

**CAS 2009/A/1926 International Tennis Federation v. Richard Gasquet**  
**CAS 2009/A/1930 WADA v. ITF & Richard Gasquet**

**ARBITRAL AWARD**

Pronounced by the

**COURT OF ARBITRATION FOR SPORT**

Sitting in the following composition:

**President:** Mr Luc **Argand**, Attorney-at-law, Geneva, Switzerland

**Arbitrators:** Mr David W. **Rivkin**, Attorney-at-law, New York, United States  
Mr Dirk-Reiner **Martens**, Attorney-at-law, Munich, Germany

**Ad hoc Clerk:** Mr Vitus **Derungs**, Lawyer, Zurich, Switzerland

in the arbitration between

**International Tennis Federation (ITF)**, London, United Kingdom  
Represented by Mr Jonathan **Taylor**, Mrs Anna **Blakely**, Mr Jamie **Herbert**, Solicitors, London,  
United Kingdom

**Appellant 1**

and

**World Anti-Doping Agency (WADA)**, Montreal, Canada  
Represented by Mr Francois **Kaiser**, Attorney-at-law, Lausanne, Switzerland

**Appellant 2**

against

Mr Richard **Gasquet**, Neuchatel, Switzerland,  
Represented by Mr Simon **Davies**, Mr Payam **Beheshti**, Solicitors, London, United Kingdom;  
Mr Stephan **Netzle**, Attorney-at-law, Zurich, Switzerland; Mr Adam **Lewis**, Mrs Kate **Gallafent**,  
Barristers, London, United Kingdom

**Respondent**

## **I. FACTS**

### **1. THE PARTIES**

- 1.1. The International Tennis Federation (hereinafter referred to as "ITF") is the international governing body for sports related to tennis worldwide. It has its registered seat in London, England.
- 1.2. The World Anti-Doping Agency (hereinafter referred to as "WADA") is the international and independent organization founded in 1999 to promote, coordinate, and monitor the fight against doping in sport in all its forms. WADA is a Swiss private law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA has established a uniform set of anti-doping rules, the World Anti-Doping Code (hereinafter referred to as "the WADA Code").
- 1.3. Mr Richard Gasquet, born on 18 June 1986, is a professional tennis player of French nationality with residence in Switzerland (hereinafter referred to as "the Player").

### **2. FACTS OF THE CASE**

- 2.1. The circumstances stated below are a summary of the main relevant facts, as established on the basis of the written submissions of the parties and the evidence examined in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion (see below section II.).

#### **A. The Adverse Analytical Finding**

- 2.2. The Player, at the current age of 23, already has a successful series of illustrious achievements behind him. He was ranked number one in France and was ranked in the top twenty-five in the world from 2004 to 2007. In 2007, he was ranked in the top 10. At the time of the events giving rise to these proceedings, he was ranked 25<sup>th</sup> in the ATP world rankings. He has frequently been tested for doping, always with a negative result, apart from the occasion that has led to this case.
- 2.3. From December 2008, the Player had an injury in his right shoulder, but nevertheless continued playing. However, he had to withdraw from a tournament in Marseille, France, in February 2009.
- 2.4. On 22 March 2009, the Player arrived in Miami, United States, with the intention to take part in the Sony Ericsson Event, an ATP Tournament (hereinafter referred to as "the Tournament"). The first match of the Tournament took place on Wednesday 25 March 2009, but the Player was not scheduled to play before Saturday 28 March 2009.
- 2.5. From Monday 23 March to Thursday 26 March 2009, the Player did some training but was hampered by his shoulder injury.

- 2.6. By Friday 27 March 2009, the concern about his shoulder injury was such that he was advised by the tournament doctor, soon after 3 PM, to obtain a magnetic resonance imaging (MRI) scan of his right shoulder. He obtained the MRI scan and returned to the tournament doctor with the results at about 6:40 PM. The doctor noted significant inflammation and advised against playing the tournament. The Player, his coach and his physiotherapist left the doctor's office at about 7 PM to discuss the matter. Upon return to the hotel, the Player finally decided not to play the tournament.
- 2.7. However, the Player did not return again to the Tournament site in the evening of 27 March 2009 for the formalities of withdrawal, although this would have been possible. Instead, he chose to defer his withdrawal until the next day, as his first match was not scheduled until late next day.
- 2.8. As the Player had decided to withdraw from the Tournament, he decided to go out and see a well-known French DJ, Mr Bob Sinclar, whom he had briefly met earlier that day, and who, as he knew, would be performing that evening in Miami in a club called "Set" as part of the so-called Winter Music Conference.
- 2.9. Before going to "Set", the Player, his coach, Mr Peyre, another coach of the same team, Mr Champion, and a friend of Mr Champion, were invited for dinner with Mr Sinclar and his wife at a Restaurant called "Vita", around 9 PM. During the evening at "Vita", they socialised with a group of four young women at a nearby table, one of them being Mrs Francesca Antoniotti, a sports news presenter on French television. Also part of that group was another woman being called Pamela. The Player talked mostly to Pamela.
- 2.10. At about midnight, the group of four men, including the Player, and three of the four women, including Pamela, set off for "Set" on foot. They entered "Set" at about 12:40 AM on 28 March 2009, when Mr Sinclar started his performance. The Player and his group were invited to Mr Sinclar's table. They stood around the table talking and listening to the music. On the tabletop, there were open jugs of mixer drinks, including apple juice, a bottle of vodka and bottles of water.
- 2.11. The Player drank a vodka and apple juice prepared for him by Mr Champion. At about 2 AM, he helped himself to some more apple juice, without vodka, using the same glass as for his previous drink. Later on, he drank a bottle of water that was sealed. All of these drinks came from the drinks put at disposal on the afore-mentioned table. At the hearing that was held in Lausanne, details of which will be developed further, the Player admitted drinking from Pamela's glass. Between 3:30 and 4 AM, he went to the bar and ordered one more vodka and apple juice.
- 2.12. While at "Set", the Player talked particularly to Pamela, though he was not with her all the time, and also talked to others. At some point, the Player and Pamela were in a room upstairs, where they kissed. When they came downstairs again, they also kissed on the stairs. Their kisses continued throughout their stay at "Set". In total, they kissed mouth to mouth about seven times, each kiss lasting about five to ten seconds.
- 2.13. At about 4:35 AM, the Player with his companions and the three women left "Set" together. Although the Player was tired, he went with his companions and the three women to another venue called "Goldrush". That place turned out to be a strip club. The Player did not have any physical contact with anyone at "Goldrush".

- 2.14. The Player with his companions and the three women soon wanted to leave “Goldrush” again, but they had to wait for Pamela to return from the toilet where she had spent longer than expected. When she returned, she had replenished her make-up and rearranged her hair. Finally, at about 5 AM, they left “Goldrush” and said their goodbyes outside the club. The Player and Pamela kissed on the mouth for two or three seconds, then he returned back to his hotel with his coach, where he went to his room and slept.
- 2.15. In the early afternoon of 28 March 2009, the Player went to the Tournament site, where he signed a withdrawal form, citing his shoulder injury as the reason for the withdrawal. At about 2:20 PM, the Player was required to provide a urine sample. He did so and signed the doping form at 2:30 PM.
- 2.16. As his injured shoulder then improved, the Player played in a competition in Barcelona, Spain, on 20 April 2009, gaining 20 ranking points and EUR 10’000 in prize money, and in a competition in Rome, Italy, on 27 April 2009, gaining 90 ranking points and EUR 27’500 in prize money. During these competitions, the Player was unaware of any test result from the urine sample provided in Miami.
- 2.17. In the meantime, the Player’s A sample had been tested at the WADA accredited laboratory in Montreal and found to contain benzoylecgonine, a cocaine metabolite, and a very small amount of unmetabolised cocaine. On 21 April 2009, the adverse analytical finding was reported to International Doping Tests and Management AB (hereinafter referred to as “IDTM”), in Lindgö, Sweden, that arranges the carrying out of doping tests on behalf of the ITF.

## **B. The Doping Charge and Facts arising after the Doping Charge**

- 2.18. By letter dated 30 April 2009, the Player was charged with a doping offence under Art. C.1 of the Tennis Anti-Doping Programme 2009 (hereinafter referred to as “the Programme”), namely, the presence of benzoylecgonine in his urine sample provided at the Tournament on 28 March 2009.
- 2.19. As of 1 May 2009, the Player stopped competing.
- 2.20. On 6 May 2009, the Player underwent a test on a sample of his hair at the laboratory of Dr Pascal Kintz at Illkirch, France. This test would have revealed the presence of cocaine if it had been ingested during a period of about four months prior to the test and if the quantity of cocaine ingested was approximately 10 mg or more. The test was negative.
- 2.21. On 8 May 2009, the B sample was opened in the presence of the Player’s representative, Dr Bruce Goldberger, and analysed at the Montréal laboratory. It was also found to contain benzoylecgonine. The finding was reported to IDTM on 10 May 2009. As the Player denied that the tested urine sample was his, it was subjected to a DNA test, the result of which, issued on 29 May 2009, convinced the Player that the sample indeed was his.
- 2.22. On 9 and 10 May 2009, the Player and his manager, Mr Lamperin, were in contact with Pamela by telephone and in a personal meeting. At these occasions, according to testimony by

the Player and his manager, Pamela reportedly said that cocaine had been in use at “Set” during the crucial night, and that she had been offered some, but denied having taken any.

