed to have tested positive during the race for the prohibited substance clenbuterol. As a result he faced a two-year ban from the sport. Contador claimed the positive result came from contaminated meat he had consumed but the relevant anti-doping authorities disagreed, claiming instead that Contador had deliberately ingested the substance via a contaminated blood transfusion. Ultimately Contador's case was decided before an arbitration panel at the Court of Arbitration for Sport (CAS) which handed down a two-year ban.

This article will examine the Contador case in detail, focussing in particular on the difficulties arising from the interplay between the provisions of the 2009 World Anti-Doping Code relating to burdens and standards of proof and sanctioning. The analysis will draw primarily on the Court of Arbitration for Sport (CAS) award – as well as other secondary sources and recent similar cases – to assess the extent to which the issues identified have been addressed in the revised 2015 World Anti-Doping Code. The article also offers some thoughts on possible further amendments to the Code which might offer additional sanctioning flexibility in specific cases.

Keywords: *Cycling, Doping, Contamination, Burdens of Proof, Sanctioning*

[First submitted in 2013 as part fulfilment of the degree of LLM in International Sports Law, Staffordshire University when the World Anti-Doping Code 2009 was still in force. The author has subsequently updated the paper in light of the recent introduction of the revised World Anti-Doping Code 2015]

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Note: This paper was first submitted in 2013 as part fulfilment of the degree of LLM in International Sports Law, Staffordshire University when the World Anti-Doping Code 2009 was still in force. The author has subsequently updated sections of the paper in light of the recent introduction of the revised World Anti-Doping Code 2015.

INTRODUCTION

On 25 July 2010 Alberto Contador Velasco stood atop the podium in Paris celebrating his third victory in the Tour de France.¹ Little was he to know that in a matter of weeks he would be facing an even tougher challenge than that posed by the mythical climbs of the French Alps: the challenge of proving his innocence in the face of a positive anti-doping test conducted at the very Tour he had just won.² Ultimately Contador failed and received a two-year ban.³ However the case generated huge global media attention and raised a number of important issues – notably in relation to sanctions – that have influenced the shape of the 2015 World Anti-Doping Code (WADC 2015).⁴

This article will examine the Contador case (hereafter '*Contador*') in detail, focussing in particular on the issues arising from the interplay between the provisions of the 2009 World Anti-Doping Code (WADC 2009) relating to burdens and standards of proof and sanctioning.⁵ The analysis will draw primarily on the Court of Arbitration for Sport (CAS) award⁶ and the WADC 2009 – as well as other secondary sources and recent similar cases – to assess the extent to which the issues identified have been addressed in the revised WADC 2015.

CASE SUMMARY⁷

Alberto Contador is an elite-level professional cyclist. At the time of the offence he was riding for ProTeam Astana and was widely considered the sport's most successful and high-profile athlete having won all of

¹ Juliet Macur, 'Third Time is a Relief as Contador takes the Tour' *New York Times* (New York, 25 July 2010) (online) [www.nytimes.com/2010/07/26/sports/cycling/26cycling.html?pagewanted=all&r=0]

² 'Adverse analytical finding for Alberto Contador' (*Union Cycliste Internationale*, 30 September 2010) [www.uci.ch/Modules/ENews/ENewsDetails.asp?id=NzA4MA&MenuId=MTYxNw&LangId=1&BackLink=%2FTempla...]

³ 'Alberto Contador Found Guilty of Anti-Doping Rule Violation by the Court of Arbitration for Sport (CAS): Suspension of Two-Years' (*Court of Arbitration for Sport*, 6 February 2012) [www.tas-cas.org/d2wfiles/document/5649/5048/0/Media20Release20_English_2012.02.06.pdf]

⁴ World Anti-Doping Code 2015: [<https://wada-main-prod.s3.amazonaws.com/resources/files/wada-2015-world-anti-doping-code.pdf>]. Media interest spanned observers and protagonists alike – see for example: Lionel Birnie, 'The Boys Who Cried Wolf' (*LionelBirnie.com*, February 2012) [www.lionelbirnie.com/the-boys-who-cried-wolf/] and Andy Shen, 'Behind the Scenes of the Contador CAS hearing with Michael Ashenden' *NYVelocity* (4 February 2012) (online) [<http://nyvelocity.com/content/interviews/2012/behind-scenes-contador-cas-hearing-michael-ashenden>]

⁵ World Anti-Doping Code 2009: [http://stage.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf]

⁶ CAS 2011/A/2384 *Union Cycliste Internationale (UCI) v. Alberto Contador Velasco & Real Federación Española de Ciclismo (RFEC) & CAS 2011/A/2386 World Anti-Doping Agency (WADA) v. Alberto Contador Velasco & RFEC*, award of 6 February 2012 [<http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/2384,%202386.pdf>]

⁷ The following is a brief chronological summary of the main elements of the case. A full, detailed chronology is contained within the *Contador CAS Award* (n6).

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cycling's Grand Tours.⁸ On 21 July 2010, a rest day on the Tour de France, Contador was subjected to an in-competition doping control by the Union Cycliste International (UCI), the international federation for cycling. The urine sample (A sample) was subsequently analysed on 26 July and found to contain small traces of the Prohibited Substance clenbuterol – an anabolic agent – in a concentration of 50pg/ML.⁹

On 26 August 2010 Contador was officially informed of the finding by the UCI and provisionally suspended. The subsequent B Sample analysis confirmed the initial A Sample finding. As a consequence it was held that Contador had committed a violation under Art 21.1 of the UCI Anti-Doping Regulations (UCI ADR), his first doping offence.¹⁰ Contador subsequently gave a press conference on 30 September at which he blamed the positive test on contaminated steak, which had been sourced by his team from Spain.¹¹ On 8 November, after several weeks of further scientific investigations, the UCI requested that the Spanish cycling federation, the *Real Federación Española de Ciclismo* (RFEC), initiate disciplinary proceedings against Contador.

