INTERNATIONAL TENNIS FEDERATION

INDEPENDENT ANTI-DOPING TRIBUNAL

DECISION IN THE CASE OF MR MARIN ČILIĆ

Tim Kerr QC, Chairman
Dr José Antonio Pascual
Dr Barry O'Driscoll

Introduction

1. This is the decision of the independent Anti-Doping Tribunal ("the Tribunal") appointed by the Anti-Doping Manager of the International Tennis Federation ("the ITF") under Article 8.1.1 of the ITF Tennis Anti-Doping Programme 2013 ("the Programme") to determine a charge brought against Mr Marin Čilić ("the player"). An oral hearing in respect of the charge took place in London on 13 September 2013.

2. The player was represented by Mr Howard L. Jacobs from the Law Offices of the same name, in California, and by Mr Mike Morgan of Morgan Sports Law LLP, solicitors in London. The ITF was represented by Mr Jonathan Taylor, assisted by Ms Elizabeth Riley, of Bird & Bird LLP, solicitors in London. I am grateful to all concerned for their comprehensive written and oral presentations which were of the high quality we have come to expect.

3. The player was charged with a doping offence following an adverse analytical finding in respect of a urine sample no. 3042183 provided on 1 May 2013 at the BMW Open in Munich. The A and B samples both returned an adverse

analytical finding for the substance nikethamide, a "Specified Substance" which is prohibited in competition.

4. By a letter dated 26 June 2013, the player accepted the presence of the substance in his body and consequently the commission of a doping offence, and accepted a voluntary suspension from competition. After further discussion and liaison between the parties, the B sample was analysed. On 6 August 2013, the player sought an oral hearing before the Tribunal. Directions were then agreed between the parties and endorsed by the chairman, leading to the hearing before the Tribunal on 13 September 2013.

5. The player accepted the commission of the doping offence but submitted that he did not intend to enhance his sport performance and that the degree of his fault was low, such that applying Article 10.4 of the Programme, any period of ineligibility should be short and should end at the time of the hearing or the Tribunal's decision. Secondarily, the player relied on Article 10.5.2 of the Programme ("No Significant Fault or Negligence") if, contrary to his primary case, it should be necessary for him to do so.

6. The ITF agreed that nikethamide is a Specified Substance, accepted the player's explanation as to how it entered his body, but put the player to proof of the proposition that he had taken it without intent to enhance his sport performance. The ITF further submitted that if the Tribunal should decide the player had not intended to enhance his performance, he was at fault and should be given a period of ineligibility at an appropriate point on the scale from zero to 24 months, applying Article 10.4. The ITF did not accept that the player could establish, under Article 10.5.2, that he was without "Significant Fault or Negligence".

7. By Article 1.7 the Tribunal must interpret the Programme in a manner that is consistent with the World Anti-Doping Code ("the Code") which:

> "shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of any Signatory or government. The comments

> annotating various provisions of the Code may be used to assist in the understanding and interpretation of this Programme."

Subject to that provision, by Article 1.8 the Programme is governed by and construed in accordance with English law.

<u>The Facts</u>

8. The player is nearly 25 years old. He was born on 28 September 1988 in Medjugorje, in Bosnia and Herzegovina. He is a Croatian citizen. He is an honest and truthful man. We accept that his opposition to doping in sport is genuine and heartfelt, that he has never knowingly taken a banned substance and that he is genuinely sorry for his inadvertent ingestion of nikethamide. His evidence to the Tribunal was full, frank and accurate, as was that of all the witnesses who gave oral evidence.

9. The player began playing tennis at the age of seven. When he was a teenager, his talent was nurtured at the National Tennis Centre in Zagreb. From 2004 onwards, he started training at the academy of Mr Bob Brett, the respected coach, in San Remo, Italy. He started playing professionally in 2005 and trained at the academy more frequently as time went on. Mr Brett became his coach. He now speaks fluent English, and knows a little French but not enough to hold a conversation.

10. The player's family members are very close to each other. His parents have consistently supported his career. His brothers also play tennis. He has risen to a very high level of achievement near the top of the world rankings. His highest ranking was ninth in the world, in the ATP singles rankings in February 2010. He has regularly played in Grand Slam tournaments and won substantial amounts of prize money.

11. The player is well aware of his responsibility to avoid ingesting any banned substance by mistake. He has received considerable anti-doping education. Before this case arose, he had heard about other athletes receiving bans for

doping offences. He knew he must take care and that one of the main risks comes from contaminated supplements. He estimates that he has been tested more than 50 times, always with negative result apart from in the present case.

