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# **Achieving compliance in international anti-doping policy: An analysis of the 2009 World Anti-Doping Code**

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## **1 Introduction**

The establishment of the World Anti-Doping Agency (WADA) in 1999 was a watershed moment in international efforts to tackle the problem of doping in high performance sport. In the first ten years of its life WADA made substantial progress not only in consolidating its position as the focal organisation for anti-doping activity, but also in developing a global policy regime to combat doping in sport with the publication of the World Anti-Doping Code in March 2003 and the agreement of the UNESCO Convention against Doping in Sport in October 2005 being key landmarks in the regime's development.

Krasner defined a policy regime as the 'principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue-area' (Krasner, 1983: 1; see also Young, 1994). In the years since the establishment of WADA the regime has acquired many of the features associated with the more formally articulated regimes (see Hasenclever et al. 1997, 2000; Keohane 1989; Levy et al., 1995; Mitchell, 1994; Young, 1994). First, the regime exhibits a significant degree of stability in the pattern of relations between core actors. Core actors in relation to doping are governments, international sports federations (IFs) and event organisers especially the IOC. WADA is funded jointly by governments and international sports organisations and both these sets of interests have equal representation on the WADA

Foundation Board and Executive Board. WADA has a number of regional offices which also fulfil the function of ensuring that the network of relations between key actors is maintained. Second, there is now a stable group of core actors which drive policy. The core group of actors includes UNESCO, the European Union, the Council of Europe, a number countries with a history of activism on doping such as Norway, Australia and Canada, the IOC and a selection of major Olympic IFs including those for track and field (International Association of Athletic Federations - IAAF) and swimming (Fédération Internationale de Natation - FINA). The third common feature of the more formal regimes is that key functions of regime maintenance, such as information exchange, policy review and the monitoring, verification and the enforcement of compliance, are fulfilled.

In 2002 the author analysed the draft of the World Anti-Doping Code (subsequently published in 2003) and assessed the challenges that faced WADA in attempting to achieve compliance from governments and from sports organisations (author 2002). The progress since 1999 towards establishing the characteristics of the more formal regimes was noted as was the central role of the Code in providing a firm foundation for anti-doping activity by the regime. Achieving compliance was identified as the central challenge facing the new Agency with the lack of capacity at the national level in many countries, the ambiguous legal status of the Code and the need to overcome distrust of 'governmental' agencies among sports organisations being the three most pressing issues. In the intervening years some of these issues have been addressed with, for example, the 2005 UNESCO Convention providing governments with a secure legal basis for acceptance of the Code. The 2003 Code was revised in the mid 2000s and the second edition was published in 2009. The 2009 Code was a much

more ambitious document which posed substantial challenges in terms of a range of regime maintenance functions including compliance. It is the fulfilment of regime maintenance functions that is the point of departure for this paper which is concerned to analyse the extent to which and the means by which the functions of policy monitoring, verification and enforcement of compliance are fulfilled.

The research for this paper was conducted during 2012. In addition to analyses of the World Anti-Doping Code and the UNESCO Convention against Doping in Sport a series of additional documents were analysed including Independent Observer (IO) reports on major sports events held between 2009 and 2012<sup>1</sup>. Data generated by the biennial surveys of compliance conducted by WADA and UNESCO were also analysed as **were** the data collected by Houlihan and Garcia (2012) as part of their study of the use of legislation to control the trafficking in performance-enhancing drugs. The analysis of documents and data was supplemented by semi-structured interviews with two senior staff responsible for the implementation of the UNESCO Convention which were designed to clarify the author's interpretation of the UNESCO data.

## **2 The World Anti-Doping Code and the UNESCO Convention against doping in sport**

The mission of WADA is 'to promote, co-ordinate and monitor at international level the fight against doping in sport in all its forms ... The Agency's principal task will be to co-ordinate a comprehensive anti-doping programme at international level, laying down common, effective, minimum standards, compatible with those in

internationally recognised quality standards for doping controls....' (WADA, 1999 p. 1). The Agency has a significant staff complement, a reasonably secure funding base, and an expanding network of working groups and standing committees. However, WADA's most significant contribution to the anti-doping regime is the publication of the World Anti-Doping Code. The drafting of the Code, which is now the recognised reference document for the anti-doping regulations of governments and international sports federations (IFs), was prompted by a series of weaknesses in previous attempts to tackle doping in sport including: the vulnerability of existing regulations to legal challenge on the grounds of the poor management of the process of sample collection and laboratory analysis; inconsistent penalties; the lack of consistency between the rules of the sample collection agency, the domestic federation of the athlete and the relevant IF; ambiguous jurisdiction; and the increasing litigiousness among athletes (Vrijman, 1995; Siekmann et al., 1999; Siekmann and Soek, 2000).

The 2009 Code is arranged in twenty-five Articles and compliance is dealt with in Article 23 (Acceptance, compliance and modification) and Articles 20 to 22 (Roles and responsibilities of stakeholders). The list of stakeholders is long and includes the IOC, National Olympic Committees (NOCs), IFs, National Anti-Doping Organisations (NADOs), event organisers, athletes and governments and for each stakeholder there is a list of expectations. Among the 12 paragraphs that outline the responsibilities of IFs are the obligations to 'adopt and implement anti-doping policies and rules which conform with the Code' and to 'require each of its National Federations to establish rules requiring all Athletes and each Athlete Support Personnel who participates as coach, trainer, manager, team staff, official, medical or paramedical personnel in a Competition or activity authorized or organized by a

National Federation or one of its member organizations to agree to be bound by anti-doping rules in conformity with the Code' (WADA, 2009 p.106-7). The Code emphasises the role of governments in 'encourag[ing] all of its public services or agencies to share information with Anti-Doping Organizations which would be useful in the fight against doping and where to do so would not otherwise be legally prohibited' (Art. 22.2) and draws attention to the obligation of governments under the terms of the UNESCO Convention Against Doping in Sport. The Article also set a deadline for ratification of the UNESCO Convention of 1<sup>st</sup> January 2010. Failure to meet that deadline 'may result in ineligibility to bid for Events as provided in Articles 20.1.8 (International Olympic Committee), 20.3.10 (International Federations), and 20.6.6 (Major Event Organizations) and may result in additional consequences, e.g., forfeiture of offices and positions within WADA; ineligibility or non-admission of any candidature to hold any International Event in a country, cancellation of International Events; symbolic consequences and other consequences pursuant to the Olympic Charter' (Art 22.6). In discussing measures designed to ensure compliance more generally the Code lists the specific Articles that non-governmental signatories must implement. Compliance is discussed briefly and the Code notes that 'Compliance with the Code shall be monitored by WADA or as otherwise agreed by WADA' (Art 23.4.1).