- 2.23. On 4 June 2009, the Player lodged a written complaint with the French prosecuting authority, alleging against “X” that a harmful substance had been administered to him, contrary to the French penal code. A criminal complaint was, at some point in time, also filed by Pamela against the Player for defamation.
- 2.24. On 7 June 2009, the French newspaper, *Aujourd’hui*, published an interview with Pamela that reportedly took place the afternoon before, and in which Pamela denied having either taken or been offered any cocaine during the evening of 27 March 2009. However, she admitted having taken cocaine on previous occasions in her life. Furthermore, she asserted that she had kissed the Player only briefly and not mouth to mouth, and that she was willing to give evidence and undergo a hair test herself.
- 2.25. On 24 September 2009, the public prosecutor’s department of Paris issued a communiqué stating that the proceedings initiated by the Player on 4 June 2009 against “X” for administration of a harmful substance to him had been closed, as no criminal offence had been revealed. The communiqué furthermore noted that the toxicological examination carried out on “*a young lady heard during this procedure*” revealed that she regularly consumed cocaine, and that she would be subject to a therapeutic order from the public prosecutor’s department. The “*young lady heard during this procedure*” was Pamela. The result of the analysis on Pamela’s hair was that cocaine and its metabolites were found for the period from September 2008 to April 2009 inclusive, with an average concentration of 5,4 ng/mg from September to November 2008, of 6,2 ng/mg from December 2008 to February 2009, and of 9 ng/mg in the period March/April 2009. These concentrations of cocaine and its metabolites were, according to the communiqué in question, within the average concentrations measured in known cocaine users.

### **C. The proceedings before the Independent Anti-Doping Tribunal of the ITF**

- 2.26. On 30 April 2009, the Player was charged with a doping offence under Art. C.1 of the Programme.
- 2.27. On 22 May 2009, the ITF submitted its opening brief to the Independent Anti-Doping Tribunal convened under the ITF regulations (hereinafter referred to as “the ITF-Tribunal”), alleging that a doping offence had been committed by the Player, and therefore asking for the consequent sanctions.
- 2.28. On 11 June 2009, the Player submitted his answer brief to the ITF-Tribunal. In the brief, he did not dispute the laboratory’s finding, but denied that he had ever deliberately taken cocaine. Moreover, he submitted that there was no doping offence, as the sample was taken out of competition, or, if it was deemed to have been taken in competition, that the relevant provisions were unlawful. Alternatively, if there was a doping offence, the Player could establish no or no significant fault or negligence. Finally, the Player argued that in any case there should be no period of ineligibility due to the particular circumstances of the present case. Particularly, due to his decision to withdraw from the Tournament before the crucial night, any ban would be grossly disproportionate.

- 2.29. On 25 June 2009, the ITF submitted its reply brief to the ITF-Tribunal, objecting to the Player's position and stating that he had indeed committed a doping offence, that he could not establish his defences and that a period of ineligibility of two years was mandatory, starting from 1 May 2009, when the Player voluntarily stopped competing.
- 2.30. On 28 June 2009, the Player put in further written submissions and evidence, in which he sought to rebut the points made in the ITF's reply brief.
- 2.31. On 29 and 30 June 2009, a hearing was held in respect of the charge in London.

#### **D. Decision of the ITF's Independent Anti-Doping Tribunal dated 15 July 2009**

- 2.32. The ITF-Tribunal first analysed whether, on the correct interpretation of the Programme, the Player's urine sample was provided in competition, as contended by the ITF, or out of competition, as the Player argued. Mainly based on the wording of Art. F.4 of the Programme, the ITF-Tribunal concluded that the sample was provided in competition and did not back the Player's position that the application of the in competition rule in the present case was unlawful.
- 2.33. Consequently, the ITF-Tribunal concluded that the Player had committed, in the present case, a doping offence. Furthermore the ITF-Tribunal noted that the Player had not previously committed a doping offence. Therefore, the present first offence would lead to a period of ineligibility of two years, unless the conditions for eliminating or reducing this period according to Art. M.5 of the Programme would be met.
- 2.34. The ITF-Tribunal then focused on the question of how cocaine got into the system of the Player. Based on the facts at hand, it concluded that it was more likely than not that Pamela's kisses were the source of the Player's contamination.
- 2.35. Turning to the question whether the Player acted with no or no significant fault or negligence, the ITF-Tribunal first concluded that, considering the Player's behaviour during the night in question, particularly taking into account that the Player was drinking from open bottles and was kissing a woman who was unknown to him before that evening and who might, for all he knew, have been a cocaine user, he could not validly invoke no fault or negligence. However, the ITF-Tribunal found that in the unusual and exceptional circumstances in which the Player was, on the balance of probability, contaminated with cocaine by kissing Pamela, he could validly establish the defence of no significant fault or negligence. Consequently, the ITF-Tribunal considered a ban on the Player with duration of one year, such as stipulated in Art. M.5.2 of the Programme.
- 2.36. Finally, the ITF-Tribunal considered whether the minimal sanction of one year of ineligibility would be proportionate to the doping offence committed in the present case. In this respect, the ITF-Tribunal decided that, when looking at the totality of the evidence at hand and at the very exceptional circumstances of the present case, a very serious injustice and infringement of the Player's right to practise his profession would be done if a one year period of ineligibility would be imposed on him. Therefore, the ITF-Tribunal imposed a ban of two and a half months on the Player's ineligibility running from 1 May 2009 up to the time and date

the ITF-Tribunal's decision was issued, *i.e.* until 15 July 2009. *Inter alia*, the ITF-Tribunal based its proportionality conclusions on the judgment of the CAS in the case *CAS 2006/A/1025 Puerta v. ITF*.

2.37. Furthermore, the ITF-Tribunal concluded that, under the unusual circumstances of the present case, fairness would require that the Player's results in the Rome and Barcelona competitions remain undisturbed.

2.38. Accordingly, the ITF-Tribunal passed the following decision:

“[The ITF-Tribunal]

- (1) *confirms the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 30 April 2009, namely that a prohibited substance, benzoylecgonine, a cocaine metabolite, was present in the urine sample provided by the player at the Sony Ericsson Event in Miami, Florida, on 28 March 2009;*
- (2) *declares the player ineligible for a period of two months and 15 days commencing on 1 May 2009 and expiring at 9am (London time) on the date of release of this decision, from participating in any capacity in any event or activity authorised by the ITF or any national or regional entity which is a member of or is recognised by the ITF as the entity governing the sport of tennis in that nation or region;*
- (3) *orders that the player's results in competitions subsequent to the Sony Ericsson Event, in Barcelona and Rome during April 2009, shall remain undisturbed and the prize money and ranking points obtained by the player in those competitions shall not be forfeited.”*

### **3. THE PROCEDURE BEFORE THE CAS**

#### **A. ITF's Statement of Appeal dated 4 August 2009**

- 3.1. On 4 August 2009, the ITF submitted a statement of appeal against the decision of the ITF-Tribunal dated 15 July 2009.
- 3.2. As regards the admissibility and the timeliness of the appeal, the ITF cites the provisions of Art. O.1, O.2, O.5 and O.6 of the Programme.
- 3.3. The ITF's statement of appeal concludes with the following requests:

*“7.1 The ITF asks that CAS set aside the erroneous findings of the tribunal identified above, replace them with the appropriate findings consistent with what is said above, and accordingly impose a period of ineligibility on the Player of not more than 24 months and not less than 12 months (but giving credit for the 2 months and 15 days already served by the player).”*

7.2 *The ITF further asks that the CAS Panel grant the ITF a contribution towards its legal fees and other expenses incurred in making this appeal, in accordance with CAS Code Article R. 65.3.”*