The RFEC initiated proceedings through its disciplinary committee, the *Comité Nacional de Competición y Disciplina Deportiva* (CNCDD). The case was heard on 26 November 2010. After considering Contador's evidence, on 25th January 2011 the CNCDD proposed a one-year period of ineligibility.¹² This was however rejected by Contador and, in a further controversial twist, Spanish Prime Minister Jose Luis Rodriguez Zapatero claimed publicly there was "no legal reason to justify sanctioning Contador."¹³ On 14 February the CNCDD issued a final decision acquitting Contador and as a result he became eligible to compete again.¹⁴

First the UCI and subsequently WADA appealed the decision of the CNCDD to the Court of Arbitration for Sport (CAS). Given that the two appeals sought the same goal – the setting aside of the CNCDD decision and the imposition of sanctions – these were combined together into a single appeal process.¹⁵ After months of

⁸ The Grand Tours of France, Italy and Spain comprise the three most prestigious and demanding stage-races in professional road cycling. Contador had previously won the Tour de France twice (2007 and 2009), the Tour of Italy (2008) and the Tour of Spain (2008).

⁹ 'Alberto Contador suspended over traces of clenbuterol from Tour de France test' *Cyclingnews* (30 September 2010) (online) [www.cyclingnews.com/news/alberto-contador-suspended-over-traces-of-clenbuterol-from-tour-de-france-test]. Interestingly, the level of clenbuterol detected was around 400 times lower than the levels detectable in some other WADA-accredited laboratories. However, as clenbuterol is not a 'threshold' substance (i.e. an adverse finding is only returned where the substance is detected above a specified level) the trace finding represented a positive test.

¹⁰ UCI Anti-Doping Rules:

[<http://www.uci.ch/Modules/BUILTIN/getObject.asp?MenuId=&ObjTypeCode=FILE&type=FILE&id=NDc3MDk&LangId=1>]. Note Contador was initially implicated in the Operación Puerto doping ring in 2006 but was subsequently cleared of any involvement. See: 'On the list, off the list: Alberto Contador and Operación Puerto' *Velonews* (27 July 2007) (online) [http://velonews.competitor.com/2007/07/news/on-the-list-off-the-list-alberto-contador-and-operacion-puerto_12964]

¹¹ 'Alberto Contador Blames Tainted Meat' *ESPN* (1 October 2010) [<http://sports.espn.go.com/oly/cycling/news/story?id=5632256>]

¹² 'Alberto Contador Given One-Year Ban by Spanish Federation' *VeloNation* (26 January 2011) (online) [www.velonation.com/News/ID/7220/Alberto-Contador-given-one-year-ban-by-Spanish-Federation.aspx]. Prior to the hearing, the CNCDD requested further evidence from the UCI and WADA in order to assist it in reaching a decision. However, for various reasons, this information was not provided and the CNCDD thus reached a decision based on its own preliminary investigations and the defence arguments put forward by Contador – see *Contador* (n6).

¹³ 'PM: Spain Shouldn't Sanction Contador' *ESPN* (11 February 2011) (online) [<http://sports.espn.go.com/oly/cycling/news/story?id=6111856>]

¹⁴ CNCDD Disciplinary Proceedings no. 17/2010. (English translation available at: [www.albertocontadornotebook.info/ResolutionContador.pdf]). Contador subsequently entered the 2011 Tour of Italy from May 7-29, winning in a dominant display.

¹⁵ Note the UCI appeal also sought to impose financial sanctions on Contador and to recoup appeal costs.

detailed legal submissions, the CAS hearing finally took place on 21-24 November 2011, almost a year on from the original disciplinary hearing of the CNCDD.¹⁶

THE CAS HEARING

Neither side disputed the adverse finding for clenbuterol and therefore the violation. Instead, the CAS hearing was dominated by fundamental disagreement over the precise route by which the clenbuterol had entered Contador's body, proof of which would determine any sanction he might face. Three alternative theories were proposed:

- The '*contaminated meat*' theory – Contador's defence which asserted that a piece of steak he consumed was contaminated with clenbuterol and was thus the cause of the adverse finding;
- The '*blood transfusion*' theory – WADA and the UCI's primary explanation which asserted that a contaminated blood transfusion was the cause of the adverse finding;
- The '*contaminated supplement*' theory – WADA and the UCI's alternative explanation which asserted that a dietary supplement containing clenbuterol could have caused the adverse finding.¹⁷

Ultimately the CAS Panel concluded, somewhat surprisingly, that neither side's primary theories were sufficiently convincing and that the most likely ingestion route was via a contaminated supplement. Based on the Panel's conclusions regarding the most likely route of ingestion, it was held that:

- The decision of the CNCDD to acquit be set aside and "as none of the conditions for eliminating or reducing the period of ineligibility...[were] applicable"¹⁸ Contador be sanctioned with a period of two years' ineligibility beginning 25 January 2011;
- Contador be disqualified from the 2010 Tour de France and stripped of any results obtained after 25 January 2011.¹⁹

THE KEY ISSUE AT STEAK (SIC): PROVING THE ROUTE OF INGESTION

Some commentators consider *Contador* to be a straightforward case of applying the WADC 2009: since Contador could not explain how the substance entered his body, he could not qualify for a reduction in sanction.²⁰ However, what *Contador* highlights is that in practice cases do arise in which the available evidence does not point conclusively to *any one particular route of ingestion* and yet, in such cases, the drafting of the Code debarbs any consideration of fault in mitigation of a sanction, even where the circumstances suggest little or none may be attached to the athlete.²¹ Thus, although the CAS decision in

¹⁶ 'The Contador Case Will be Heard in November 2011' (*Court of Arbitration for Sport*, 26 July 2011) [http://www.tas-cas.org/d2wfiles/document/5077/5048/0/Media20Release20_English_2026.07.pdf].

