Fight against doping? Or Fight against anti-doping?

These are questions that we always ask when we are carrying out an "anti-doping" case representing an athlete before the Disciplinary Committees of national or international federations. Maybe the question seems like the same, but here is the point. Is the World Anti Doping Agency (WADA) fight simply against doping in sports? Or Is WADA conducting a fight against their own principles or, in other words, a fight against itself?

We can see in all WADA's regulations concerning the anti-doping fight in their webpage, such as The Code[1], The annual prohibited list[2], The General Standards[3], the Technical documents, etc, that apparently WADA is fighting against doping and their only concern is to punish the athletes or any support personnel, who use substances and methods which enhance their performance to gain an advantage against their competitors. At this point, all of us think that we are talking about an answer for the first question. However, at least regarding in South America, the situation is absolutely different, and we were defending cases that make it look like WADA is fighting against anti-doping.

But why we do we say against anti-doping? Because it seems like the anti-doping organizations do not want to prevent doping or do not want to protect the athletes from this bad issue. On the contrary, they just want to sanction athletes for any reason. The anti-doping organizations have the rules and have the power to act fairly and protect the athletes, but they decide not to act like that. They prefer to be considered as authoritarian, omnipotent and no one can disprove their regulations or decisions. They just want to show the world the numbers of how many athletes are sanctioned by doping and how many years they will be banned from sports. When an organization looks upon the people as numbers, there is a dehumanization and the fight against doping turns into a fight against the athletes and obviously against anti-doping.

In our law practice, we have been lucky to represent and defend national and international athletes before national and international federations and before TAS when we were at an appeal process.

First of all, we will discuss a case which went before a National Federation in Colombia of a sport that is especially important to us and gave us some little sparkles of victory. In this case, the national

[1] https://www.wada-ama.org/en/what-we-do/the-code
[2] https://www.wada-ama.org/en/content/what-is-prohibited
[3] https://www.wada-ama.org/en/resources/search?f%5B0%5D=field_resource_collections%3A228

federation and the NADO started a case against our client because of the presence of a substance called Furosemide (S5, Diuretics). It is a special situation in Colombia that our judge is also the prosecutor, in this case the National Federation. In which legal fair system would that happen? None. However, the National Federation gave us 15 days to prepare the case and we were given a single hearing to present all the evidence, our final pleadings and then a date was set for the final decision. We asked for an extension of 5 more days waiting for a laboratory report about a medicine that we thought was the prohibited substance. Nevertheless, their answer was that they cannot reschedule because the judges have to work elsewhere, have a tight schedule and they only could attend the hearing on that day. This was not because of other cases, but because they have other jobs and this role is unpaid and they do not want to waste their time. And this is the reality: our judges, in most of the cases, are not people prepared to decide upon such an important matter as an anti-doping case, in which a person could be banned from their only source of income - sports. These judges of our National Federations have no qualifications from WADA-NADO-International Federations to be judges and decide on the life of an athlete. So, a person who is not prepared and does not know the regulations could sanction a person with a ban of 4 years? This is not logical or fair.

Another problem we see in the system created by WADA is the outrageous delay of the most of the anti-doping processes in certain federations. Here we can talk about 2 different cases, which involved 2 different sports, one was in front of a national committee and the other at the International Federation. The National Disciplinary Committees prosecute and judge cases in which the test was made through the National Anti-Doping Organization or by the local leagues or federations. By contrast, when it has been the international Federation who organized collection and testing of the samples for an international competition or the “Whereabouts” program, the case goes to the International Federation.