## **B. ITF’s Appeal Brief dated 1 September 2009**

- 3.4. On 1 September 2009, the ITF submitted its appeal brief, providing basically the following reasons in support of its requests.
- 3.5. ITF mainly appeals the ITF-Tribunal’s decision as to the sanctions imposed on the Player for his offence, contending that the ITF-Tribunal was required to respect and abide by the mandatory provisions of the Programme as to sanction: it should have imposed a period of ineligibility of not more than 24 months but not less than 12 months, and that it was not entitled to depart from the minimum sanctions mandated by the Programme by imposing a period of ineligibility of 2 months and 15 days only. Furthermore, the ITF appeals the ITF-Tribunal’s decision not to disqualify the results obtained by the Player in events subsequent to the Tournament.
- 3.6. In short, the ITF bases its appeal first of all on the position that the Player has not satisfied the threshold requirement of showing how the cocaine got into his system, a requirement that an athlete seeking to rely on a plea of no or no significant fault or negligence must establish in the first place.
- 3.6.1. With regard to the relevant applicable standard of proof, the ITF cites the formula created by the jurisprudence of the CAS (*e.g. CAS 2007/A/1370 & 1376 FIFA, WADA v/CBF, STJD, Dodô*, para. 127):
- “the player must establish the facts that he alleges to have occurred by a “balance of probability.” [...] the indicted athlete bears the burden of persuading the judging body that the occurrence of the circumstances on which he relies is more probable than their non-occurrence or more probable than other possible explanations of the doping offence”.*
- 3.6.2. Applying this approach to the present case, the ITF accepts that the Player ingested a small amount of probably less than 10 mg of cocaine in approximately an 8 to 12 hour window prior to collection of his sample. The ITF also accepts that there is no direct evidence that the Player himself knowingly took cocaine in the night of 27/28 March 2009 and that the small amount of cocaine ingested could be argued to make it less, rather than more, likely that he deliberately and knowingly ingested cocaine, as the amount ingested was too small to have any recreational effect.
- 3.6.3. However, the ITF submits that the evidence offered by the Player in support of his position that Pamela was the source of the cocaine in his system is not sufficient to establish that it is more likely than not, first of all, that Pamela took cocaine that night, and secondly, that she was indeed the source of contamination.
- 3.6.4. The ITF submits that, besides the kissing theory, there are a number of other possible contamination explanations, such as that cocaine was put into a drink of the Player, was

on a surface, a glass or a doorknob touched by the Player, or was on a person that the Player touched. To the ITF, all of these possible explanations are consistent with the scientific evidence in the present case; none of them can be ruled out.

- 3.7. The ITF also submits that the Player cannot establish that the cocaine got into his system with no or no significant fault or negligence on his part. In the ITF's opinion, regardless of whether the source of the Player's contamination was that cocaine was in his drink, or that he touched a contaminated person, surface or object at "Set", or that he was kissing Pamela after she had ingested cocaine, he was in any case acting with fault or negligence, or could at least not invoke that his fault was, for the purpose of Art. M.5 of the Programme, not significant.
- 3.8. Finally, the ITF submits that the ITF-Tribunal has erred when departing from the mandatory provisions of the Programme on the grounds that the minimum 12-month sanction mandated by the Programme was not "*just and appropriate*" in view of the facts of the present case. Such discretion neither exists under the Programme nor was it ever created by the jurisprudence of the CAS, particularly not by the award of the CAS cited by the ITF-Tribunal, *i.e. CAS 2006/A/1025 Puerta v. ITF*.

### **C. WADA's Statement of Appeal dated 10 August 2009**

- 3.9. On 10 August 2009, WADA submitted a statement of appeal against the decision of the ITF-Tribunal dated 15 July 2009.
- 3.10. WADA asserts that, as the ITF-Tribunal's decision is a final decision, it may be appealed to CAS by WADA pursuant to Art. O.2 of the Programme.
- 3.11. With regard to compliance with appeal deadlines, WADA cites Art. O.5 of the Programme, granting it 21 days after it has received the complete file relating to the decision to file an appeal to CAS. As WADA was provided by the ITF with the full file of the case on 22 July 2009, WADA's statement of appeal was filed, in the view of WADA, within the 21-day filing deadline.
- 3.12. Finally, WADA concludes its statement of appeal with the following requests:
  - “1. *The Appeal of WADA is admissible.*
  2. *The decision of the ITF Independent Anti-Doping Tribunal in the matter of Mr Richard Gasquet is set aside.*
  3. *Mr Richard Gasquet is sanctioned with a period of ineligibility to be set between one and two years starting on the date on which the CAS award enters into force. Any period of ineligibility, whether imposed to or voluntarily accepted by Mr Richard Gasquet before the entry into force of the CAS award, shall be credited against the total period of ineligibility to be served.*
  4. *All competitive results obtained by Mr Richard Gasquet from March 28, 2009 through the recommencement of the applicable period of ineligibility shall be*

*disqualified, with all of the resulting consequences including forfeiture of any medals, points and prizes.*

5. *WADA is granted an Award for costs.”*

#### **D. WADA’s Appeal Brief dated 4 September 2009**

- 3.13. On 4 September 2009, WADA submitted its appeal brief, providing basically the following reasons for the requests made in its statement of appeal.
- 3.14. As far as the Player’s anti-doping rule violation is concerned, WADA points out that the Player acknowledged that the bodily samples were his, and that he did not contest the presence of benzoylecgonine in his sample. Benzoylecgonine is a metabolite of cocaine, a stimulant that appears on the WADA 2009 Prohibited List under class S6, Stimulants and that is prohibited in competition. The Player’s violation of Art. C.1 of the Programme is thus established. Moreover, WADA entirely supports the ITF-Tribunal’s findings, based on Art. F.2 and F.4 of the Programme, that the doping offence in question occurred in competition, and not out of competition.
- 3.15. As far as the determination of the sanction following the doping offence is concerned, WADA points out first of all that the Player must, if he asks for the elimination or reduction of a possible period of ineligibility due to no or no significant fault or negligence, first establish how the prohibited substance entered his system. In that respect, the standard of proof placed on the athlete is by a balance of probability (Art. K.6.2 of the Programme; Art. 3.1 WADA Code). With regard to such proof, WADA notes the Player’s respective position, *i.e.* that the origin of the prohibited substance was a contamination from mouth-to-mouth transmission while kissing Pamela several times after she had ingested cocaine. However, according to WADA, the Player has not, until this stage of the procedure, provided convincing evidence making it more probable than not that the cocaine entered his system as a result of kissing mouth-to-mouth with Pamela, mainly since Pamela never admitted having taken cocaine in the respective night and testified that she had not been taking cocaine for a long time before that night. According to WADA, the Player did not provide any evidence that could establish that Pamela had ingested cocaine while she was with him. Besides that, WADA points out that the Player had admitted that other sources of contamination, such as drinking from open bottles and ordering drinks at the bar at “Set”, were also possible.
- 3.16. Should CAS nevertheless rely on the Player’s explanations and find that he has established how the prohibited substance entered his system, WADA is of the opinion that the Player has not provided satisfactory evidence showing that he bears no or no significant fault or negligence.
- 3.16.1. In order to establish no fault or negligence, an athlete must, according to the definition in Appendix One of the Programme, show

*“that he/she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he/she had Used or been administered the Prohibited Substance or Prohibited Method.”*

3.16.2. WADA is of the opinion that in the case at hand, the Player put himself in an unsure situation by entering into an environment where contamination with a prohibited substance was a risk. Furthermore, the Player even admitted that he was not as cautious as usual as he drank from open bottles. This is not compatible with the duty of care of a professional tennis player. In conclusion, according to WADA, the Player shall not be entitled to benefit from the elimination of the sanction for his doping offence according to Art. M.5.1 of the Programme.

3.16.3. Establishing no significant fault or negligence requires, also according to Appendix One of the Programme, that an athlete can establish

*“that his/her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Doping Offence in issue.”*

3.16.4. Should the CAS, against WADA’s main position, conclude that the Player did not commit a significant fault or negligence, WADA expresses that it could also accept, in view of the specific circumstances, that the Player’s fault might be considered as not significant. However, WADA argues that a finding of no fault or negligence would not be possible. Consequently, the sanction imposed on the Player shall be a ban on his eligibility of not more than 24 months and not less than 12 months.

3.17. Finally, WADA challenges the ITF-Tribunal’s decision to reduce the sanction in the present case based on considerations of proportionality, as the Programme would not offer the possibility to reduce a sanction based on such considerations. WADA asks for a proper application of the strict scheme of sanctions provided for under the Programme.

#### **E. Player’s Answer to the Appeals dated 2 October 2009**

3.18. On 2 October 2009, the Player submitted his answer to the ITF and WADA appeals, concluding with the following requests:

“303. CAS is respectfully asked:

303.1 *To dismiss the ITF’s and WADA’s appeal.*

303.2 *In any event, irrespective of the outcome of the appeal, to order that the ITF and WADA are jointly and severally liable to pay all Richard’s costs of the Appeal. He has been forced to defend an appeal brought by the ITF and WADA in which neither argue that the ban actually imposed on him was in fact disproportionate, but both now seek to impose a (disproportionate) ban on him “pour encourager les autres”. It would be quite wrong to require him to pay for the costs of their doing so.”*