The reference document for governments is the UNESCO Convention which invites States Parties to 'commit themselves to the principles of the Code' (Art 4.1) although it is noted that the Code itself does 'not create any binding obligations under international law for States Parties' (Art 4.2). While the Convention has legal force its phrasing is vague and it imposes few clear obligations on governments and, according

to the French UNESCO member 'is a relatively permissive document' (UNESCO, 2009 p. 19). It refers to states undertaking 'appropriate measures', prompts them to 'encourage ... all forms of international cooperation'. Indeed with regard to most aspects of anti-doping activity by states the emphasis is on encouragement rather than requirement. As regards monitoring and compliance the Convention, like the Code, is monitored on a biennial basis overseen by a conference of States Parties which has WADA present in an advisory capacity and other stakeholders, such as the IOC and IPC, present as observers.

In terms of the typology of international legal instruments developed by Abbott, Keohane, Moravcsik, Slaughter and Snidal (2000) the UNESCO Convention is at the weak end of the range when assessed according to the three dimensions of obligation, precision and delegation. On a spectrum of obligation that runs from unconditional obligation to expected norms the Convention is closer to the weaker end probably best illustrated by the escape clause in Article 39 which states that 'Any State Party may denounce this Convention' within six months of giving notice. In terms of 'precision' the Convention allows broad areas of discretion and in terms of 'delegation' to specified third parties to implement the Convention the text relies more heavily on bargaining and normative pressure than on recourse to the courts. In summary, the Convention creates weak obligations to deliver imprecise objectives through a vague implementation framework. The weakness of the Convention in supporting the objectives of the World Anti-Doping Code has been acknowledged in a recent internal report submitted to the WADA Executive which found a series of 'systemic, organizational and human reasons why the drug testing programs have been generally unsuccessful' (WADA, 2012c, p.1) and concluded that the 'real problems are the

human and political factors. There is no general appetite to undertake the effort and expense of a successful effort to deliver doping-free sport' (WADA, 2012c, p.3). Particular problems which related especially to governments were 'low standards of compliance measurement (often postponed), unwillingness to undertake critical analysis of the necessary requirements, unwillingness to follow-up on suspicions and information, unwillingness to share available information and unwillingness to commit the necessary informed intelligence, effective actions and other resources to the fight against doping in sport' (WADA, 2012c, p3).

In assessing the scale of the challenge of monitoring compliance with the Code the following characteristics need to be borne in mind. First, the 2009 Code is a more detailed set of requirements and is much more prescriptive than the 2003 version (Hanstad *et al.*, 2010). Second, the Code contains a number of technically or logistically complex areas such as those concerning therapeutic use exemption (TUE)<sup>2</sup> and whereabouts information. Third, the Code requires extensive collaboration both domestically (with customs services and with police for example) and internationally (sharing information on athletes between Anti-Doping Organisations). The Convention is less prescriptive, but is nonetheless clear in the expectations that it has of governments in relation to supporting domestic sport organisations and liaising with international partners. Underpinning the Code and the Convention is the assumption that an effective response to the problem of doping in sport requires 'universal harmonization of core anti-doping elements' (WADA 2009 p. 11).

### **3 The challenge of harmonisation**



Harmonisation refers to both a process and an outcome and is centred on the Code and the sets of international standards and guidelines that accompany it and also on the UNESCO Convention. As a process harmonisation relies on the collective efforts of WADA and UNESCO as monitoring and information collecting bodies, on the Court of Arbitration as the primary forum for rule interpretation and on the IOC and the IFs as the bodies which have the power to impose the most significant sanctions. As an outcome harmonisation is rather more difficult to define. As indicated in Table 1 the 2009 Code incorporates a number of different definitions of harmonisation arguably reflecting the degree of flexibility required to ensure maximum agreement and to adapt to local circumstances. However, it is notable that the 2009 Code puts a greater emphasis on ‘uniformity’ and is less accepting of ‘proximity’ or ‘tolerability’ than the 2003 version.

Table 1 about here

#### **4 Rapid implementation, but slow compliance**

Implementation of the Code focuses on three primary sets of organisational actors: governments, IFs and event organisers. Formal adherence to the Code was rapid and extensive among IFs, event organisers and other international sport organisations. All summer and winter Olympic international federations promptly accepted the Code and within five years well over one hundred IFs were signatories. The support for the Code from IFs was reinforced by strong expressions of governmental support. The 2003 Copenhagen Declaration provided governments with the opportunity to indicate

their intention to recognise and implement the Code and was a first step in the preparation of the UNESCO Convention which was made available for ratification in 2005. The UNESCO Convention was the most rapidly ratified<sup>3</sup> convention in UN history with sixty-nine member states ratifying the Convention within two years and a total of 172 ratifications obtained by September 2012. In many respects the joint history of the Code and the Convention is one remarkable success particularly if judged by the pace with which both were accepted and the degree of procedural validity derived from endorsement by governments, IFs, the IOC and NOCs. The broader success of the regime is indicated not only by the speed of acceptance of the Code and Convention, but also by the willingness of countries and sport organisations to continue funding WADA. In both 2011 and 2012 WADA received all expected funds from sports organisations and well over 95% of expected funds from governments.