12. The player has for some years received advice on nutrition and diet from the Croatian Olympic Committee ("NOC"), which provides vitamins and supplements free of charge which, the NOC advises, are safe to take. These do not include glucose, which can be obtained from ordinary shops in Croatia such as the chain store "DM", where it is sold alongside foodstuffs in powder or tablet form under the name "Traubenzucker", a German word meaning "grape sugar", also denoting glucose. It is used for cooking and sweetening.

13. From 2010, his physical trainer was Mr Slaven Hrvoj, who worked at the National Tennis Centre in Zagreb. Mr Hrvoj was concerned that the player was not eating enough and advised him to take electrolytes, protein and glucose. The player saw no doping risk from glucose since he regarded it merely as sugar and thus food. The electrolytes and protein products, but not the glucose, came from the NOC.

14. The player became aware, from reading the words on the package, that the glucose product he used, Traubenzucker, had listed among its ingredients (in Croatian) a substance called "nikotinamid". Online research at Google and Wikipedia in around February 2011 taught him that nikotinamid was harmless; he has since, moreoever, tested negative many times while taking powdered glucose containing nikotinamid, so it is not surprising he regarded it as harmless from an anti-doping perspective.

15. The ITF provides a high level of anti-doping education to professional tennis players. Players such as this one are regularly reminded of their responsibility to ensure they remain free from banned substances and in particular of the danger of taking supplements without checking their ingredients. As explained in the statement of Dr Stuart Miller, the ITF's Anti-Doping Manager, there is a

section on the ITF's website warning that the supplements industry is largely unregulated and that consumption of contaminated supplements can lead to penalties under the Programme.

16. The ITF sends players a wallet card, now including a UBS stick with information in English, French and Spanish, which players are advised to keep with them at all times. It includes the prohibited list, a 24 hour telephone helpline number, website addresses enabling substances to be checked, and advice on the need to be especially wary of dietary supplements. Dr Miller also pointed to the publicity given to cases of bans on tennis players such as Robert Kendrick, who had taken a supplement to combat jetlag.

17. The player was well aware of his anti-doping responsibilities. He had received his wallet card but did not keep it with him, instead putting it in a drawer. He was not worried about testing positive because of the advice and products he received from the NOC, and because he did not take other products except glucose in powder or tablet form, and had tested negative many times while taking it. He believed that as long as he did not take anything different from what he was taking, he would be safe.

18. In June 2012, he suffered a dip in form and went through a spell of erratic play and mediocre results.

19. At about this time the player began to take creatine, on the advice of Mr Hrvoj. Creatine is a permitted substance used to boost energy levels over time. It is sandy and unpleasant in taste and texture. He took it with glucose powder, partly to make the creatine less unpleasant to ingest and partly because Mr Hrvoj advised that glucose helps the body to absorb creatine. He stopped

taking creatine after about six weeks, but resumed in about late February 2013, continuing until about the end of April 2013.

20. On 7 April 2013 the player arrived in Monte Carlo, where he has an apartment, to compete in the Rolex Masters tournament starting on 15 April. Each day he trained with Mr Brett at St Remo, half an hour's drive away, taking his father and brother with him. On 14 April, the night before his first match, the player stayed in a hotel rather than at the apartment, to prepare mentally. He won his first round match the next day.

21. At some point between 15 and 18 April, he realised his supply of glucose powder was low and asked his mother, Mrs Koviljka Čilić, to buy some more. He knew there was none at the local supermarket, and suggested a pharmacy about 800 metres from the apartment. His mother knew the pharmacy and had shopped there before for medicines.

22. He then played his next match on 18 April, losing to Richard Gasquet. It was obvious to him that his parents and his coach were not getting on well and this was a source of stress for him, made worse by his defeat on the court that day.

23. In the period from 18-20 April, the player's mother went to the pharmacy to buy glucose as he had requested. She was served by a lady she recognised from previous visits. Mrs Čilić speaks no French and showed the word "glucose" written on a piece of paper. The pharmacist took a packet from the shelf and placed it on the counter. Mrs Čilić said twice that it was for her son who plays "tennis professional", getting no reaction due to the language barrier.

24. A French speaking man helped with translation. She heard him use the words "tennis professionel". The pharmacist moved the packet towards Mrs Čilić, which she took as an indication that the product was safe and contained no banned substance. She knew that her son was subject to anti-doping rules and had to be careful what he took. Convinced by what she had seen and heard, she bought the packet, took it to the apartment and left it in the kitchen.

25. After resting for two days, the player resumed training at St Remo on 21 April 2013. His father accompanied him to the training session and wanted him to speak to Mr Brett about the situation, but he did not do so. He stopped the training session early and went back to Monte Carlo to watch the final of the Rolex Masters instead. The packet Mrs Čilić had bought remained in the kitchen. It had clear writing on it with the word "Coramine" in upper case letters and the word "Glucose" in lower case letters.