¹⁷ *Contador* (n6)

¹⁸ *Ibid*, para 340.

¹⁹ *Contador* (n6), para 359. In addition, the UCI's appeal request for a fine to be imposed on Contador was held over to a separate hearing.

²⁰ Jonathan Taylor and Antonio Delgado, 'Comments on the Contador Case: Should the Improbable be Accepted as Truth?' (2013) 16 *Spain Arbitration Review* 117.

²¹ An additional consideration arises where a trace amount of a prohibited substance has been found and which may have little or no performance enhancing effect. While a full discussion of the merits of introducing thresholds for prohibited substances is outside the

Contador accords with the well-established doctrine of strict liability – whereby an athlete bears sole responsibility for what enters his or her body – in this author’s view, application of the full sanction of two years’ ineligibility in such circumstances remains somewhat unsatisfactory, not least from the point of view of fairness.^{22,23} The case therefore raises an important question and one which is the focus of this study: to what extent have the issues raised by the *Contador* verdict been addressed in the revised WADC 2015, in particular in relation to burdens of proof and sanctioning?

THE RELEVANT PROVISIONS OF THE WORLD ANTI-DOPING CODE 2009²⁴

As already noted, there was no dispute over the adverse finding or that Contador had committed a violation under Article 2.1.²⁵ As a consequence, the outcome turned on the application of three specific articles in the WADC 2009:

- *Article 3.1 – Burdens and Standards of Proof:* This Article establishes an initial burden on the anti-doping organisation to prove a violation to the “comfortable satisfaction” of the hearing panel. Further it establishes that where the burden shifts to the athlete “to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability...”²⁶
- *Article 10.2 – Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances or Prohibited Methods:* This specifies the base sanction for a first violation as two years’ ineligibility, subject to the athlete qualifying for mitigation under the conditions set out in Article 10.5.²⁷
- *Article 10.5 – Elimination or Reduction of a Period of Ineligibility Based on Exceptional Circumstances.* Under this article: in order to qualify for a reduction in sanction the athlete must demonstrate on the balance of probabilities that he or she bore “no fault or negligence” or “no significant fault or negligence” in relation to the violation.²⁸ Importantly however, where the substance in question is prohibited “...the Athlete *must also* establish how [it] entered his or her system...” (emphasis added).²⁹

scope of this paper, this was an issue debated in the context of the *Contador* case. See for example the expert evidence provided by Dr Douwe de Boer in Contador’s defence: www.velonation.com/Photos/Photo-Album/mmId/614/mediaId/574.aspx

²² WADC 2009 (n5). An adverse analytical finding under Article 2.1 is a ‘strict liability’ offence meaning the presence of a Prohibited Substance constitutes a violation regardless of “intent, fault, negligence or knowing use.”

²³ See for example: Ryan Rezel, ‘Guilty Until Proven Innocent, and then, Still Guilty: What the World Anti-Doping Agency can Learn from the National Football League about First-Time Anti-Doping Violations’ (2012) 29 Wisconsin International Law Journal 807 for a discussion of fairness and sanctioning.

²⁴ Strictly speaking, the relevant applicable rules in *Contador* were the UCI Anti-Doping Rules (UCI ADR). However, for clarity and consistency, the following discussion refers to the relevant provisions of the WADC 2009 rather than the UCI ADR on the basis that the UCI, as a Code signatory, had incorporated the mandatory elements of the Code into its ADR at the time of the offence. The UCI ADR articles relating to anti-doping violations (Article 21), burdens and standards of proof (Article 22) and sanctions (Articles 293, 296 and 297) incorporated the corresponding articles in the WADC 2009 (Articles 2, 3, 10.2 and 10.5).

²⁵ *Contador* (n6), para 44.

²⁶ WADC 2009 (n5), art 3.1.

²⁷ WADC 2009 (n5), art 10.2.

²⁸ WADC 2009 (n5), art 10.5. Under Article 10.5, where an athlete can demonstrate no fault or negligence the sanction may be eliminated (Article 10.5.1). If an athlete cannot demonstrate no fault or negligence but can demonstrate no significant fault or negligence, the length of sanction may be reduced by up to a half (Article 10.5.2).

²⁹ *ibid.*

Therefore, in order for Contador to qualify for a reduction in the base sanction of two years' ineligibility, he needed to clear two separate but contingent hurdles: first, demonstrate on the balance of probabilities how the substance entered his system and second, demonstrate a lack of fault or negligence.

DISCHARGING THE BURDEN OF PROOF

To succeed in clearing this first hurdle, Contador had to prove that the steak he consumed was contaminated with clenbuterol absent any direct evidence – the steak itself no longer existed nor were any tests performed on team-mates to corroborate his story. Further, the CAS Panel considered that the burden established in the WADC 2009 required him to demonstrate not simply that his explanation was more likely than not to have occurred but that it was more likely than other explanations that may be available.³⁰ Importantly, since this requirement put Contador in the awkward position of having to prove a “negative fact”, the CAS Panel placed a reciprocal obligation on the UCI/WADA to contribute to the “clarification of the corresponding facts”.³¹ The Panel considered the UCI/WADA's submission of two alternative explanations for the positive test to have fulfilled this obligation.³²