However, there remains a strong concern voiced within some ‘activist’ NADOs and increasingly within WADA and UNESCO that rapid formal implementation might mask either an undesirable degree of variation in interpretation or a lukewarm commitment to effective action among some key stakeholders (WADA 2012c). As regards the extent of variation in interpretation Hanstad *et al.* (2010, p. 426) noted ‘huge differences’ in implementation especially regarding the establishment of a registered testing pool of athletes, the requirements for availability for testing and the sanctions for not providing whereabouts information. Dikic *et al.* (2011 p. 13) also noted ‘the significant differences in reported data concerning filing failures and missed tests’. In relation to the depth of commitment there is a concern that some NADOs in central and Eastern Europe are under-resourced to such an extent that their

capacity to operate effectively is seriously in doubt. There are also concerns with those countries in which the commitment of the NADO is not in doubt but where other agencies on which the NADO partly depends (such as customs and excise, the police and national governing bodies of sport) give anti-doping a much lower operational priority (Houlihan and Garcia, 2012). Other sources of evidence of the unease about the extent and depth of compliance come from WADA's recent IO reports on the doping control procedures at major international sports events. For example, while the doping control at the 2010 Asian Games was assessed as 'effective', the report noted 'substantial' 'opportunities for improvement' (WADA, 2010a p. 3). Among the areas of concern were the training of chaperones, the TUE process, the level of training of members of the TUE committee and the adequacy of doping control stations. The positive conclusion of the IO report on the 2010 Tour de France, that 'the anti-doping programme ... was of good quality', is belied by the fact that the report is by far the longest in recent years – running to fifty pages and 57 recommendations for improvement. The report highlighted the lack of trust and cooperation between the French anti-doping agency and the UCI, noted the 'predictability' of the UCI testing programme, criticised the willingness of the UCI 'to allow riders with suspicious profiles, backed up by robust intelligence' the comfort of knowing that they are extremely unlikely to be tested immediately post-stage finish, remarked on the 'overly rider-friendly' nature of the anti-doping programme and noted that the Code of Conduct to which the professional teams had signed 'seem[ed] to have been disregarded by both the Pro-Teams and the UCI' (WADA, 2010b pp. 4 & 5). The 2011 Pan American Games also resulted in a critical IO report which highlighted unclear criteria for sample analysis, the refusal by the Brazilian Chef de Mission to provide doping control staff with the room locations for athletes,

inconsistencies in sample collection and conflicts of interests between athletes and doping control staff (WADA, 2011).

Concerns about compliance also arose from the report on the London 2012 Olympic Games. The Observers' report noted the importance of target testing those athletes 'who may have been subject to less robust anti-doping programs prior to their arrival in London' (WADA, 2012a p. 3) and drew attention to the 'many athletes [who] either did not advise the IOC or their NOC of their TUE [therapeutic use exemption]' (WADA, 2012a p. 4). The report also highlighted the 'meaningful number of cases [where] the lack of whereabouts information made it challenging to locate athletes at the desired time' (WADA, 2012a p. 9) and suggested that the IOC should impose sanctions on NOCs that failed to provide whereabouts information. Similar, but more substantial, concerns were expressed with regard to the London Paralympic Games. Attention was drawn to the 'limited contact with the NADOs and the IFs on intelligence sharing' (WADA, 2012b p. 6), the difficulties of locating athletes for testing and the granting of a TUE 'without supporting medical information' (WADA, 2012b). This accumulation of evidence suggests that a distinction needs to be drawn between adherence and implementation on the one hand and compliance on the other.

## **5 Adherence, implementation and compliance**

It is important to distinguish adherence (ratification or acceptance) from implementation and also from compliance. Adherence refers to 'a domestic decision to ... enact the international legal rule as a national measure' (Trachtman, 2010 p. 4).

What tends to make adherence more than the formalisation of a policy aspiration is action in the form of the commitment of resources at the domestic level and beyond the contributions made to WADA. The commitment of resources in support of the Code by primary actors, especially governments, marks the transition from adherence to implementation. These resources might include the creation of a budget, the allocation of the function/responsibility within the machinery of government and the appointment of staff. These inputs might be accompanied by the development of outputs, for example in the form of anti-doping education/information resources and the establishment of a doping control programme. On the basis of this definition of implementation there is considerable evidence of success. For example, 123 countries have either established a NADO as a distinct administrative unit or have allocated the anti-doping function to an existing ministry and 18 countries out of a sample of 49 UNESCO member states have introduced legislation specifically designed to tackle trafficking in performance enhancing drugs (Houlihan & Garcia, 2012).

Unfortunately, it is not uncommon for implementation and compliance to be treated as synonymous with WADA (and consequently many NADOs) failing to distinguish between the concepts. Much of what the Code and the Convention refer to as 'compliance' is more accurately defined as either adherence or as implementation. Compliance rests, conceptually, between implementation (formal ratification of an agreement, establishment of an administrative unit and allocation of budget for example) and impact, and may be defined as the day to day, routine, behaviour of an actor which conforms to the rules and intent of the Code. As Jacobson and Weiss point out 'Measuring compliance is more difficult than measuring implementation. It involves assessing the extent to which governments [or other policy actors] follow

through on the steps they have taken to implement international accords' (1995 p. 123). Measuring the 'day to day, routine behaviour' of over 170 countries and over 150 IFs is a daunting task for UNESCO and WADA and even if the focus is narrowed to the 35 Olympic sports federations and the sports powers (the 30 countries that win around 75% of Olympic medals) the task of monitoring compliance remains challenging.