In the first of them, the player was notified of an analytical adverse finding (AAF) for the presence of the substance Boldenone, an anabolic steroid categorized as a prohibited substance of the WADA List (S1). This substance was found from an in-competition test. Due to the type of substance, the athlete was provisionally suspended, so he could not participate in any activity related to sports. In Colombia, when a football player receives a notification, the investigation process is not handled through the procedures established in the national legislation just as the case aforementioned. But it is made before the Disciplinary Committee of the League in its first instance and before the

Disciplinary Committee of the National Federation in its second instance, and only after that can the athlete appeal before TAS. So, in this process they must wait for the proceedings in the first instance that, since the opening of the B Sample, can take 8-9 months. After this process, around 90% of the cases lead to a sanction because this particular committee lacks knowledge of the anti-doping process. It applies the Colombian penal rules so is basically impossible to appeal on the basis of the absence of significant fault or negligence (similar to the case abovementioned). The athlete has to appeal before the National Federation. At this point, even if they are innocent, he/she is banned for doing the only thing they know how to do and, obviously, do not receive any salary or prize money.

Here we find our third complaint: why is it necessary to suspend the athlete while the process is on-going? But we will come back to this point later. So, in the appeal process we are not allowed to ask for a hearing, or for time to present new evidence, or include witness statements or any other usual information to support our case. We can only present basic details and hope for a reduction. Moreover, in this strange case of Boldenone, a few days after the appeal was filed (you have 3 days after the decision of the league) we receive new information regarding the use of boldenone in Colombia; statements of people who work at farms regarding the use of the substance in cows and other evidence that we wanted to show to the committee. This could have supported the appeal based on inadvertent use through contamination. However, the Disciplinary Committee did not allow us to present this evidence because it was presented “out of terms”. So, again, are we fighting against doping? Or against the athlete? Against anti-doping? If the system wants to know the truth, why does it not accept evidence that probably explains why the Boldenone was in the athlete´s body? If the regulations say that the athlete shall explain in a balance of probability how the substance entered into his body, why can’t the disciplinary committees accept this evidence even if the procedural terms are over? We are not in a litigation between two parties, we are both parties here looking to support the fight against doping, so the procedural terms are not more important than the substantial ones, regarding the fault or not of an athlete. The player’s rights were affected by not letting him/her present their evidence.

And here we find the fourth point, the athlete did not know how the substance entered into his body and made a huge effort to prove his innocence. The Disciplinary Committees must understand that they are judging an athlete who possibly unintentionally committed a procedural fault, but he is not a murderer, a thief, a corrupt person, a rapist, in general, he is not a criminal. When WADA and its organizations understand this, the process will be fairer.

Going back to our second issue (delays), in this case the National Federation took 5 months to decide that the athlete was guilty, and they did not take into consideration the new scientific evidence filed. So we had to go before TAS, and this process normally takes 4 months to get a final decision. Meanwhile, the player still has no job and no income, and an anxious wait to discover if his career is at risk. After the hearing and taking into consideration all the evidence, the Tribunal decided to reduce the initial sanction of 4 years to a 2 years sanction, backdated to the date of the test (November 2017) and so at the moment of the award (September 2019), the player could participate in the next tournament. In Colombia, an anti-doping football case will start in the Dimayor (League) Disciplinary Committee which took approximately 8 months. After this the player can appeal before the disciplinary committee of the Colombian Football Federation and this will take at least 6 months, then they could appeal before CAS and will take another 4-5 months. Therefore, our conclusion is that if the times are reduced in one single instance in the national proceedings, the process will not take more than 8 months which is more than enough time between 2 instances (not three) to solve the case of a human being that again, has not any income because he is provisional sanctioned and treated like a criminal.

However, these kinds of situations not only happen in national proceedings, but also in the international ones. An example is a case we have presented before one of the most important International Federations in sports. This case unfortunately is with the same substance, Boldenone, but in another sport. It is no coincidence that in Colombia we have a lot of Boldenone cases because is one of the few countries in the world that legally allows the use of the substance in cattle feed. In this case, the International Federation took the sample during a competition. The Federation started an investigation process so the athlete can try to explain how the substance entered his body or explain anything about the presumed infraction of the anti-doping rules. They gave us around 2 months to file a petition, when there are laboratories issues for example. Due to the type of substance (S1) the athlete was forbidden to participate at any activity related to sports since the first notification (August 2018).