Some commentators consider that the CAS Panel erred in placing this obligation on the UCI/WADA and in so doing undermined the burden of proof which rested upon the athlete.³³ However, this author proposes an alternative view that the accommodation of multiple competing theories allowed the evidential waters to be muddied to an extent sufficient to make it *more* difficult for Contador to discharge the burden upon him. More specifically, it is submitted there is a difference – if not in the abstract then certainly in practice – between proving the likelihood or not of one possible explanation and proving the likelihood of one explanation over two alternatives. This is because to succeed in the latter case requires the athlete to both substantiate his own explanation *and* to cast sufficient doubt on the plausibility of the alternatives.³⁴

Furthermore, the existence of multiple competing theories generated an important opportunity cost for Contador – the resources he expended in rebutting the UCI/WADA's theories were diverted away from supporting his own version of events.³⁵ Indeed this opportunity cost concept raises an additional and much broader question of equity: what of an athlete who finds himself in a similar position to Contador yet without the same financial resources to rebut the various alternative theories that might be proposed by anti-doping authorities?³⁶

³⁰ *Contador* (n6), paras 112-113.

³¹ *Contador* (n6), para 109.

³² *Contador* (n6), para 110.

³³ Taylor and Delgado 'Comments on the Contador Case' (n22). While such arguments are persuasive, it is unclear whether or not the Panel specifically required that the UCI/WADA propose alternative theories on the route of ingestion; it is possible the Panel would have been satisfied simply with the evidence the UCI/WADA produced which countered directly Contador's 'contaminated meat' theory. For example the Panel noted that: “Although arguing that...they are under no duty to establish how the Prohibited Substance entered the athlete's body, the Appellants nevertheless decided to put forward alternative theories as to the possible source of the Prohibited Substance...” (*Contador* n6, para 52).

³⁴ Importantly, the *Contador* Panel made it clear that the alternative theories proposed by the UCI/WADA did not require the same degree of substantiation as Contador's: “...the Appellants do not have the burden of establishing that other alternative scenarios caused the adverse analytical finding, since the risk the Respondents' scenario cannot be ascertained remains with them.” (para 111).

³⁵ Opportunity cost is a well-established concept in economic theory and can be expressed as the value of the next-best alternative forgone as a result of choosing a particular option. See for example: [www.econlib.org/library/Enc/OpportunityCost.html].

³⁶ There are hints at this equity problem in the recent case involving British cyclist Jonathan Tiernan-Locke. Tiernan-Locke was banned for two years in 2014 based on abnormalities identified in his Athlete Biological Passport (ABP). While the circumstances of his case differ from *Contador*, Tiernan-Locke has consistently protested his innocence and has indicated financial costs prohibited

While the approach of the CAS Panel in *Contador* does not set a binding precedent, it is likely that in future cases the same reasoning may be followed and which could put an athlete at a similar disadvantage. In this respect the *Contador* decision is consistent with previous CAS decisions that have allowed for the weighing of multiple possible explanations, notably *WADA v. Swiss Olympic Association & Simon Daubney*.³⁷

Reaching the standard of proof

The balance of probabilities standard embodied in Articles 3.1 and 10.5 of the WADC 2009 represents an important “threshold requirement”; were an athlete not required to prove how a substance entered his body it would undermine the strict liability provisions underpinning the Code.³⁸ Thus, various CAS Panels have reiterated the importance of reaching the standard in order to trigger the provisions which allow for consideration of an athlete’s fault or negligence.³⁹ Clearly, the difficulty Contador faced in discharging the burden upon him had a large bearing on his inability to reach this threshold. Nonetheless, the case highlights a further difficulty that arises with the application of this threshold test – notably where multiple theories have been advanced, none of which are sufficiently compelling to establish primacy. In such a situation the risk of not meeting the threshold remains with athlete even though all arguments are considered equally likely.⁴⁰ Although strictly speaking this outcome did not occur in *Contador*, this was principally because the Panel concluded that the ‘contaminated supplement’ theory was the most likely explanation. There was no compelling evidence to elevate it above the other two theories proposed and in reality *Contador* came as close as any case to a position where all theories were equally likely.⁴¹

The key point is that, were the Panel to have in fact held all three theories to be equally likely, it would have been compelled to hand Contador a two-year ban with no definitive explanation as to how the substance entered his body and no recourse to considering his degree of fault.⁴² From the point of view of fairness, this seems a difficult proposition to accept and, in the limited instances where the balance of probabilities threshold has been arrived at but not crossed, one could argue there ought to be an opportunity to examine the fault of the athlete so as to potentially mitigate any sanction.

More broadly, other recent cases involving clenbuterol highlight the difficulty in applying the balance of probabilities threshold. In some instances the threshold has been set according to the country in which an athlete has competed. For example, athletes that have returned adverse findings whilst competing in both Mexico and China have had ‘contaminated meat’ explanations readily accepted on the basis of studies

him from pursuing an appeal to the CAS. His case has also received heavy criticism from commentators for the long delays involved. See for example: ‘Jon Tiernan-Locke: I can’t afford to clear my name’ *Plymouth Herald* (20 August 2014) [www.plymouthherald.co.uk/EXCLUSIVE-Jon-Tiernan-Locke-t-afford-clear/story-22783784-detail/story.html].

³⁷ CAS 2008/A/1515 *WADA v. Swiss Olympic Association & Simon Daubney* [https://wada-main-prod.s3.amazonaws.com/resources/files/cas_2008_a_1515_daubney.pdf]. Indeed *Daubney* is referred to specifically on this issue at para 62 of the *Contador* award.

³⁸ Adam Lewis & Jonathan Taylor, *Sport: Law and Practice* (2nd edn, Tottell Publishing, 2008) 984

³⁹ See for example: CAS 2006/A/1130 *WADA v. Stanic and Swiss Olympic Association* [https://wada-main-prod.s3.amazonaws.com/resources/files/cas_stanic.pdf]

⁴⁰ *Contador* (n6), para 111.