## **6 Factors affecting compliance with the Code**

The move beyond implementation to compliance may be affected by a range of factors. First, compliance might be the outcome of the rational calculation of the balance between the perceived benefits and costs of compliance on the one hand and the advantages and risks associated with defection on the other. For example, for many NGBs (and, to a lesser extent, event organisers) financial dependence on governments is extensive and, assuming that governments and IFs are supportive of the principles of the Code, the financial consequences of non-compliance may be significant. However, the cost/benefit calculation undertaken by governments might be affected by wider political considerations, such as the desire to demonstrate the superiority of a political system (as was the case with the former East Germany and Soviet Union), or the concern at a possible loss of relative sporting advantage (the USA in the 1970s), either of which might result in a government being less concerned with ensuring rigorous compliance by its sports organisations. If the rational calculation of advantage is the basis for the decision to comply then severe sanctions and rigorous testing, both of which are at the heart of the Code and Convention, are

favoured as a way of increasing potential costs and risks and thus skewing the calculation in favour of compliance.

A second explanation might be that for many countries, especially those in Western Europe and North America, the costs of implementation and compliance were relatively low because many elements of the Code were adapted from current practice within this group of countries. Hooghiemstra and van Ees (2011, p. 491) noted, in their analysis of good governance and business compliance behaviour, that the degree of compliance was positively correlated with firm size and explained this as being due to the fact that ‘standards of good governance generally are based on practices within the large listed firms’. While it was indeed the case that the countries which were most influential in shaping the Code were those with a long history of activism on the issue of doping and were generally among the ‘sports powers’, the 2009 version of the Code moved well beyond the policy and practice of most activist countries. The increasing complexity of the whereabouts requirements and the TUE process and the move from a primary reliance on laboratory analysis to police and customs investigation created challenges for all stakeholders. Some of these challenges were administrative and organisational (such as the maintenance of whereabouts databases, and liaison and information exchange between anti-doping agencies, police, customs and public prosecutors) and others were scientific (for example, recruiting suitably qualified members for the TUE panel). The requirements of the 2009 Code posed fewer problems for richer countries with established NADOs, but as the recent WADA IO reports indicate some countries with established anti-doping arrangements still struggled to achieve compliance.

Third, while it has been regularly noted that there appears to be a generally low level of defection from collaboration agreements this has often been explained by the modesty of the thresholds for implementation and compliance and the extent of ambiguity which can be exploited by the less committed states. As Downs et al. (1996) argued many international agreements are framed in such a way that signatories are required to depart only slightly, if at all, from their current pattern of behaviour. As mentioned in relation to the previous point while this argument might have been accurate in the context of the 2003 Code the 2009 edition raised significantly the expectations held of stakeholders, especially IFs and governments. However, with regard to the UNESCO Convention it was suggested by one senior official that it had been assumed within UNESCO that anti-doping would not be a crucial political issue for member states and therefore the Convention needed to be ‘designed in such a way as to not be a burden’ (Interview, 13 March 2012).

The fourth possible explanation of implementation and compliance is that it may be motivated less by rational calculation and more by the comfort gained from normative conformity (Winter and May, 2001) or from the desire to earn approval (May, 2005). However, much depends on the prevailing normative profile and whether it conforms to the norms aspired to in the Code and Convention. At present it can be argued that the prevailing norms are of tolerance and passive engagement with anti-doping policy (as reflected for example in many recent IO reports and in the UNESCO Anti-Doping Logic survey which is discussed in more detail below) rather than an enthusiastic embrace. Consequently, the impact of normative socialisation is not necessarily positive for, as Lieberman and Asaba (2006) noted, while the collective response to an agreement might create pressures for uniformity the end product might be selective



compliance in which actors exhibit a common pattern of non-compliance. As was evident from the review of the International Observer reports laxity in collecting whereabouts information and in the administration of the TUE system appear to be common areas of weak or non-compliance. A fifth factor is indirect and results from initial (even if reluctant) adherence. As Simmons (2009) demonstrates in relation to human rights regimes the adherence by government to an international agreement can affect domestic politics by stimulating the formation of, or strengthening of, a supportive domestic coalition which would lead to implementation and subsequent compliance. However, Trachtman (2010 p. 13) adds an important word of caution by noting that ‘repeated interactions with duplicity or hostility would not necessarily change anyone’s ... incentives to comply’. Finally, compliance with the Code might be affected by other regimes and whether they are complementary or contradictory (Stokke, 2001). For example the international regime concerned with trafficking in recreational drugs is complementary to many elements of the 2009 Code **and although data sharing between NADOs and the police and customs services has been generally slow to develop in practice there have been no objections in principle to closer cooperation.** However, there is a clear tension with regimes concerned with the protection of the privacy of personal data. Data sharing, for example relating to TUE and whereabouts, is essential for the effectiveness of the anti-doping policy regime.<sup>4</sup> **In the draft revision by WADA of the international standard on privacy and personal information there is clear evidence of an accommodation between WADA’s preferences and those of the OECD, Council of Europe and the European Union, for example regarding data relating to minors, but data on athlete whereabouts and test results will be made available to a range of organisations including the athlete’s federation and anti-doping organisations with testing authority over the athlete**

(WADA 2013). However, the European Union is currently debating a revision to the European Data Protection Directive which has the potential to conflict with the implementation of the Code.<sup>5</sup>

## **7 Designing an effective compliance system**

The major problem facing WADA is that implementation is not compliance and that treating simple adherence and formal implementation as evidence of compliance is misleading. There is indeed extensive evidence of successful implementation in the form of outputs – for example the number of tests conducted, the number of countries with NADOs and the number of Code/Convention signatories – but there is the suspicion, as mentioned earlier, that compliance (depth of commitment) among some IFs and governments is shallow and undermining the efforts of the policy regime. The concern with compliance is reinforced by an awareness that monitoring is weak and transparency is poor at IF and NGB levels. There is also an awareness that sanctions against organisations appear weak mainly because their application seems either implausible or irrelevant. Sanctions seem to be clustered at the two extremes of the spectrum as there are some that are so draconian (exclusion from the Olympic Games or prohibition from hosting major sports events) that they lack credibility and others that are so mild (a gentle public reprimand) that they lack authority. All these concerns highlight the importance of the design of an effective compliance system.