3.19. The Player makes the following points in his answer to the appeal:

3.20. The Player does not contest the doping offence as such.

- 3.21. As far as the manner of ingestion of the prohibited substance and the possible plea of no or no significant fault is concerned, the Player recalls Art. K.6.2 of the Programme, providing for a “*balance of probability*” as the required standard of proof that he has to meet. The Player understands that in case a doping tribunal is offered several alternative explanations for the ingestion of the prohibited substance, but is satisfied that one of them is more likely than not to have occurred, it is irrelevant that there may remain other possibilities that they consider to be less likely. In other words, for a doping tribunal to be satisfied that a way of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. An athlete needs thus only to show that one specific way of ingestion is marginally more likely than not to have occurred.
- 3.21.1. With regard to the manner of ingestion in the case at hand, the Player first of all relies on a number of established facts, such as that the Player’s and ITF’s expert witnesses agreed during the procedure before the ITF-Tribunal that the minute quantity of cocaine metabolite detected in his urine made it unlikely that this was a case of recreational use; that the quantity was of the order of 1 to 10 mg and more likely than not towards the lower end of that range, *i.e.* 5 mg or less; that the hair analyses performed by Dr Kintz excluded the possibility that the Player is a regular social user of cocaine; that the Player and Pamela kissed several times, mouth to mouth, during the relevant night; and that there was no evidence that anyone had a motive to contaminate him.
- 3.21.2. The Player first of all rules out deliberate ingestion of cocaine or spiking of a drink. Considering the minute quantity of benzoylecgonine found in his urine sample, any explanation construed by the Appellants concluding in deliberate ingestion or spiking is, according to the Player, not merely speculative but wholly fanciful. Deliberate contamination or spiking is thus an unlikely way of contamination.
- 3.21.3. With respect to the possibility of contamination through kissing Pamela, the Player relies on his version of the facts of this case that Pamela and he had kissed about seven times mouth-to-mouth at “Set”, each kiss lasting five to ten seconds, and once more when saying good bye in front of “Goldrush”, lasting for two to three seconds. In this respect, the Player first refers to the witness statement of his coach, Mr Peyre. Secondly, he emphasises that the ITF has not, in front of the ITF-Tribunal, disputed those factual elements. Thirdly, he questions the credibility of Pamela’s statements published on 7 June 2009 in *Aujourd’hui*. According to the Player, Pamela’s credibility cannot be relied on since her statements contradict the results of the hair test executed on her by order of the public prosecutor’s department of Paris.
- 3.21.4. Considering the likelihood of contamination through kissing Pamela, the Player first of all pointed out that there were two possible routes by which kissing shortly after cocaine use by Pamela could have resulted in contamination: transfer of saliva, or transfer of loose particles of cocaine powder clinging on the lips or epidermal areas around the nose for some time after the use of the substance.
- 3.21.5. Consequently, it is quite possible that milligram quantities of cocaine could have been inadvertently transferred from Pamela to the Player during mouth-to-mouth kissing. The Player also cited the opinions of the experts Dr Kintz and Professor Forrest, whereby they agreed that contamination through kissing Pamela was the most likely explanation for the presence of cocaine in the Player’s system. Moreover, the experts Dr Cone and

Dr Kintz stated that it is more likely than not that the circumstances that explain the Player's contamination are the intimate kisses with Pamela.

- 3.21.6. To corroborate his position that Pamela indeed used cocaine shortly before kissing him, the Player made reference to the ITF-Tribunal's argumentation in the challenged decision. According to the ITF-Tribunal, it was probable that cocaine was in use at "Set", due to the reputation of the Winter Music Conference, and due to the fact that the Player ingested a minute quantity of cocaine, probably in the period from 2 AM to 6 AM of 28 March 2009, during most of which period the Player was at "Set". Furthermore, according to the challenged decision, Pamela was offered cocaine at "Set", as she told the Player and Mr Lamperin on 10 May 2009. Also, as the ITF-Tribunal considered Pamela to have taken cocaine in the past, it was likely that she availed herself of the opportunity of using the drug during a social night out if the drug was offered to her. And finally, the ITF-Tribunal considered that Pamela spent what the Player described as an "excessive" time in the toilet at "Goldrush" shortly before 5 AM on 28 March 2009, and then kissed the Player for a few seconds on the mouth. Based on these elements, the Player concludes that the evidence that Pamela had previously taken cocaine is potentially probative of her having taken it subsequently and, in particular, also during the night of 28 March 2009, when she had been offered it. Such conclusion is finally also confirmed by the results of the hair test executed on her by order of the public prosecutor's department of Paris.
- 3.21.7. In conclusion, the Player claims that deliberate ingestion or contamination is ruled out, that it is established that Pamela kissed him in the way he described, that it is more likely than not that Pamela took cocaine during the night of 27/28 March 2009, and that it is also more likely than not that she was the source of his contamination. Therefore, any other source of contamination entirely overlooks and is inconsistent with the agreed expert evidence that another inadvertent contamination was not at least as likely as contamination from Pamela.
- 3.21.8. In order to determine whether he acted with no fault or negligence, the Player is of the opinion that the relevant question to answer is if he knew or suspected, or if he could reasonably have known or suspected, with the exercise of the utmost caution, that he had been administered the cocaine by mouth to mouth kissing with Pamela. Equally, as far as no significant fault or negligence is concerned, the Player deems that the relevant question is whether he can establish that his fault or negligence in allowing cocaine to be transferred to him from mouth to mouth kissing with Pamela, when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence, was not significant in relation to the doping offence at stake.
- 3.21.9. When analysing these questions, the focus has to be only on the factual circumstances that relate to the kissing between the Player and Pamela, but not to any factual circumstances relating to another manner of ingestion that have all been found, on a balance of probability, not to have occurred.
- 3.21.10. Consequently, the focus shall not be on the fact that the Player entered the Winter Music Conference, an event that is according to WADA and the ITF notorious for illegal use of recreational drugs. The focus shall also not be on the Player's alleged lack of caution regarding the drinking of apple juice from open bottles.

- 3.21.11. However, the focus must, for example, be on the fact that the Player met Pamela at “Vita”, and that the Player learned only then that she was also planning to go to “Set” later. In this respect, it was impossible that the Player could have known when meeting Pamela, exercising the utmost caution, that she might be inadvertently responsible for administering cocaine to him were he to kiss her later that night. The Player did not see her, during the entire evening, taking cocaine or appearing to be under the influence of the drug.
- 3.21.12. In conclusion, the Programme cannot impose an obligation on an athlete never to go out to any restaurant or nightclub where he might meet an attractive stranger whom he might later be tempted to kiss. This would be an unrealistic and impractical expectation that should not be imposed on athletes by sanctioning bodies in their endeavours to defeat doping (cf. CAS advisory opinion *CAS 2005/C/976 & 986 FIFA & WADA*, para. 73).
- 3.21.13. Therefore, in the present circumstances, it cannot be said that the Player should reasonably have known or suspected, even with the exercise of utmost caution, that he had been administered cocaine. Consequently, he bears no fault or negligence. Accordingly, any period of ineligibility should be eliminated.
- 3.21.14. Alternatively, the Player’s fault or negligence shall be considered as not significant in view of the circumstances of the present case, which leads to a reduction of a two year ban for the Player’s first doping offence to a ban between one and two years.
- 3.22. In addition, the Player claims that in view of the factual circumstances of the exposure to the prohibited substance and of the testing, the nature and circumstances of the particular rules that result in the sanction, the principle of proportionality, any sanction on the Player’s eligibility longer than the sanction he already served, *i.e.* 2 months and 15 days, would not be lawful. In that respect, the Player supports the ITF-Tribunal’s decision.
- 3.23. Finally, as far as the duration of the Player’s ban on ineligibility and possible consequences on won prize money and ranking points are concerned, the Player concludes that any period of ineligibility will be eliminated and the Player’s subsequent results should not be disqualified if the CAS finds no fault or negligence. Should the CAS, however, find that the Player acted with fault or negligence of an insignificant degree, and thus impose a period in excess of the ban as imposed by the ITF-Tribunal, the Player submits that such ban should commence from 28 March 2009, based on Art. M.9.3 (b) of the Programme, since the Player accepted the finding of cocaine in his sample promptly after having obtained the results of the DNA test. In any event, the 2 months and 15 days already served should be credited against any ban imposed on the Player by the CAS, and any ban in excess of the two months and 15 days should be deemed to run from the end of the two months and 15 days ban, and not from the decision of the CAS.

## **F. Further Procedural issues**

- 3.24. Considering that in both appeal procedures *CAS 2009/A/1926* and *CAS 2009/A/1930*, the decision dated 15 July 2009 of the ITF-Tribunal regarding the Player is challenged, and taking into account furthermore that all parties reached an agreement to join these two procedures in one procedure, the two mentioned procedures are consolidated in one single procedure. The same Panel of arbitrators is thus in charge of both cases.
- 3.25. Furthermore, the Panel noted that the parties to the present procedure agreed that the ITF and WADA shall be considered as co-appellants, and Mr Richard Gasquet as sole respondent.
- 3.26. On 6 November 2009, beyond the expiry of any deadline for the party's submissions, the ITF made a further submission by filing the text of a decision in a precedent case, which should be supporting its position in the present procedure. At the outset of the hearing in the present case, which took place on 10 November 2009, the parties discussed the admissibility of such late submission. The Panel decided that, considering Art. R56 of the CAS Code, there was no legal basis to accept the late submission in question. Moreover, the Panel also noted that the relevant precedent decision would already have been available to the ITF at an earlier stage, and that therefore, a late submission of it was in any case not justified. Therefore, the Panel decided to reject the admissibility of the submission in question. Nevertheless, the Panel stated that the ITF was still free to base its defence on the decision concerned, so far as it relied on its legal argumentation, as any existing precedent decision could possibly be taken into consideration by the CAS, if deemed necessary.