⁴¹ It is notable that the alternative ‘contaminated supplement’ theory proposed by the UCI/WADA rested on a deductive approach based largely on the existence of other cases where supplements had been contaminated. See *Contador* (n6), paras 303-311.

⁴² Indeed a sceptical observer might view the Panel’s decision to accept the ‘contaminated supplement’ theory as a means of escaping this invidious position.

indicating a link to the use of clenbuterol in livestock in those countries.⁴³ This is despite doubts over both the scientific rigour of the studies purporting to show this chain of causation⁴⁴ and the ability of anti-doping authorities to differentiate clearly between accidental and deliberate clenbuterol ingestion based on the analysis of urine samples.⁴⁵

Engaging the mitigation provisions of the Code

Article 10.5 of the WADC 2009 allows for the mitigation of sanctions in “exceptional circumstances”.⁴⁶ For Contador to qualify for a reduction in sanction under this article he therefore needed to first demonstrate how the substance entered his system and subsequently demonstrate a lack of fault or negligence.

However Contador’s failure to clear the first of these hurdles debarred him from attempting the second, despite appearing to bear limited fault or negligence. Thus, even in what might genuinely be considered exceptional circumstances – and therefore deserving of the application of Article 10.5 – the WADC 2009 drafting did not permit any mitigation of the sanction.⁴⁷ Clearly there is a difficult balance to strike between maintaining strict liability and ensuring fairness, however Article 10.5 appears designed to ensure that the range of “exceptional circumstances” in which it might apply is so small as to be virtually non-existent. Indeed this difficulty was hinted at in the CAS Panel’s judgement which suggested it might have been willing to consider the extent of Contador’s fault or negligence had it been argued explicitly even though Article 10.5, strictly applied, ought to have disallowed it.⁴⁸

Importantly, *Contador* is not an outlier. Other cases involving contaminated supplements also demonstrate the difficulties of engaging the mitigation provisions for exceptional circumstances. In a very similar case to *Contador*, the US swimmer Jessica Hardy received a one-year ban after testing positive for clenbuterol as a result of consuming a contaminated supplement despite taking numerous steps to address precisely such a risk. In its appeal against the ban, WADA suggested Hardy’s case was not in fact “exceptional” and that she had demonstrated significant negligence such that Article 10.5.2 could not be engaged.⁴⁹

⁴³ ‘US Cycling Athlete Godby Accepts Loss of Results’ (*United States Anti-Doping Agency*, 2 August 2013) [www.usada.org/us-cycling-athlete-godby-accepts-loss-of-results/]; ‘Nielsen not Sanctioned for Clenbuterol Positive’ *Cyclingnews* (22 March 2011) [www.cyclingnews.com/news/nielsen-not-sanctioned-for-clenbuterol-positive/]; ‘Good news for Ovtcharov’ (*ITTF*, 15 October 2010) [www.ittf.com/front_page/ittf_full_story2.asp?ID=22286].

⁴⁴ Sam Saramatunga, ‘Uphill Struggle’ (2011) 155 *Solicitors Journal* 14. To an extent this issue has been addressed by the revised Article 3.2.1 in WADC 2015 (n4) which states: “Analytical methods or decision limits approved by WADA after consultation within the relevant scientific community and which have been the subject of peer review are presumed to be scientifically valid.”

⁴⁵ Mario Thevis et al., ‘Does the analysis of the enantiomeric composition of clenbuterol in human urine enable the differentiation of illicit clenbuterol administration from food contamination in sports drug testing?’ (2013) 27 *Rapid Communications in Mass Spectrometry* 507–512.

⁴⁶ WADC 2009 (n5), art 10.5. See comment to Article 10.5 for the scope of its application.

⁴⁷ *ibid.* This was compounded by the Panel’s decision to accept the ‘contaminated supplement’ theory since the comment to Article 10.5 expressly rules out its application in such circumstances. The comment to Article 10.5 states: “...a sanction could not be completely eliminated...in the following circumstances: (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement...”

⁴⁸ *Contador* (n6), para 359. The Panel noted: “no evidence has been adduced proving that the athlete acted with no fault or negligence or no significant fault or negligence.” See also: Jorge Ibarrola, ‘Doping: Contador: Burden of proof and Presumption of Culpability’ (2012) 10 4 *WSLR*. Indeed it is unclear how the Panel reached the view that no evidence had been put forward as to Contador’s fault or negligence, particularly in relation to his use of supplements – see *Contador* (n6), paras 315-324.

⁴⁹ CAS 2009/A/1870 *World Anti-Doping Agency (WADA) v. Jessica Hardy & United States Anti-Doping Agency (USADA)*, award of 21 May 2010 [www.tas-cas.org/d2wfiles/document/4218/5048/0/Award20187020FINAL.pdf]

THE WADC 2015: A NEW APPROACH OR MORE OF THE SAME?

In light of the preceding discussion, a key question is to what extent have the issues raised by *Contador* been addressed in the revised WADC 2015? To answer this question, the following analysis applies the WADC 2015 to the facts of *Contador* to assess whether or not any sanction might differ from the original two-year ban handed down under the WADC 2009.