A compliance system refers to the matrix of actors, relationships, values, expectations and actions encapsulated in the Code rules. As such a compliance system is best

conceptualised as a social institution which Urpelainen (2011 p. 215) defines as ‘equilibria of well-defined games’ which reflect the degree of intentionality required for the effective functioning of any collective agreement/policy regime (Hodgson, 2006). According to Mitchell and Chayes (1995) a compliance system has three elements: a primary rule system, a compliance information system and a non-compliance response system.

The primary rule system refers to actors, rules and procedures and is concerned with determining who gets regulated and through what means. A high level of specificity and transparency enhances compliance because those predisposed to comply have clearer guidance about what they need to do and can be confident that their compliance is visible to others, and non-compliers are easily identified and find it more difficult to argue that their failure to comply is due to inadvertence. However, the cost of clarity of specification and transparency is often a loss of subtlety and depth which frequently shifts the focus away from the monitoring of policy impact to the monitoring of policy outputs.

The Code represents the primary rule system for anti-doping and as discussed above provides a clear statement of which organisations will be expected to be compliant.

The Code is also clear about how the compliance of primary stakeholders (governments and IFs) will be assessed (biennial self-reporting) and the responsibility that they have for ensuring the compliance of domestic sports organisations and event organisers. In relation to governments the Code is reinforced by the UNESCO Convention and UNESCO has its own biennial process of self-reporting modelled on that developed by WADA. The primary purposes of a compliance information system

are to ensure maximum transparency and also to ensure that the data collected are: relevant; of high quality; analysed thoroughly; and are disseminated widely. As Mitchell notes, in order to make the threat of a retaliatory response credible 'the regulated actors must know that their choices will not go unnoticed' (1996, p. 19). The final element in the compliance system is the non-compliance response system. Partly because of the cost of the alternatives and partly because of the fossilisation of practice sanctions remain the preferred response to non-compliance in most regimes. However, sanctions are rarely cost-free and, as is very clear from the experience of their use in sport, the consequences of their use can be such that regulators are reluctant to use them. Too many international regimes construct elaborate sanctions, but lack an organisational focus for their application. In this regard the Code is strengthened not only by the presence of WADA and its permanent secretariat which can provide the administrative infrastructure for monitoring and the dissemination of information, but also through the presence of CAS which has the potential to strengthen the application of sanctions, not only in its role as an appeal body, but also as a focus for the emergence of a body of sport law which may, over time, give greater authority to the decisions and administrative actions of those responsible for anti-doping policy.

## **8 Measuring the extent of compliance with the anti-doping Code**

WADA defines compliance in very broad terms as follows: 'Firstly, an ADO [Anti-Doping Organisation] must accept the Code. By doing this, it agrees to the principles of the Code and agrees to implement and comply with the Code. Secondly, the ADO must implement the Code by amending its rules and policies to include mandatory

articles and principles of the Code. These anti-doping rules must be submitted to WADA for review, in order for the rules to be pronounced in line with the Code. Lastly, the ADO must enforce its amended rules and policies in accordance with the Code.<sup>6</sup> It is this final requirement which comes closest to the definition of compliance adopted in this paper.

As mentioned above a crucial element in an effective compliance system is the systematic gathering of information about the actions of anti-doping organisations (government national anti-doping organisations (NADOs) and IFs). WADA gathers information in three main ways. First it monitors the decisions of ADOs to ensure consistency of decision-making and can refer to the Court of Arbitration for Sport (CAS) decisions which it considers to be inconsistent with obligations under the Code. This is a significant power which the Agency has activated on a number of occasions.<sup>7</sup> For example, in November 2012 WADA appealed to CAS against the decision by the Indian ADO to issue a reprimand to an athlete, Nirupama Devi, whose sample contained the drug methylhexaneamine. WADA has also defended itself before CAS when its decisions have been challenged, for example by the British Olympic Association on the issue of the permanent exclusion of athletes guilty of a doping offence from selection for the national Olympic squad. Second, the Agency receives feedback from its regional offices and from assessments contained within IO reports. The third major way in which WADA gathers information on compliance is through the biennial survey of ADOs (governments, IFs and NOCs). The WADA survey is a series of self-report questions which offer respondents a range of fixed responses and was used by UNESCO as the basis for its own process for monitoring governmental compliance with the Convention against Doping in Sport. Indeed at the

2009 conference of UNESCO States Parties there was strong support for the harmonisation of monitoring systems across UNESCO, WADA and the Council of Europe.

The UNESCO Anti-Doping Logic survey comprises 28 principal close-ended questions which address a range of aspects of Code compliance. Some questions are designed to elicit information about the type of measures adopted (e.g. legislation, regulations or other actions) while others are designed to gather information about the extent to which measures have been taken in relation to specific problems such as trafficking and whether those measures were ‘extensive’, ‘substantial’ or ‘partial’ for example. Topics covered include whether members of the athlete’s entourage are targeted, the extent of public financial support, the extent to which domestic sport organisations act in a manner consistent with the Code and the extent of cooperation between domestic sport organisations and international anti-doping organisations. The outcome is a summary which indicates, on a five point scale, the extent of compliance with 16 of the Convention’s articles and an overall assessment on a one to ten point scale where ten represents high compliance. Brazil, for example, was considered to be non-compliant on the ten point scale and was particularly weak in areas related to education, research and funding. UNESCO listed around 20 States Parties (out of 105 who responded) as non-compliant including Croatia, Jamaica, Brazil and Morocco (UNESCO 2011). While there was some overlap with the WADA survey results the Agency had a far longer list of non-compliant countries. Forty-eight countries (out of 203) were deemed non-compliant including Namibia, Zambia, Argentina, Brazil, DPR Korea, Greece and Portugal.<sup>8</sup>