We filed all the arguments and evidence that we collected: 38 different documents and personal evidence, which we can use to prove that the substance entered into the athlete´s body by the consumption of contaminated meat (November 2018). The Federation responded in March 2019, denying all our evidence because their own medical experts attacked our scientific arguments. However, they were some issues in the federation’s expert report that, from our point of view, and

according our experts, were not true. Hence, we decided to present new scientific explanations and evidence which could prove our point that the athlete had no negligence or significant fault (April 2019). Five months later, the federation responded by rejecting our arguments (September 2019) and they insisted on a sanction of a 4 year ban.

At this point, we decided to reject that proposal and ask for the case to be filed before the Tribunal of the Federation. Pending an answer, the CAS decided to reduce the sanction of the athlete mentioned above (October 2019). Due to the fact that they were very similar cases (both Boldenone, both in the same region of Colombia, both with close carbon 13 percentage), we sent the award to the Federation so they could take into consideration the arguments of the presence of the Boldenone in Colombia. At this stage, 7 months had passed in which we had not received either the notification of the proceedings before the Tribunal, or an answer from the CAS award. The most important matter here is that WADA is in charge of reviewing the case. It means that the Federation and WADA have to decide the final decision together, otherwise WADA will appeal before CAS. We do not have any problem if WADA appeals before CAS, but what we think is outrageous is that the Federation has to request permission from WADA, having no independence regarding their own procedures and making an impossible case for the athletes who face similar situations. This is unbelievable. This goes against all the fundamental rights regarding a due process and in the meanwhile, the poor athlete has been 19 months waiting FOR THE OPENING OF THE CASE BEFORE THE TRIBUNAL. It means that he has to wait the decision of the Tribunal and then, the decision of CAS. Does that sound fair? Does it look legal? Does it seem humane? Not at all. It looks like a fight against the poorer and less famous athletes, so they can show their strength before the world, because in the same Federation there is a process against a famous athlete and its case is solved in less than 6 months. But what happens with the life of a person who is treated like a criminal even though if he is innocent? And in the hypothetical case that the athlete was guilty, do they not deserve a due process? Do they not deserve a prompt decision? It is an absurd the way that WADA and some Federations treat athletes like murderers, at least if he/she is a murderer, she/he will have a due process.

Our recommendation and main point is that if you really want to judge people and fight against doping, you firstly must start by creating procedures to prevent and sanction in a fair time the athletes who committed infractions and have no explanations. But if an athlete can provide more than 40 types of evidence, oath statements of witnesses, similar decisions on cases, is it fair to treat

him like the athlete who did not present anything, or accept his fault? The most prudent answer will be ‘yes’, but for WADA is it ‘no’.

Finally, international tribunals need to realise that life for a professional sports person is not the same in Europe than in Latin America. If an athlete in Europe is sanctioned and shall not work at sports, they will find help from the Government, maybe find another job and have a decent life. However, WADA must be conscious that if an athlete cannot work at sport during the investigation phase, they probably would not have anything to eat, because the unemployment here is so high it is very hard to get another job. Furthermore, most of the athletes do not have a profession because their lack of financial resources to pay for a university course. Moreover, just because a person is being investigated does not mean that they are guilty. Maybe the substance entered into their body by a mistake of their club doctor, maybe a mistake in the laboratory, maybe they ate some contaminated food or legal medicine (all of these happened in some of our cases). There can be so many scenarios that WADA does not want to understand. In other words, it’s like a jail sentence for the Latin-American athletes who have to confront an “anti-doping” process because the rules are made for the rest of the world without taking consideration of this truth.

In Colombia, an athlete who faces an “anti-doping” process, could have more years of “jail” or sanction than a person who committed culpable homicide (minimum 32 months).

Is the fight against doping? Or against athletes and anti-doping? We must understand this huge difference so we can make progress on the protection of our sports and indeed, the protection of our athletes.

César Giraldo Carlos Buitrago