Revisions to the Code

No substantive changes have been made to Articles 2.1 and 3.1 in the WADC 2015.⁵⁰ However the WADC 2015 contains an important recasting of the articles on sanctioning. The most relevant changes can be summarised as follows:

- *Article 10.2:* The base sanction for a first violation of Article 2.1 is four years' ineligibility "unless the Athlete...can establish the anti-doping violation was not intentional."⁵¹ For the purposes of this article, "intentional" is defined as "conduct which [the athlete] knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute an anti-doping rule violation and manifestly disregarded that risk."⁵²
- *Article 10.4:* If an athlete can demonstrate that "he or she bears no fault or negligence, then the otherwise applicable period of ineligibility shall be eliminated."⁵³ Importantly this article does not apply in the case of mislabelled or contaminated supplements.⁵⁴
- *Article 10.5.1.2:* Where a positive test for a prohibited substance can be shown to have arisen from a "contaminated product" and the athlete can demonstrate no significant fault or negligence, the sanction applied may range from a reprimand up to two years' ineligibility.⁵⁵
- *Article 10.5.2:* Where Article 10.5.1.2 does not apply (i.e. the prohibited substance cannot be shown to have come from a "contaminated product") but the athlete can demonstrate no significant fault or negligence, there may be discretion to reduce the base sanction by up to a half i.e. two years' ineligibility.⁵⁶

At first glance this would suggest the revisions included in the WADC 2015 have taken account of the *Contador* case; while the new Code provides a stiffer sanction for first-time offences, there is a greater flexibility to cover cases involving "contaminated products" or where no significant fault or negligence can be shown. So far so good, but what is the effect in practice?

Applying the WADC 2015 to Contador

Fig. 1 illustrates an indicative – and highly simplified – schematic of the possible sanctioning outcomes arising from an application of the new WADC 2015 to the facts of the *Contador* case:

⁵⁰ WADC 2015 (n4).

⁵¹ *ibid*, art 10.2.1.1

⁵² WADC 2015 (n4), art 10.2.3

⁵³ WADC 2015 (n4), art 10.4

⁵⁴ *Ibid*. The comment to Article 10.4 states: "No fault or negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement..."

⁵⁵ WADC 2015 (n4), art 10.5.1.2

⁵⁶ WADC 2015 (n4), art 10.5.2

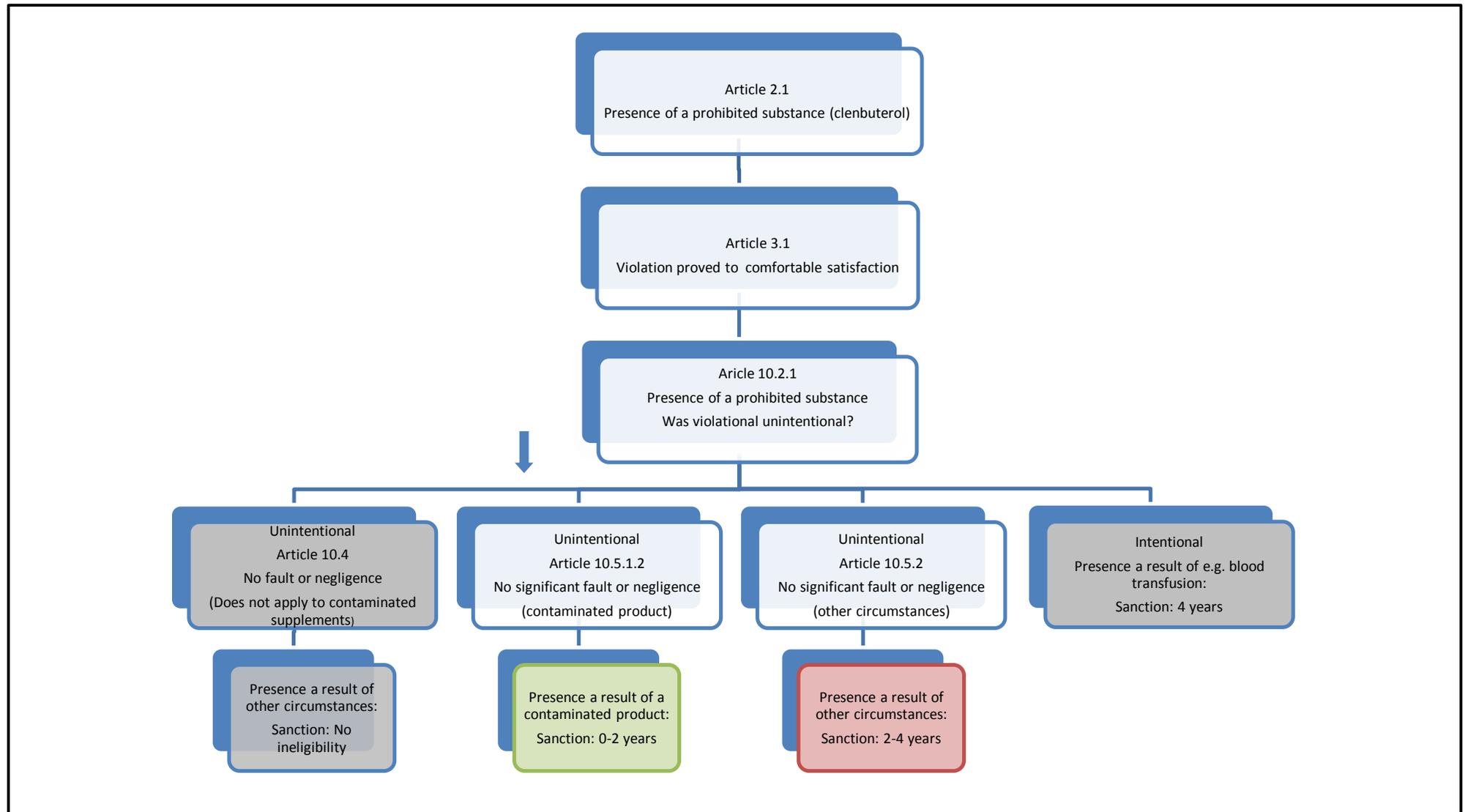


Fig. 1: Applying the WADC 2015 to Contador

Fig. 1 indicates that under the new Code – in particular the new provisions on “contaminated products” contained within Article 10.5.1.2 – Contador would likely have received a sanction ranging from a reprimand up to a maximum of two years’ ineligibility, depending on the degree of fault found by the Panel (highlighted in green in Fig. 1). This outcome would also appear to fit with the sanctioning example contained within the WADC 2015 and which resembles closely the *Contador* scenario.⁵⁷ The Code example suggests that applying the WADC 2015 to a similar set of circumstances might result in an athlete receiving a notional 4-month period of ineligibility under Article 10.5.1.2.⁵⁸