26. On the main face of the packet, the ingredients were listed in French as "Nicéthamide 0,125g" and "Glucose monohydrate 1,500g". The contents were described as "20 comprimés à sucer", i.e. 20 tablets to suck. The product was described as "antiasthénique" to treat "sensation de fatigue notamment en altitude" (feelings of tiredness especially at high altitude) or to be used "en cas de malaise" (if feeling unwell/faint/sick). The manufacturer's name was shown as "Novartis", a pharmaceutical company.

27. The writing on the sides of the packet used the word "médicament" to describe the product. The leaflet inside the packet, written in French, clearly used the same term to describe the product and included a "**Sportifs:** Attention…" warning (bold text in original), stating that the tablets contained an active ingredient which can cause a positive test for persons subject to doping control. Anyone reading the side of the packet or the leaflet, even with only very limited knowledge of French, would easily have identified the danger for an athlete with anti-doping responsibilities.

28. The substance "nicéthamide" is the French spelling of nikethamide, a stimulant prohibited in competition. It was the active ingredient in the tablets. In sport, it is performance enhancing, for a short time. The amount of glucose in each tablet is very small, much less than an athlete would take in powder or tablet form to boost energy levels. The small amount of glucose was probably added just as a sweetener to the nikethamide tablets. It is not accurate to describe the

tablets as glucose tablets. That is what the player mistakenly thought they were.

29. On Monday 22 April 2013, the player attended another training session, which did not go well.

30. That evening he returned to the apartment and spoke to his parents, who said they would no longer watch training sessions at the academy in St Remo. Later in the evening he noticed the packet of what he thought were glucose tablets, which reminded him that he had asked Mrs Čilić to buy them. He noticed they were in tablet form, not powder.

31. He asked Mrs Čilić about them and she said no other form of glucose was available at the pharmacy and that she had checked that it was safe for a professional tennis player to take them. He looked at the front of the packet and saw the French word "sucer", which he thought meant sugar (šećer in Croatian). He noticed that only two ingredients were listed. He thought that "nicéthamide" was the same as nikotinamid, which he knew to be harmless. He thought these were sugar and vitamin tablets and looked no further.

32. He did not read the side of the packet, did not do any internet research into the word "Coramine" or "nicéthamide", did not seek medical advice, did not contact the telephone helpline number on his wallet card, and made no further enquiry about whether the product was safe to take from an anti-doping perspective. It did not cross his mind that it might be unsafe. He took a photograph of the front of the packet and sent it to Mr Hrvoj, asking whether it

was alright to take it, i.e. whether it would be effective, given that the dose of glucose was so small.

33. Mr Hrvoj does not have scientific qualifications in nutrition or pharmacology. He had not heard of Coramine. He assumed it must be a brand name. He did not realise that it was a medicine made by a pharmaceutical company whose active ingredient is a banned stimulant. He did not do further research or seek more information about the product. He texted back that the product was not as good as the normal powder because the dose of glucose was so small. He advised the player to take two tablets each day with his creatine. He texted that he would bring the usual glucose powder with him to Munich, where they were to meet on 27 April.

34. The evidence of Dr Miller shows that it would have been a very simple matter for either the player or Mr Hrvoj to have discovered within minutes by internet research or other enquiry that Coramine is nikethamide and that nikethamide is a banned stimulant on the prohibited list (under S.6 (stimulants)). When Mr Hrvoj later did this exercise after learning of the positive test result, it only took him about 10 minutes to discover these things.

35. The player probably took one of the tablets straight after his text conversation with Mr Slaven, the same evening. After that, he took two tablets each morning with creatine, to make the latter less unpleasant and to help his body with absorption of creatine. It is likely that he took a total of 11 tablets in the period from 22 to 26 April 2013. There are nine of the original 20 tablets remaining in the packet and no evidence that any have gone missing.

36. During that period, the player was training with Mr Brett in a very tense atmosphere. He was due to compete in the BMW Open tournament in Munich the following week. He had known for some time that he had a “bye” in the first round and that his first match was to be played on Wednesday 1 May 2013.

After training on Friday 26 April, he flew to Zagreb to celebrate his girlfriend's birthday.

37. He left the tablets behind at the apartment in Monte Carlo, as he expected to meet Mr Hrvoj in Munich the following day and expected to resume taking his normal glucose powder, which Mr Hrvoj had said he would bring. Mrs Čilić later took them back to her home in Medjugorje. Thus, the player did not take any of the tablets during the four days from 27-30 April 2013, before playing his first and only match in Munich on 1 May 2013.