## **4. THE HEARING**

- 4.1. A hearing was held on 10 November 2009 at the CAS premises in Lausanne. All the members of the Panel were present. The parties did not raise any objection as to the constitution and composition of the Panel.
- 4.2. The following persons attended the hearing:
- 4.2.1. For the ITF: Mr Jonathan Taylor, assisted by Mrs Anna Blakely, solicitors, and the ITF Anti-Doping Manager Mr Stuart Miller;
  - 4.2.2. For WADA: Mr François Kaiser, assisted by Mr Yvan Henzer, attorneys-at-law, the WADA Legal Manager Mr Julien Sieveking, and the WADA Science Director Mr Olivier Rabin;
  - 4.2.3. Mr Richard Gasquet, accompanied by his attorneys, Mr Adam Lewis, Mrs Kate Gallafent, Mr Jean Veil, Mr Simon Davies and Mr Payam Beheshti; and by his agent Mr Nicolas Lamperin, and a member of his agency company, Mr Ramzi Khiroun.
- 4.3. The Panel heard evidence from the following persons:
- 4.3.1. The Player;
  - 4.3.2. Mr Olivier Rabin, the WADA Science Director.

- 4.4. Each person heard by the Panel was invited by its President to tell the truth subject to the consequences provided by the law and was examined and cross-examined by the parties, if they wished to do so, as well as questioned by the Panel.
- 4.5. The parties had then ample opportunity to present their cases, submit their arguments and answer to the questions posed by the Panel. After the parties' final submissions, the Panel closed the hearing and reserved its final award. The Panel heard carefully and took into consideration in its discussion and subsequent deliberation all the evidence and the arguments presented by the parties even if they have not been summarized herein.
- 4.6. Neither during nor after the hearing did the parties raise with the Panel any objection as to the respect of their right to be heard and to be treated equally in these arbitration proceedings.

## **II. IN LAW**

### **1. JURISDICTION**

- 1.1. The jurisdiction of the CAS to act as an appeal body is based on Art. R47 of the CAS Code of Sports-related Arbitration in the version in force as of January 2004 (hereinafter referred to as "the CAS Code") which provides that:

*"A party may appeal from the decision of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body."*

and on Art. O.2 of the Programme.

- 1.2. Moreover, the jurisdiction of the CAS is explicitly recognised by the parties in the Order of Procedure that they signed on 7 October 2009 (ITF), 12 October 2009 (WADA) and 8 October 2009 (the Player).

### **2. ADMISSIBILITY OF THE APPEALS**

- 2.1. According to Art. O.5.1 of the Programme,

*"The deadline for filing an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party."*

- 2.2. The decision of the ITF-Tribunal was issued and notified to the ITF on 15 July 2009. The ITF filed a statement of appeal against this decision to the CAS on 4 August 2009, thus within the time limit fixed by Art. O.5.1 of the Programme. The appeal of the ITF is therefore admissible.

2.3. According to Art. O.5.2 of the Programme,

*“the filing deadline for an appeal filed by WADA shall be the later of:*

- a. twenty-one (21) days after the last day on which any other party in the case could have appealed; and*
- b. twenty-one (21) days after WADA’s receipt of the complete file relating to the decision.”*

2.4. WADA was provided by the ITF with the full file of the case on 22 July 2009, and its statement of appeal was filed on 10 August 2009, thus within the 21-day filing deadline counted as of receipt of the full file of the case by WADA. The appeal of WADA is therefore admissible.

### **3. APPLICABLE LAW**

3.1. Art. R58 of the CAS Code provides:

*“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in absence of such choice, according to the law of the country in which the federation, association or sports body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.”*

3.2. The above provision was expressly mentioned in the Order of Procedure and was accepted by all of the parties.

3.3. The “*applicable regulation*” in this case is the ITF Tennis Anti-Doping Programme 2009, which provides in Art. A.9 that

*“Subject to Article A.7, this Programme is governed by and shall be construed in accordance with English law.”*

3.4. The ITF has adopted and implemented the WADA Code in its Programme. Art. A.7 of the Programme, to which Art. A.9 is subject, provides as follows:

*“The Programme shall be interpreted in a manner that is consistent with the [WADA-]Code.”*

3.5. The WADC prevails in the event of a conflict between its provisions and those of the Programme. The application of the (rules of) law chosen by the parties has its confines in the *ordre public* (Zürcher Kommentar zum IPRG/*Heini*, 2nd edition 2004, Art. 187 marg. no. 18; see also *Kaufmann-Kohler/Rigozzi*, Arbitrage International, 2006, marg. no. 657). Usually, the term *ordre public* is thereby divested of its purely Swiss character and is understood in the sense of a universal, international or transnational sense (*Kaufmann-Kohler/Rigozzi*, Arbitrage International, 2006, margin no. 666; Zürcher Kommentar zum IPRG/*Heini*, 2nd edition 2004,

Art. 187 margin no. 18; cf. also *Portmann* causa sport 2/2006 pp. 200, 203 and 205). The *ordre public* proviso is meant to prevent a decision conflicting with basic legal or moral principles that apply supranationally. This, in turn, is to be assumed if the application of the rules of law agreed by the parties were to breach fundamental legal doctrines or were simply incompatible with the system of law and values (TF 8.3.2006, 4P.278/2005 marg. no. 2.2.2; Zürcher Kommentar zum IPRG/*Heini*, 2nd edition 2004, Art. 190 margin no. 44; CAS 2006/A/1180, no. 7.4; CAS 2005/A/983&984, no. 70).

#### 4. SCOPE OF REVIEW

- 4.1. The parties to the present arbitration proceedings do not agree on the scope of review of the Panel. In fact, while the ITF considers that the Panel shall have the power to rule *de novo* on the present case, the Player considers that the Panel shall not have the power to rule *de novo*, but deems that the Panel's scope of review should be limited by Art. O.6.3 of the Programme.
- 4.2. In order to define the scope of review of the CAS in the present case, reference is made, on one side, to Art. R57 par. 1 of the CAS Code:

*“The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.”*

- 4.3. On the other side, Art. O.6.3 of the Programme is to be taken into account:

*“Where required in order to do justice (for example to cure procedural errors at the first instance hearing), appeals before CAS pursuant to this Article O shall take the form of a re-hearing de novo of the issues raised by the case. In all other cases such appeals shall not take the form of a de novo hearing but instead shall be limited to a consideration of whether the decision being appealed was erroneous.”*

- 4.4. The wording of Art. O.6.3 of the Programme is ambiguous. On the one hand, it allows the CAS to review an appeal in the form of a *de novo* hearing only *“where required in order to do justice.”* On the other hand, in all the other cases (*i.e.* where *not* required in order to do justice), the CAS must limit its scope of review to a *“consideration of whether the decision being appealed was erroneous”*.
- 4.5. In the case *CAS 2009/A/1782 Volandri v/ITF*, the arbitration panel had to consider the meaning of the cited provision of the Programme under the 2008 ITF Anti-Doping Programme which contained a similar provision at Art. O.5.1 with the exact same wording. Therefore, in order to interpret Art. O.6.3 of the Programme in the version that is applicable in the present case, the Panel refers to the case *CAS 2009/A/1782 Volandri v/ITF*, and particularly to its paragraphs 68. to 73.
- 4.6. The concept of *“in order to do justice”* is illustrated in Art. O.6.3 of the Programme with just one example (*i.e.* *“for example to cure procedural errors at first instance hearing”*), which does not help to understand why the CAS Panel does not *“do justice”* if it considers that the *“decision being appealed was erroneous”*. The Panel is *a fortiori* allowed to review the

appealed decision if it is arbitrary, *i.e.* if it severely fails to consider fixed rules, a clear and undisputed legal principle or breaches a fundamental principle. A decision may be considered arbitrary also if it harms in a deplorable way a feeling of justice or of fairness or if it is based on improper considerations or lacks a plausible explanation of the connection between the facts found and the decision issued.