Despite the tough stance on non-compliance indicated in the Code and, by implication, the Convention the practical response by both UNESCO and WADA tends to rely on positive intervention in the form of support, capacity building and persuasion with the strongest negative intervention being ‘naming and shaming’ by WADA through the publication of the names of non-compliant countries and IFs. However, two significant concerns remain. The first is that the threshold for ‘compliance’ is set low and would qualify as basic implementation rather than the depth of day to day commitment implied by the definition of compliance offered by Jacobson and Weiss earlier in this paper. The second concern relates to the willingness and capacity of both UNESCO and WADA to take more robust action against non-compliant governments and sports organisations. In other words what will be the response of UNESCO and WADA if (when) their bluff is called as it arguably already has been by Brazil and the UCI?

## **9 Strengthening the compliance system for anti-doping**

The global anti-doping regime faces three related challenges: first, how to monitor effectively the degree of implementation of the formal requirements of the Code and Convention and how to monitor and assess the depth of compliance (day to day commitment); second, how to strengthen implementation of the formal requirements of the agreements; and third, how to deepen the day to day commitment to the agreements.

### **9.1 *Monitoring compliance***

The Anti-Doping Logic survey conducted by UNESCO and the compliance survey carried out by WADA provide sufficient information to determine the degree of formal implementation of the requirements of the respective agreements although as both are self-report tools there is a clear need for verification from other sources such as IO reports and feedback from Regional Anti-Doping Agencies. Both survey tools are more successful at gauging breadth of commitment rather than depth of commitment. Surprisingly, given the extensive experience in designing and monitoring conventions UNESCO does not provide guidelines on effective monitoring; rather it is left to the discretion (and resources) of signatory states. Moreover, with regard to the monitoring of the anti-doping convention, there is a clear impression that the rapidity of ratification is seen as the primary indicator of success. This attitude towards compliance was reinforced by one senior UNESCO official in relation to the ADL survey who commented that ‘the priority was to get a good response [rate which] is seen as an indicator of commitment by the UN’. Overall the current formal assessment tools are important, but of limited value in terms of assessing depth of compliance.

The weakness of the current compliance monitoring system is a significant problem for the anti-doping regime. In addition to the data collected through the biennial surveys there is a clear need for more detailed quantitative data, for example, related to the financial support provided by governments and IFs for anti-doping activity, the qualifications and expertise of anti-doping staff, the size and basis of selection of the registered testing pool, the basis on which athletes are selected for testing, the conduct of no-notice out of competition tests and the way in which missed tests are recorded. While adding to the data required from ADOs will not be popular the absence of more



detailed information which is publicly available makes the assessment of the depth of commitment extremely challenging.

One final way in which governmental compliance with anti-doping agreements might be assessed is by gathering data regarding compliance with other related conventions and agreements. As Trachtman (2010) has argued countries often exhibit common orientations to international agreements. In other words countries which have a reputation for compliance with longer established international agreements are more likely to comply with more recently ratified agreements such as the UNESCO Convention.

## 9.2 *Strengthening compliance with the formal requirements of the Code and Convention*

Organisations generally rely on a limited and often crude range of instruments to achieve compliance the most common of which are inducements and sanctions. Inducements, which are most effective when tackling causes of non-compliance arising from either inability or inadvertence, include financial transfers where one actor will pay to enhance the compliance of another. Both WADA and UNESCO support capacity building, the former mainly through the work of its RADOs while UNESCO has a modest fund of \$3m to underwrite this activity although it should be noted that the fund is reliant on donations from States Parties and also has to support youth education projects. If sanctions, the most common tool of implementation in current anti-doping policy, are to be effective they must be credible and potent. However, there must be some scepticism regarding the credibility of sanctions as

Brazil has been awarded the hosting rights for the football World Cup in 2014 and the Olympic Games in 2016 yet was listed among the non-compliant countries in WADA November 2011 report on compliance (WADA, 2011) and was heavily criticised in the IO report on the 2011 Pan-American Games. Significantly, both inducements and sanctions tend to be reactive tools, dealing with breaches of an agreement after they have occurred. More proactive approaches to enhancing compliance involve investing in capacity building particularly through education and training programmes.

According to Tallberg (2002 p. 613) 'non-compliance is best addressed through a problem solving strategy of capacity building, rule interpretation, and transparency, rather than through coercive enforcement'. Both UNESCO (in relation to the Convention) and WADA accept that there is a role for education and capacity building in supporting progress towards compliance. However, the efficacy of a particular instrument depends substantially on the cause of non-compliance. Table 2 summarises the main reasons for non-compliance and assesses the likely impact of different types of response. The test of a sophisticated and successful policy regime is that it has a repertoire of instruments tailored to the range of sources of possible non-compliance in a particular policy area.

Table 2 about here

### 9.3 *Deepening the day to day commitment to the Code and Convention*

Identifying the need for greater depth of commitment to anti-doping is far easier than producing a prescription or its achievement. There are six areas for action which can

be explored in the pursuit of deeper compliance: external inspection; internal domestic lobbying; greater use of the law; stronger sanctions; better governance of anti-doping at governmental and IF levels; and increased norm internalisation due to repeated interaction.

External inspection has perhaps the greatest potential for determining and enhancing depth of compliance. For a number of years the Council of Europe monitored compliance with its own anti-doping convention by sending inspection teams of three or four experts to visit a country and meet a range of domestic stakeholders from government and sport. Despite some weaknesses the process was reasonably effective in giving the Council an insight into the nature of anti-doping activity and the extent of compliance (Houlihan, 2003). Although the process was expensive and would clearly be more so once expanded beyond Europe WADA has a broadly similar model already in place in the form of its IO programme. The IO programme has proved to be an effective tool for data collection and monitoring and also for prompting event organisers and participant countries to improve anti-doping processes. Moreover, the programme has produced an experienced group of observers. There should be considerable scope to expand the IO programme and for the cost to be met fully or at least substantially by event organisers.