Seen in this light, the WADC 2015 undoubtedly provides much greater flexibility and addresses a number of the issues highlighted in the application of the WADC 2009 to *Contador*, notably the difficulty in engaging provisions designed to mitigate sanctions in cases of limited fault or negligence. This is achieved principally by removing the explicit requirement for an athlete to prove how a prohibited substance was ingested (Article 10.5.2) in order to qualify for a fault-based reduction.⁵⁹

In a sense this should not be surprising. Given the huge media interest in the case and its outcome, it is clear *Contador* has had a profound influence on the recasting of the sanctioning elements within the WADC 2015. Nonetheless, while the revisions to the WADC 2015 go some way towards addressing the problems arising from *Contador*, they do not represent the end of the story. On closer examination of the specific arguments presented in *Contador*, two related problems remain. Taken together these could result in a harsher sanction being applied under the WADC 2015 to an athlete that finds themselves in similar circumstances.

First, engaging article 10.5.1.2 still requires that:

“the athlete or other person can establish no significant fault or negligence and that the detected prohibited substance came from a contaminated product...” (emphasis added).⁶⁰

As such, a strict rendering of this article indicates its application is contingent upon an athlete being able to demonstrate that a contaminated product was the source of their adverse finding. As discussed, Contador did not argue that his adverse finding was caused by a contaminated product and there existed no specific, direct evidence to support product contamination as the source.⁶¹ Instead the Panel concluded a contaminated supplement was the most likely explanation and rejected the primary arguments put forward by both the athlete himself and the UCI/WADA.

Second, the base sanction for a violation under Article 2.1 has been increased to four years’ ineligibility.⁶² The effect of this is to similarly raise the ‘floor’ on the reduced sanction that may be applied under Article

⁵⁷ WADC 2015 (n4), Appendix 2: Examples of the Application of Article 10 (Example 3). While the circumstances described are not exactly the same as *Contador*, the example is based on an adverse analytical finding (out of competition) for a prohibited substance. The athlete in the example is able to demonstrate no significant fault and establish that the adverse finding is caused by a contaminated supplement so as to engage Article 10.5.1.2.

⁵⁸ *ibid.*

⁵⁹ Compare Article 10.5.2 in WADC 2009 and WADC 2015 respectively.

⁶⁰ WADC 2015 (n4), art 10.5.1.2.

⁶¹ See (n41). It could be argued that Contador deliberately pursued the ‘contaminated steak’ theory precisely because of the lack of evidence pointing to a contaminated supplement and because it therefore represented his only means of escaping without a sanction (i.e. under Article 10.5.2 WADC 2009). While this argument may have some validity, it was nonetheless a high-risk strategy and one that ultimately failed.

⁶² WADC 2015 (n4), art 10.2.1.1.

10.5.2 to two years' ineligibility.⁶³ In practice, this now means that under the WADC 2015, an athlete demonstrating no significant fault or negligence faces a lengthier period of ineligibility than that which would have applied under the WADC 2009. This effect is compounded by the fact that Article 10.4 – which allows for the elimination of a sanction on the basis of no fault or negligence – remains extremely narrow in scope. In a scenario in which the route of ingestion is unclear it would seem virtually impossible for an athlete to engage the provisions contained within it.⁶⁴

Combining these two elements suggests that a strict application of the WADC 2015 sanctioning provisions to the *Contador* case might, in fact, result in a sanction of between two and four years' ineligibility under Article 10.5.2 (highlighted in red in Fig.1). Any period longer than two years would represent a harsher sanction than the ban Contador actually received under the WADC 2009. The potential for this sort of outcome to occur is not merely a hypothetical concern. While also brought under the WADC 2009, a recent similar case involving the Jamaican athlete Veronica Campbell-Brown offers a vivid reminder that such a scenario could indeed arise under the WADC 2015.⁶⁵ In May 2013, Campbell-Brown returned an adverse analytical finding for the presence of Hydrochlorothiazide (HCT), at the time a prohibited (specified) substance.⁶⁶ As the athlete was unable to produce evidence demonstrating how the substance came to be in her sample – notably all her supplements were found to be free from contamination – the Jamaica Athletics Administrative Association (JAAA) initially handed down a two-year ban.⁶⁷ However, on appeal to CAS, Campbell-Brown was exonerated due to systemic failures in doping control procedures by the Jamaica Anti-Doping Commission (JADCO) and which the Panel held could reasonably have caused contamination of her sample with HCT.⁶⁸

While Campbell-Brown was ultimately cleared due to these serious procedural irregularities, her case nonetheless highlights the risks that arise where an athlete is unable to produce evidence as to how a particular substance has been ingested yet where little or no fault can be ascribed to their actions. These risks have become magnified under the WADC 2015, in particular where prohibited substances are concerned, due to the stiffer base sanctions that are now levied.

CONCLUSION: TIME FOR A 'NOT PROVEN' CLAUSE?

This paper has considered a very specific aspect of the *Contador* case – the interplay between the burden and standard of proof and the sanctioning provisions in the WADC 2009 and the extent to which the issues arising have been addressed in the WADC 2015. While *Contador* and other similar cases have undoubtedly

⁶³ WADC 2015 (n4), art 10.5.2. Under Article 10.5.2 a panel may only reduce the base sanction provided for in Article 2.1 by up to a half.