- 4.7. In order to exercise such a review, the CAS must be able to examine the formal aspects of the appealed decisions but also, above all, to evaluate – sometimes even *de novo* - all facts and legal issues involved in the dispute. The Panel therefore particularly rejects the Player's position that Art. O.6.3 of the Programme is prohibiting the parties to bring before the CAS Panel new evidence that has not been presented to the previous instance. In this respect, the Panel observes that all the parties – including the Player – have filed various submissions and evidence after the hearing before the ITF-Tribunal. Moreover, in the case at hand, there was no “evidence ambush” which might have given unfair advantages to one or the other party. As far as the Player is concerned, he has, for example, for the first time in the proceedings concerning the present case, submitted before the CAS the results of Pamela's hair test, together with the entire file of the investigation carried out by the public prosecutor's department of Paris with respect to the Player's criminal complaint. Through this submission, he has thus contradicted his own position that, according to Art. O.6.3 of the Programme, new evidence should not be allowed before the CAS. The Player has thus, at least tacitly, accepted that new evidence must be allowed in an appeal procedure before the CAS, despite any possible interpretation of Art. O.6.3 of the Programme.
- 4.8. In view of all the above and under the circumstances of the case and the findings of the Panel as explained hereunder, the scope of review of the CAS Panel as provided under Art. R57 of the CAS Code is not limited.
- 4.9. Besides that, the Panel underlines that according to Art. A.7 of the Programme, in case there is a contradiction between the Programme and the WADA Code, the Programme shall be interpreted in a manner that is consistent with the WADA Code. With regard to the scope of review in an arbitration proceeding before the CAS, Art. 13.2.1 of the WADA Code states that the provisions applicable before the CAS shall apply in case of an appeal to CAS. In other words, for an interpretation of the ambiguous rule of Art. O.6.3 of the Programme, reference is to be made to Art. R57 of the CAS Code, which is cited at the outset of the present chapter, and which gives the Panel a full scope of review to decide on an appeal. Consequently, this conclusion entirely confirms the precedent reasoning with regard to the scope of review of the CAS in the present case.
- 4.10. Furthermore, at the present case, it is the view of the Panel that there are sufficient grounds to resolve the issue at stake (*i.e.* its scope of review) even within the framework of article O.6.3 as is.

## 5. MERITS

5.1. The main issues to be resolved by the CAS Panel are:

- A. Has there been an adverse analytical finding with respect to the Player's urine sample?
- B. Is the urine sample to be considered as having been taken in or out of competition?
- C. If a doping offence has been committed, can the Player prove, considering the required standard of evidence, how the prohibited substance entered his system?
- D. If the Player can meet the relevant requirements of evidence to the prior question, was he acting with no fault or negligence or with no significant fault or negligence?
- E. In case applicable, what must be the sanction imposed on the Player? Particularly, which duration would a ban on the Player's eligibility need to have, when would such ban start to run, and which results of the Player would have to be disqualified, leading to loss of prize money and ranking points?
- F. May such sanction be reduced due to reasons of proportionality?

### A. Adverse analytical finding

5.2. On 28 March 2009, at the occasion of his withdrawal from the Tournament, the Player was subjected to a doping test and asked to file a urine sample. Both the A- and the B-test results were positive for Benzoyllecgonine, a metabolite of cocaine. Cocaine is a stimulant that appears on the WADA 2009 Prohibited List under class S6, Stimulants. While first denying that it was his urine that was tested, the Player admitted, after a respective DNA-test, that it must indeed have been his own urine that was submitted to the doping test. The player thus does not any more contest the adverse analytical finding as such.

### B. Doping test in competition or out of competition?

5.3. The Panel first recalls that the ITF-Tribunal has decided, on the basis of Art. F.2 and F.4 of the Programme, that the Player's urine sample was to be considered as having been provided in competition. The wording of the relevant provisions reads as follows:

*"F.2 A Player may be notified that he/she has been selected for Testing in conjunction with an Event in which he/she is participating at any time from 00.01 local time on the day of the first match of the main draw (or of the qualifying draw, if he/she is participating in the qualifying draw) of the Competition in question until immediately following the completion of the Player's last match in the Event (or, where he/she is participating in the Event as a nominated member of the team, until immediately following the completion of his/her team's last match in the Event). Such periods (and only such periods) shall be deemed "In-Competition" periods for purposes*

*of this Programme and the Code (for purposes of the Code, the “Event Period” shall start at the same time as the “In Competition” period and shall end at midnight on the day of the last match played in the Event).*

*F.4 Any Player who retires, is a no-show, is defaulted from a match or withdraws from the main draw or qualifying draw after the first match of such draw has commenced must submit to Testing at the time of the retirement/no show/default/withdrawal if requested to do so. If the Competition in question is a doubles Competition, then his/her doubles partner must also submit to Testing at the same time if requested to do so. If the Player in question is not on-site at the time of the request, the ITF may require that the Player appear for Testing at a specified time and location, in which case the Player may be required to contribute to the cost of the test in an amount not exceeding US\$5,000. Such Testing will be deemed to be In-Competition Testing for purposes of this Programme.”*

- 5.4. The Panel notes that the ITF and WADA agree with the ITF-Tribunal’s decision in this respect, but it also takes note of the Player’s position, mainly expressed first before the ITF-Tribunal, and then at the occasion of the hearing in the present case, that the Player’s sample shall not be considered as having been taken in competition, but instead out of competition. The Player’s position is based on an interpretation of Art. F.4 of the Programme, according to which this provision could not have been designed for a case such as the present case of the Player, and on the argument that a literal application of the provision concerned would, in the present case, lead to a situation of serious injustice.
- 5.5. However, the Panel is convinced that Art. F.4 of the Programme must apply in the present case, that the Player’s sample must therefore be considered as having been delivered in competition, and that the application of the provision in question does not at all lead to a situation of injustice, either in the specific present case or in any other case.
- 5.6. The Tournament’s first match took place on Wednesday 25 March 2009. Therefore, based on Art. F.2 and F.4 of the Programme, and although the Player was not scheduled to play until Saturday 28 March 2009, any doping test he was subjected to from 25 March 2009, 00:01 AM local Miami time, and until his withdrawal, must be considered as an in-competition test. Therefore, the doping test to which he was subjected upon his withdrawal, on 28 March 2009, must be considered according to Art. F.4 of the Programme as an in-competition test.
- 5.7. The fact that the Player did not compete in any official match until he withdrew from the Tournament does not alter this finding. The applicable provisions do not make any distinction between the case of a player who has not yet competed and the case of a player who has already competed in an official match of the tournament in question. On the contrary, it obviously deals with all the players in the same way. Moreover, the fact that the player already seems to have decided to withdraw from the Tournament the evening before the day of his effective withdrawal may also not alter the Panel’s finding.

### **C. Ingestion of substance on a balance of probability**

- 5.8. In order to determine whether the Player acted with no fault or negligence or with no significant fault or negligence when he was contaminated with the prohibited substance, he first needs to establish how the prohibited substance entered his system. In order to establish whether the Player can prove, at a satisfactory level of probability, how the prohibited substance entered his system, the Panel recalls the provisions providing for the relevant level of evidence, i.e. Art. K.6.2 of the Programme, according to which:

*„Where this Programme places the burden of proof upon the Participant alleged to have committed a Doping Offence to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability...“*

And furthermore Art. 3.1 of the WADA Code, which provides that:

*“Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability...”*

- 5.9. In view of these provisions, it is the Panel’s understanding that, in case it is offered several alternative explanations for the ingestion of the prohibited substance, but it is satisfied that one of them is more likely than not to have occurred, the Player has met the required standard of proof regarding the means of ingestion of the prohibited substance. In that case, it remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered by the Panel to be less likely to have occurred. In other words, for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The Player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred.
- 5.10. The Panel notes that according to the facts of the present case, several possible means of ingestion of the prohibited substance exist, such as deliberate ingestion, deliberate spiking or accidental contamination of a drink, accidental contamination by touching contaminated surfaces or people, accidental contamination by breathing in cocaine dust, or accidental contamination by kissing Pamela after she had ingested cocaine.
- 5.11. In the Panel’s view, it is indisputable that the possibility of deliberate ingestion is ruled out due to the facts of the present case. All three of the parties’ experts (those presented by the Player and by the ITF: Professors Cone, Forrest and Kintz) specifically agreed “that the total amount of cocaine that entered Mr Gasquet’s body would have been so minute that it must have reflected incidental exposure or exposures rather than use in the amounts commonly used by social users of cocaine.” (Consensus of Experts’ Views dated 29 June 2009, ITF appeal bundle No. 3, Tab 20, page 499).
- 5.12. The facts in evidence support this agreed finding. The Player’s hair test has shown that the Player has never, as far as the hair test may go back in time including the time of the Miami tournament, consumed any cocaine at an amount above 10 mg. It is thus considered by the Panel as established that the Player is certainly not a regular user of the substance in question.

The parties' experts also agreed on this fact: "We are agreed that the tribunal can reasonably conclude from the results of the hair analyses that Mr. Gasquet does not use even very small amounts of cocaine on a regular basis."