A second approach to strengthening monitoring and compliance is to stimulate the development of domestic lobby/watchdog capacity. For example the UN Convention on the Rights of Persons with Disabilities requires states to have a 'framework that includes one or more independent mechanisms to promote, protect and monitor the Convention's implementation' (UN, 2010 p.30). In some countries this activity could

be centred on the work of the domestic NADO which is often the most potent domestic lobbyist. However, it would be more appropriate if an independent group could fulfil the watchdog role and thus include the monitoring of the functioning of the NADO in its remit. However, such an innovation requires not only adequate resources, but also a degree of openness within NADO and NGB governance that is frequently lacking.<sup>9</sup>

A third option, and one which is gaining ground, is to encourage countries to introduce legislation specifically designed to tackle aspects of doping such as manufacturing and trafficking. While the willingness to introduce legislation is more likely among those countries where there is greater depth of compliance it is also likely that the introduction of legislation will further deepen commitment to anti-doping activity by involving a wider range of public bodies such as customs and excise, police and public prosecutors (Houlihan and Garcia 2012) and thus creating a more potent domestic lobby. The fourth option is to alter the risk-benefit ratio by increasing the sanctions imposed for doping violations. With regard to athletes there has been considerable pressure, especially from athletes' organisations for more severe penalties, but attempts to impose heavier penalties, for example by NOCs, have been challenged by WADA on the grounds that it contradicts the Code's commitment to harmonisation. In acknowledgement of the strength of demand for tougher penalties the second draft of the third edition of the Code is proposing an increase in sanctions for a serious first offence from two to four years thus significantly altering the cost/benefit calculation.<sup>10</sup> However, there has been far less debate about the imposition of sanctions on non-compliant governments, IFs and event organisers.

It is difficult to separate an organisation's response to doping from broader issues relating to the governance of the organisation on the assumption that those organisations which demonstrate a commitment to the principles of good governance are more likely to embrace a deeper commitment to the Code (see Mattli and Woods, 2009, for a general discussion of the connection between good governance and compliance). Good governance, with its primary emphasis on transparency and on self-auditing (Hall, 2009), not only makes the capture of an NOC, IF, NADO or National Governing Body of sport by sectional interests, less likely but it also enables external agencies to verify more effectively claims of commitment to anti-doping.

The final area for action relates to the process of norm promotion and internalisation. For example, sanctions should ideally be part of a broader strategy which allows opportunities for moral reinforcement, for example, through regular meetings/conferences and through the publication of evidence of non-compliance. Norm internalisation is more likely to be achieved if there is repeated interaction with core regime members, such as WADA officers, and if compliance failures are dealt with promptly, robustly and publicly.

## **10 Conclusion**

In the thirteen years since its establishment WADA has been extremely successful in developing a coordinated approach to doping in sport by bringing together three sets of stakeholders – governments, IFs and event organisers – which have a history of mutual suspicion. The speed with which the Code was ratified by IFs and other sports organisations, especially the IOC, was exceptional, but no less so than the speed with

which the UNESCO Convention was ratified. Within six years of its establishment WADA could rightly claim that the architecture of a robust anti-doping policy regime was firmly in place. However, in the opening section of this paper the concern to identify the means by which and the extent to which functions of monitoring, verification and enforcement were fulfilled was identified. As this paper has demonstrated while there has been considerable progress, it has also been argued that the pace of adherence and implementation should not be taken to indicate depth of compliance. Indeed there is substantial evidence of a shallow level of commitment from a number of important governments and IFs. **The 2012 report to the WADA Executive on the lack of effectiveness of testing programmes was a powerful indictment of the extent to which momentum in anti-doping has stalled and the extent to which compliance is seen as the central problem facing WADA. The report notes that ‘Code compliance is uneven’ and accuses governments of a ‘lack of political commitment to fight against doping’ (2012, pp.3 & 6). However, the report also makes clear the lack of leverage that WADA has over other stakeholders and how reliant it is on partners –IFs and governments – many of who seem to have reached the limit of their enthusiasm for tackling doping ‘Instead of WADA being recognized as the leader in the fight against doping in sport and supported by the stakeholders, it is viewed as an irritant, surrounded by stakeholders, some of which are self-interested or conflicted organizations’ (2012, p.2 Appendix A).**

The challenge for WADA and UNESCO is daunting and is to devise a strategy which will encourage stakeholders to move from formal implementation to the level of compliance necessary for a more effective response to the problem of doping in sport. **This paper has argued that the problem of compliance is multi-dimensional and raises**

issues of political and organisational commitment as well as issues of capacity. The issues of capacity (finance, expertise and facilities for example) could be overcome through the expansion of the funds available to UNESCO and WADA, but the unwillingness of stakeholders to provide additional funding is indicative of the deeper political problem. While some stakeholders, especially governments, might be disillusioned at the intractability of the problem of doping in sport the impression is that too many governments and IFs have reached the point where the benefit to be gained from supporting WADA no longer outweighs the advantages of a more dilatory approach to cooperation. Rebuilding stakeholder commitment will require not only a more effective inspection system, but also the development of a stronger supportive lobby within IFs and within the major sports countries and the clear expectation that domestic law should be the cornerstone of the work of the NADO.