⁶⁴ WADC 2015 (n4). While Article 10.4 allows for an elimination of any sanction where no fault or negligence can be shown, the associated commentary makes clear that it is only likely to be engaged in circumstances involving acts of deliberate sabotage. This would imply an athlete would need to be able to produce corroborating evidence indicating the likely source of ingestion.

⁶⁵ CAS 2014/A/3487 *Veronica Campbell-Brown v. the Jamaica Athletics Administrative Association (JAAA) & the International Association of Athletics Federations (IAAF)*, award of 24 February 2014. [www.tas-cas.org/fileadmin/user_upload/Award20348720_internet_.pdf]

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ *ibid.* For a detailed discussion of the *Campbell-Brown* decision see: Marjolaine Viret and Emily Wisnosky, 'Strict liability swings both ways: Campbell-Brown award expects ADOs to match exacting standards imposed on athletes' (*World Anti-Doping Code Commentary*, 24 May 2014) [<http://wadc-commentary.com/campbell-brown/>]

influenced the drafting of the WADC 2015, it would appear that perhaps not all of the difficulties identified have been addressed fully, particularly those that arise where an athlete cannot definitively establish how a substance was ingested but where they may ostensibly bear little or no fault.

In light of the preceding discussion, one option might be for WADA to consider introducing into the Code the concept of a 'not proven' clause – similar to that used in Scottish criminal law – to be applied in very limited circumstances where genuine doubt exists as to how a substance has been ingested.⁶⁹ The application of this sort of concept could be one way to enable due consideration of an athlete's fault or negligence in such cases where strict application of the Code might result in an otherwise unduly harsh sanction.

Indeed, a 'not proven' provision of this nature could also potentially be extended to non-analytical doping violations. Such an option might apply where it is difficult, due to the nature of the evidence, to establish to a sufficient degree of certainty the use or attempted use of a prohibited substance or method and where there may be limited fault on the part of the athlete. An example of such a scenario can be found in the recent, ongoing case involving the alleged administration of prohibited substances to 34 players at Essendon Bombers FC in the Australian Football League (AFL) during the 2012 season.⁷⁰ No player tested positive for a prohibited substance at the time; instead the case hinges on circumstantial evidence which indicates that players were subject to a regime of injections within "a pharmacologically experimental environment [that was] never adequately controlled or challenged or documented..."⁷¹ It is alleged that these injections included the banned peptide Thymosin beta-4.⁷²

After a lengthy investigation and various legal challenges, in March 2015 an AFL Anti-Doping Appeal Tribunal found the charges against the players involved could not be proven to a comfortable satisfaction.⁷³ It appears a key reason for the Appeal Tribunal verdict was the difficulty that the panel faced in establishing definitively, based on the available evidence, that the players had in fact used prohibited substances.⁷⁴ WADA subsequently appealed the Tribunal verdict to the CAS in May 2015 and as such it is possible that the players involved could still be banned.⁷⁵ However, from the point of view of fault, there remains significant doubt as to whether the players had sufficient knowledge of the substances in question or indeed even consented to their administration.⁷⁶

⁶⁹ 'Not proven' is a well-established concept in Scottish criminal law. It represents a verdict where the evidence is insufficient to prove a case beyond reasonable doubt, or where there exist other reasons for not finding the accused party guilty. See: www.copfs.gov.uk/glossary-of-legal-terms#N

⁷⁰ For a chronological summary of the main events see: 'Timeline of events in the Essendon supplements saga' *Herald Sun* (31 March 2015) [www.heraldsun.com.au/sport/afl/timeline-of-events-in-the-essendon-supplements-saga/story-fni5f6kv-1226774541366]

⁷¹ 'Dr. Ziggy Switkowski Report' *Essendon FC* (6 May 2013) [www.essendonfc.com.au/news/2013-05-06/dr-ziggy-switkowski-report]

⁷² Grant Baker, 'AFL issues Essendon 34 with infraction notices, Bombers accused of using banned Thymosin beta-4' *Herald Sun* (14 November 2014) [www.heraldsun.com.au/sport/afl/afl-issues-essendon-34-with-infraction-notice-bombers-accused-of-using-banned-thymosin-beta4/story-fni5f6kv-1227121859160]

⁷³ 'Full statement from the AFL's Anti-Doping Tribunal' (AFL, 31 March 2015) [www.afl.com.au/news/2015-03-31/full-tribunal-statement]

⁷⁴ Jake Niall, 'The Essendon verdict: the inside story of the anti-doping tribunal hearing' *The Age* (31 March 2015) [www.theage.com.au/afl/afl-news/the-essendon-verdict-the-inside-story-of-the-antidoping-tribunal-hearing-20150331-1mc2nb.html]

⁷⁵ 'WADA statement on AFL cases' (*World Anti-Doping Agency*, May 2015) [www.wada-ama.org/en/media/news/2015-05/wada-statement-on-afl-cases]

⁷⁶ Niall (n72). See also (n69).

Clearly, introducing a 'not proven' provision of the type proposed would take a great deal of careful consideration to ensure it would be workable and not open to abuse. However, given the increasingly high stakes associated with anti-doping cases and the potential for genuine doubt as to how (or even if) a prohibited substance has entered an athlete's body, the availability of such a provision in the Code could provide useful additional flexibility. It would certainly seem to be of benefit in cases involving a positive test for a prohibited substance where the precise route of ingestion cannot be established but where there is a reasonable indication that the athlete has demonstrated little or no fault or negligence. While strict liability remains a cornerstone of the anti-doping edifice, it is perhaps time to consider adopting a more nuanced approach that mitigates some of the harshness that arises from a mechanistic application of the rules.

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