- 5.13. In addition, it is not contested that the quantity of cocaine that must have been ingested by the Player during the night of 27 to 28 March 2009, in order to lead to the known doping test result, is so small that it cannot have had any recreational effect. If the Player had had the intention to have a recreational effect by consuming cocaine, he would certainly have ingested an amount that is big enough for that purpose. Consequently, considering the lack of cocaine-experience of the Player, and considering the small amount of cocaine that must have been ingested by him, which could not have any recreational effect, the Panel concludes that the Player did not ingest this amount intentionally.
- 5.14. Considering the small quantity of cocaine that the Player must have inadvertently ingested, deliberate spiking also becomes less likely than to have occurred. In the opinion of the Panel, should anyone have aimed to spike the Player's drink with cocaine with bad intention, in order to make sure that the substance may in any case be detected in a doping test, he would certainly have used a bigger quantity than the one that has actually been ingested by the Player. Besides that, the Panel sees no evidence that the surroundings of the Player in the night from 27 to 28 March 2009 would have been hostile towards him, and that an intentional spiking could have resulted from these surroundings. On the contrary, the Player spent a night out with his coach and a few friends, the entourage of a DJ who came from the same home country as the Player, and a few women, also coming from the Player's home country. Consequently, people were socialising and enjoying themselves, and it is more than difficult to imagine that anyone could have had the intention to harm anyone else.
- 5.15. The Panel also rules out contamination through an accidental spiking of the Player's drink. In fact, it has been reported by the Player and has remained uncontested by all the other parties that consumption of cocaine was not seen at "Set". In other words, during the night from 27 to 28 March 2009, cocaine has at least not been consumed in the openly visible places of "Set", such as from tables or from the bar. However, cocaine may have been consumed in the toilets of "Set", where such activity would not have been visible for the Player or for other attendants of the club. In fact, the Panel deems to be sufficiently enlightened to understand that, in public places such as a night club, cocaine users might prefer to follow their habit in a private and closed environment, in order not to be observed by other attendants of the nightclub, since, as a matter of fact, the use of cocaine is considered a crime. As in a nightclub, the toilets are virtually the only place where such privacy is guaranteed, they are thus becoming the main venue for such activity.
- 5.16. Consequently, would one wish to support the theory of an accidental spiking of the Player's drink with cocaine, he would need to demonstrate how the said substance could be transferred from the surfaces of the furniture in a toilet cabin to the Player's glass or to a bottle from which the Player poured a drink. Obviously, to prove this line of causality seems rather difficult, if not impossible, and it therefore makes the theory of accidental spiking much less likely than to have occurred.
- 5.17. Also because cocaine is generally consumed, if at all, only in the private areas of any club, it is unlikely that the prohibited substance entered the Player's system due to him touching contaminated surfaces or breathing in cocaine dust, as there were only very few surfaces at "Set" that could have indeed been contaminated, and cocaine dust, if any, could have been in

the air only in a very limited concentration and only in a few clearly definable places, i.e. the toilet cabins.

- 5.18. Moreover, the ITF and WADA have not submitted any evidence, but only speculation, that any of these alternate causes of ingestion could have occurred.
- 5.19. The only means of ingestion that have thus not been ruled out so far are the contamination by touching persons having cocaine dust on them, or by kissing Pamela after she had ingested cocaine.
- 5.20. As far as the possibility of contamination through touching persons with cocaine dust on them is concerned, the Panel notes that this theory has not been developed any further by the parties, and that no evidence supporting this way of ingestion has been submitted.
- 5.21. With regard to the kissing theory, the Panel notes that it is basically undisputed that the Player and Pamela kissed several times during the night in question, each kiss lasting for five to ten seconds. In this respect, the Panel is aware that in an interview published by the French newspaper, *Aujourd'hui*, on 7 June 2009, Pamela asserted that she had kissed the Player only briefly and not mouth to mouth. However, the credibility of Pamela's statements in this interview is more than questionable, because in the same interview, she denied being a regular cocaine user. However, the fact that she was indeed a regular cocaine user is now established by means of the result of the analysis regarding the concentration of cocaine in her hair ordered by the public prosecutor's department of Paris. Due to such lack of credibility of Pamela's public statements, the Panel prefers to rely on the statements of the parties to the present procedure with regard to the number and duration of kisses exchanged between Pamela and the Player.
- 5.22. Moreover, the result of Pamela's hair test, carried out by the public prosecutor's department of Paris, reveals that Pamela was, at least during the months from September 2008 to April 2009, to be considered as an average cocaine user with a trend to increasing quantities of ingestion per month (average concentration of 5,4 ng/mg from September to November 2008, 6,2 ng/mg from December 2008 to February 2009, and 9 ng/mg in March and April 2009).
- 5.23. However, the Panel is aware of the fact that there is one missing link in the theory that kissing with Pamela had contaminated the Player with the prohibited substance: In fact, there is no clear evidence that Pamela consumed cocaine during the night in question and before kissing the Player. Nevertheless, considering the facts at disposal, particularly the fact that Pamela's monthly quantity of consumption of cocaine was constantly increasing from September 2008 to April 2009, resulting in a concentration in her hair test that increased in the same time by 66.6 %, the Panel concludes that it is more likely than not that Pamela also consumed cocaine during the night from 27 to 28 March 2009. In fact, it is common ground that cocaine is a drug used in social environments, as it is said that it has, *inter alia*, the effect on users to become more sociable and more communicative. The night at "Set" was thus a perfect surrounding for a cocaine user such as Pamela to ingest the substance. In this respect, the fact that no one has effectively seen her consuming cocaine during the night in question does not mean that she did not consume cocaine during that night. As a matter of fact, and as mentioned previously, cocaine might have been ingested predominantly in the toilet cabins at "Set", which explains why no one would have seen Pamela ingesting the substance. In view of these considerations, the Panel is of the opinion that it is more likely than not that Pamela ingested cocaine during the night she met the Player. The link that was missing, i.e. the question whether Pamela has

consumed cocaine during the relevant night, is thus established and proven at a level of probability that is satisfying the Panel.

- 5.24. Because the Panel concludes that Pamela ingested cocaine during the night in question and that she kissed the Player, the remaining question is now whether the Player could have been contaminated with cocaine by kissing Pamela during the night in question. In this respect, the Panel takes note of the agreement reached among the parties' experts, according to which contamination with cocaine through kissing is, from a medical point of view, a possibility in the present case:

*“We are agreed that there is no need to postulate any mechanism by which cocaine may have entered Mr Gasquet’s body other than an intimate kiss with “Pamela” immediately after she had used cocaine.”*

- 5.25. In view of all of the above, the Panel concludes that it is more likely than not that the Player's contamination with cocaine resulted from kissing Pamela. The Panel is satisfied that there is at least a 51% chance of it having occurred. Any other source is either less likely than the kissing to have resulted in the contamination, or is even entirely impossible. With regard to a possible contamination from physical contact with persons other than Pamela at “Set”, the Panel emphasises that it is not established with which persons the Player had any physical contact, e.g. by shaking hands, if any, and if these persons were cocaine users. In any case, the closest physical contact the Player had with anyone during the night from 27 to 28 March 2009 was with Pamela, who was, at least at that time, a regular cocaine user.
- 5.26. The Panel therefore concludes that the Player has met the required standard of proof, such as stipulated in Art. K.6.2 of the Programme and Art. 3.1 of the WADA Code, with regard to the way of ingestion. Therefore, in a next step, the Panel has to consider whether the player acted with no fault or negligence, or with no significant fault or negligence.

#### **D. Fault or Negligence of the Player?**

- 5.27. In order to define whether the Player acted with no fault or negligence, or with no significant fault or negligence, the Panel first of all recalls the definitions in Appendix One of the Programme, according to which an athlete must, in order to establish no fault or negligence, demonstrate

*“that he/she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he/she had Used or been administered the Prohibited Substance or Prohibited Method.”*

or, in order to establish no significant fault or negligence, demonstrate

*“that his/her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Doping Offence in issue.”*

- 5.28. In this respect, the Panel fully supports the Player's position that, when answering the question of the reproachable fault, the focus has to be only on the factual circumstances that relate to

the kissing between him and Pamela, and not on any factual circumstances relating to other manners of ingestion mentioned in the present matter, which have all been found, on a balance of probability, not to have occurred.

- 5.29. Consequently, the focus cannot be on the fact that the Player entered the Winter Music Conference, an event that is, according to WADA and the ITF, notorious for illegal use of recreational drugs. The focus also shall not be on the Player's alleged lack of caution regarding the drinking of apple juice from open bottles.
- 5.30. The Panel has to lay its focus on the facts that the Player met Pamela at a restaurant, "Vita", that he learned only then that she was also planning to go to "Set" later, and that he never saw her or anyone else, during the entire evening, taking cocaine or appearing to be under the influence of that drug.
- 5.31. Considering these facts, the Panel concludes that it cannot find that the Player did not exercise utmost caution when he met Pamela in an unsuspecting environment like an Italian restaurant ("Vita"). He could not have known that she might be inadvertently responsible for administering cocaine to him if he were to kiss her that night. Also, the Panel concludes that it was impossible for the Player to know, still exercising the utmost caution, that when indeed kissing Pamela, she might inadvertently administer cocaine to him. As the Player did not know Pamela's cocaine history and did not see her, during the entire evening, taking cocaine or appearing to be under its influence, how could he imagine that she had been consuming cocaine? And even more, how should he have been in a position to know that, even assuming that he knew that she had been consuming cocaine, that it was medically possible to be contaminated with cocaine by kissing someone who had ingested cocaine beforehand? The parties' experts in the present matter concluded only after some study that this is possible. The members of the Panel are not reluctant to admit that they would not have believed, without having seen the statements of these experts that such a means of contamination is possible. The Panel's position is thus clear: even when exercising the utmost caution, the Player could not have been aware of the consequences that kissing Pamela could have on him. It was simply impossible for the Player, even when exercising the utmost caution, to know that in kissing Pamela, he could be contaminated with cocaine.
- 5.32. The question following this conclusion is thus the following: is it the intention of the Programme or of the WADA Code to make a reproach to a player if he kisses an attractive stranger whom he met the same evening, under the circumstances such as in the present case? This can obviously not be the intention of any Anti-Doping Programme. As a matter of course, no Anti-Doping Programme can impose an obligation on an athlete not to go out to a restaurant where he might meet an attractive stranger whom he might later be tempted to kiss. As the Player correctly emphasised, this would be precisely the sort of "*unrealistic and impractical expectations*" that the CAS identified in the CAS advisory opinion *CAS 2005/C/976 & 986 FIFA & WADA*, par. 73, and that should not be imposed by sanctioning bodies in their endeavours to defeat doping.
- 5.33. In view of the above, the Panel comes to the conclusion that by kissing Pamela, and thereby accidentally and absolutely unpredictably, even when exercising the utmost caution, getting contaminated with cocaine, the Player acted without fault or negligence, in accordance with the respective definition in Appendix One of the Programme.