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**Table 1: Interpretations of harmonisation**

<b>Intended outcome</b>	<b>Description</b>	<b>Examples from the 2009 World Anti-Doping Code</b>
Consensus	Agreement on values and ends which allows variation in means.	Preamble which states the ‘Fundamental rationale for the World Anti-Doping Code’ and lists the values which underpin the ‘spirit of sport’
Uniformity	Identical standards or processes	<p>Art. 2.1: Methods for determining the presence of a prohibited substance, its metabolites or markers in an athlete’s sample</p> <p>Art. 3.1: Standard of proof to be applied when the responsible anti-doping organisation is presenting its case and the standard to be applied when the burden of proof is on the athlete to rebut allegations</p> <p>Art 6.1: The requirement that only approved laboratories shall be used for sample analysis</p> <p>Art. 17: Statute of limitations</p>
Proximity	Very close similarity in standards and processes with variation justified by the particularities of cases, countries, sports or events.	<p>Art 10.5: Elimination or reduction of period of ineligibility based on exceptional circumstances</p> <p>Art 10.6: Factors that might lead to an increased penalty</p> <p>Art 22.2 sharing of information between countries</p>
Compatibility	Difference is allowed up to the point where it undermines the credibility of standards, processes and objectives and breaches agreed basic principles.	Art 5.1.1: Sets standards for determining the number/proportion of athletes to be tested, which athletes should be tested and be included in the registered testing pool.

Tolerability	Acceptable disharmony	Art 23.4.6: Comment to Article 23.4.6 in which:  WADA ‘recognizes that amongst Signatories and governments, there will be significant differences in anti-doping experience, resources, and the legal context in which anti-doping activities are carried out. In considering whether an organization is compliant, WADA will consider these differences.

Adapted from author 2002

**Table 2: Causes of non-compliance by governments, IFs and event organisers and the likely effectiveness of a range of responses**

Cause of non-compliance	Sanctions	Education/ capacity building	Inducements/ rewards
<p><b>Choice, for example due to:</b></p> <ul style="list-style-type: none"> <li>▪ a desire to retain the benefits of the 'badge' but avoid the obligations</li> <li>▪ only agreed to the Code under pressure (diplomatic, moral, financial etc.)</li> <li>▪ the objective is partial/selective compliance</li> <li>▪ a free-rider strategy (benefit from the compliance of others, but avoid those costs themselves)</li> <li>▪ resources needed for compliance have been diverted elsewhere</li> <li>▪ the benefits of compliance have low domestic political salience</li> </ul>	<p>Likely to have a positive impact on organisational behaviour</p>	<p>Information deficits and a lack of capacity are unlikely to be primary factors in choosing to defect</p>	<p>Inducements have the potential to affect behaviour of this type of defector, but the inducements would have to be substantial</p>
<p><b>Inability, for example due to:</b></p> <ul style="list-style-type: none"> <li>▪ the lack of necessary financial or scientific resources</li> </ul>	<p>Will not have a positive impact on organisational behaviour</p>	<p>Likely to have a substantial positive impact</p>	<p>Unlikely to have a positive impact unless accompanied by capacity</p>



<ul style="list-style-type: none"> <li>▪ the lack of administrative capacity e.g. no regulatory infrastructure or subjects of regulation are remote</li> <li>▪ domestic political instability e.g. where the signatory government is replaced by one that is less sympathetic</li> </ul>			building
<p><b>Inadvertence, for example due to:</b></p> <ul style="list-style-type: none"> <li>▪ an inadequate, but sincere, attempt at local implementation</li> <li>▪ incompetence i.e. poor application of policy tools</li> </ul>	Unlikely to have a positive impact unless accompanied by capacity building	Likely to have a substantial positive impact	Unlikely to have a positive impact unless accompanied by capacity building

Adapted from author 2002

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<sup>1</sup> The Independent Observer programme is defined by WADA as a ‘Team of anti-doping experts, gathered by WADA for a major sporting event, who monitor, audit and report on the doping control and results management processes at that particular event’. The experts are usually recruited from NADOs and have scientific, medical or doping control managerial expertise. Their brief is to certify that the doping control procedure had been conducted properly and to suggest areas for improvement. IO teams attend major international sports events at the invitation of the organising body although the presence of an IO team is increasingly seen as a normal feature of a major sports event.

<sup>2</sup> A therapeutic use exemption (TUE) may be applied for by an athlete in order that they can take a prohibited substance without risk of incurring a doping violation. The bases for granting a TUE are, inter alia, that no advantage will be gained by the athlete beyond a return to normal health.

<sup>3</sup> The precise form of acceptance of the Convention varies slightly with some countries ratifying the Convention while others stating ‘acceptance’ or ‘accession’.

<sup>4</sup> For an interesting discussion of the potential tension between privacy laws and anti-doping activity see [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-IS-PPPI/WADA\\_Summary\\_of\\_Comments.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-PPPI/WADA_Summary_of_Comments.pdf)

<sup>5</sup> See WADA comments at [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-IS-PPPI/Olivier\\_Niggli\\_introduutory\\_notes\\_20090619.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-PPPI/Olivier_Niggli_introduutory_notes_20090619.pdf)

<sup>6</sup> Available at <http://www.wada-ama.org/en/Resources/Q-and-A/WADA-Compliance-Monitoring/> Accessed 21.11.12.

<sup>7</sup> In 2006 WADA reported that of 423 ADO decisions that it had reviewed 75 were not in line with the Code.

<sup>8</sup> WADA 2011 compliance report: <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/Code-Compliance--Reporting/Compliance-Report---Nov---2011/>

<sup>9</sup> While other major policy areas such as human rights and corruption have well established independent watchdog organisation (Amnesty International and Transparency International respectively) anti-doping has yet to see the emergence of such organisations. Those organisations that do exist, such as the Anti-Doping database and WADA Watch, have a limited remit which makes them unsuitable for a watchdog role.

<sup>10</sup> [http://playtrue.wada-ama.org/news/wada-foundation-board-presented-with-new-draft-code/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=wada-foundation-board-presented-with-new-draft-code](http://playtrue.wada-ama.org/news/wada-foundation-board-presented-with-new-draft-code/?utm_source=rss&utm_medium=rss&utm_campaign=wada-foundation-board-presented-with-new-draft-code)