- 5.34. In view of this result, the Panel concludes, based on Art. M.5.1 of the Programme, that the period of ineligibility that would otherwise be applicable due to the Player's undisputed doping offence should be eliminated.
- 5.35. Consequently, the questions listed at the outset of this part of the decision (cf. above 5.1.) with respect to the timing of a possible ban and the disqualification of competition results, on the one hand, and the proportionality of a sanction imposed on the Player in the present case, on the other hand, do not have to be answered. Due to the above-mentioned finding, they have lost any relevance.

#### **E. Consequences of the "No Fault or Negligence" finding**

- 5.36. In view of its finding that the Player acted with no fault or negligence when the present doping offence occurred, the Panel has finally to determine the consequences of its respective finding. In that regard, reference is made to Art. M.5.1 of the Programme, that reads as follows:

*"M.5.1 If the Player establishes in an individual case that he/she bears No Fault or Negligence in respect of the Doping Offence in question, the otherwise applicable period of Ineligibility shall be eliminated. [...] In the event that this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the Doping Offence shall not be considered a Doping Offence for the limited purpose of determining the period of Ineligibility for multiple Doping Offences under Article M.7."*

- 5.37. Consequently, in view of its finding that the Player had acted with no fault or negligence, and in view of Art. M.5.1 of the Programme, the Panel would have to overrule the decision of the Tribunal, to replace the challenged decision with the decision that no period of ineligibility should be imposed on the Player for his doping offence, and to rule that such doping offence should not be counted as the Player's first doping offence in case he would, at a later point in time, be charged with another doping offence.
- 5.38. However, the Panel notes that the Player, in his answer to the appeals at stake (par. 303 of the Player's answer), only asked for the appeals of the ITF and WADA to be dismissed and, at least in his motions, did not express a request for the decision of the Tribunal to be overruled and set aside.
- 5.39. As a matter of course, the Panel notes that the Player, throughout his answer, repeatedly expressed that he had acted with no fault or negligence, and that therefore any period of ineligibility should be eliminated. In this respect, the Panel particularly highlights the following parts of the Player's appeal answer:

Par. 4 (*in fine*): *"Richard should not be subjected to any ban from playing in these circumstances."*

Par. 11.2: *"Richard will once again contend that he acted with No fault or Negligence"*

Par. 14 (d): *"...why in the circumstances, his actions involved no fault or negligence",*

Par. 157 f.: *“...he therefore bears no fault or negligence in respect of the Doping Offence in question. 158. Accordingly, the otherwise applicable period of ineligibility (2 years) should be eliminated. The facts and circumstances of this case are exactly the kind for which Article M.5.1 should apply to avoid the injustice of a faultless player having to be banned from his/her profession.”*

Par. 167 (in fine): *“Of course, if the player is correct that he in fact acted with No Fault or Negligence, then one never gets to this stage.”*

Par. 299: *“In all the circumstances of this case, if the Tribunal finds no fault or negligence (and so does not impose a period of ineligibility) then any period of ineligibility will be eliminated (under Article M.5.1) and the Player’s subsequent results should not be disqualified (under Article M.1.2).”*

5.40. However, the Panel also takes note of the following parts of the Player’s answer, whereby the Player makes his formal requests in the case at stake, that are directly contradicting the above-cited parts:

Par. 167: *“The ITF Tribunal’s decision on sanction should be left undisturbed.”*

Title before par. 298: *“The sanction of a two and a half months ban imposed by the ITF Tribunal was appropriate and should not be disturbed”*

5.41. Considering the obvious contradiction in the Player’s position, *i.e.* that the Player stated on the one hand that he had acted with no fault or negligence, but declared on the other hand that the sanction imposed by the Tribunal shall remain undisturbed, and furthermore considering that the Player did not conclude his position that he had acted with no fault or negligence with a request to set aside the challenged decision, the Panel finds that it has no other possibility than to strictly follow the Player’s request at the conclusion of his answer to the appeal, which is:

*“303.1 To dismiss the ITF’s and WADA’s appeal.”*

5.42. Consequently, the Panel is, due to the principle of *ne eat iudex ultra petita partium*, not in a position to grant the Player more than what he asked for. In particular, the Panel is not in a position to set aside and overrule the challenged decision and to replace it with a decision that no sanction shall be imposed on the Player. The Panel is only asked to dismiss the appeals of the ITF and WADA.

5.43. In view of its finding that the Player acted with no fault or negligence, and in view of the Player’s request to dismiss the appeals of the ITF and WADA, the Panel therefore decides that the decision of the Tribunal shall not be set aside, but that the appeals of the ITF and WADA are dismissed. Besides that, as the Tribunal has not disqualified any competition results of the Player due to his doping offence, and since the decision of the Tribunal is herewith left undisturbed by the CAS even though the Panel insists on the fact that the Player acted with no fault or negligence, it goes without saying that the Panel of the CAS shall not disqualify any of the Player’s competition results, and none of the won prize money shall be reimbursed, and none of the won ranking points shall be deducted from the Player.

## F. Conclusions

- 5.44. It is uncontested that the Player committed a doping offence, *i.e.* that in the urine sample he provided at the occasion of his withdrawal from the Tournament, a miniscule quantity of benzoylecgonine was found, which is a metabolite of cocaine. Cocaine is a stimulant that appears on the WADA 2009 Prohibited List under class S6, Stimulants.
- 5.45. As the Player's sample was provided after the first match played at the Tournament, upon his withdrawal from the Tournament, the Panel decides, based on Art. F.4 of the Programme, that the sample is to be considered as having been delivered in competition, regardless of the fact that the Player himself had not yet competed in an official match at the Tournament.
- 5.46. On a balance of probability, the Panel concludes that it is more likely than not that the Player's contamination with cocaine resulted from kissing Pamela. Any other source is either less likely than the kissing to have resulted in the contamination, or is even entirely impossible. The Panel thus concludes that the Player has met the required standard of proof, such as stipulated in Art. K.6.2 of the Programme and Art. 3.1 of the WADA Code, with regard to the way of ingestion.
- 5.47. In continuation, the Panel states that under the given circumstances, even if the Player exercised the utmost caution, he could not have been aware of the consequences of kissing a girl who he had met in a totally unsuspecting environment. It was simply impossible for the Player, even when exercising the utmost caution, to know that in kissing Pamela, he could be contaminated with cocaine. The Player therefore acted without fault or negligence.
- 5.48. Consequently, in accordance with Art. M.5.1 of the Programme, any period of ineligibility that would apply on the Player would have to be eliminated, and the decision of the Tribunal, finding that the Player acted with no significant fault or negligence when he committed the present doping offence, would have to be overruled. However, as the Player only asked for the appeals of the ITF and WADA to be dismissed, but not for the challenged decision to be set aside, the Panel is simply dismissing the appeals of the ITF and WADA, but has to maintain undisturbed the decision of the Tribunal. Moreover, the Panel confirms that the Player's competition results shall not be disqualified, and that any won prize money or ranking points shall remain with the Player. Finally, the Panel considers that, even though the Tribunal's decision shall be left undisturbed, the present doping offence should, for the limited purpose of determining the period of ineligibility for multiple doping offences under Art. M.7 of the Programme, not be counted as the Player's first doping offence in case he would, at a later point in time, be charged with another doping offence.

...

**ON THESE GROUNDS**

The Court of Arbitration for Sport rules:

1. The appeal of the International Tennis Federation (ITF) against the decision of the Anti-Doping Tribunal convened under the ITF regulations dated 15 July 2009 regarding the tennis player Richard Gasquet is dismissed.
2. The appeal of the World Anti-Doping Agency (WADA) against the decision of the Anti-Doping Tribunal convened under the ITF regulations dated 15 July 2009 regarding the tennis player Richard Gasquet is dismissed.
3. ...
4. ...
5. ...
6. All other motions or petitions for relief are dismissed.

Done in Lausanne, 17 December 2009

THE COURT OF ARBITRATION FOR SPORT

President of the Panel  
**Luc Argand**

**David W. Rivkin**  
Arbitrator

**Dirk-Reiner Martens**  
Arbitrator

**Vitus Derungs**  
Ad hoc clerk