38. We now know from the subsequent laboratory analysis that when the player played that match, a trace of nikethemide remained in his body. We accept the uncontested evidence of Professor Peter Sever, Professor of Clinical Pharmacology and Therapeutics at Imperial College, London, that the player's performance was not thereby enhanced.

39. After the match, which he lost, the player was selected for doping control and completed a doping control form. He declared aspirin and some vitamin supplements on the form, but not creatine, though he had declared creatine before when completing doping control forms. He provided a urine sample. He was not concerned about testing positive, for the reasons already given.

40. During the period from 5 to 18 May 2013, the player competed in the Mutual Madrid Open and the Rome Masters tournaments. He played poorly in both tournaments.

41. The player's sample was conveyed to the WADA accredited laboratory in Montreal, Canada, the the Laboratoire de contrôle du dopage INRS-Institut Armand-Frappier. The A sample was analysed and found to contain nikathemide in a concentration of approximately 66 ng/ml. The certificate of analysis was dated 24 May 2013. The same day, the laboratory reported the

results to International Doping Tests & Management in Lindigö, Sweden, and to the ITF.

The Proceedings

42. By letter dated 10 June 2013 the ITF charged the player with a doping offence under Article 2.1 of the Programme arising from the adverse analytical finding showing the presence of nikethamide in the player's A sample. The player received the letter on 11 June by email at an apartment in London, before playing his first singles match in the Queen's Club Championships. He was shocked and horrified.

43. He immediately contacted Mr Hrvoj in Zagreb, who established from internet research in about 10 minutes that the athlete Torri Edwards had tested positive for nikethamide after taking glucose tablets. After a further call to his mother, he soon had a photograph on his Blackberry of the offending packet of Coramine Glucose, which arrived two days later in London with the player's brother, together with the accompanying leaflet and remaining tablets, all of which were produced to the Tribunal.

44. The player instructed lawyers in Brussels. He played and won his first round match at Wimbledon on 24 June. He has not played in a competitive match since. On 26 June his lawyers in Brussels responded on his behalf, voluntarily accepting a provisional suspension until a decision in the case, and waiving his right to analysis of the B sample. He withdrew from Wimbledon, citing a knee injury to avoid adverse publicity.

45. In a letter to the ITF dated 27 June 2013 (see paragraph 2.13 of the player's written submissions) he attributed the positive test to glucose tablets taken out of competition without intent to enhance sport performance, and proposed a meeting to see whether the sanction could be agreed, failing which his right to a hearing was reserved. The B sample was then analysed and confirmed the result of the A sample analysis. The player was informed of this on 3 July.

46. By email dated 6 August 2013, the player sought a hearing before the Tribunal. The hearing was later fixed for 10 September 2013 at the offices of Bird & Bird, the ITF's solicitors in London. Directions were subsequently agreed and approved by the chairman. The ITF's opening brief was dispensed with by consent. The constitution of the Tribunal was determined and agreed by the parties.

47. While preparing for the hearing, the player visited Dr Stephen Humphries, an experienced London based consultant psychiatrist, who read the player's draft witness statement (in the same terms as the signed statement before the Tribunal) interviewed him for about 90 minutes (his account being consistent with the statement and with his evidence to us), took notes and prepared a report dated 22 August 2013.

48. In his report, Dr Humphries recited the interview and concluded (paragraph 2.26) that:

> … at the time of the incident with the glucose tablets [the player]'s state of mind was one of anxiety, acute stress, and what is called dysphoria, which is a form of negative mood state encompassing symptoms of depression and irritability. … he could not 'see the wood for the trees'.

49. Dr Humphries went on to express the final summary of his opinion:

> … I am of the opinion that [the player]'s mental state was adversely affected by interpersonal stress and conflict leading to poor concentration and a degree of cognitive impairment which adversely affected his attention to detail in checking the labelling of some glucose tablets brought by his mother.

50. The player produced his detailed written submissions dated 24 August 2013, with supporting evidence. He relied on Article 10.4 of the Programme, denying any intent to enhance sport performance, arguing that the degree of his fault was slight and mitigated by stress, and that any period of ineligibility should be backdated either to 26 June 2013 (the date of his voluntary provisional suspension) or 1 May 2013 (the date of sample collection) and should be short, so as to expire at the time of the Tribunal's decision.

51. In his written submissions, he did not rely on Article 10.5 (see paragraph 6.5 of his written submissions). However, in the oral presentations, both parties briefly addressed Article 10.5.2 (no significant fault or negligence), which would only need to be addressed by the Tribunal if it should decide, contrary to the player's case, that he could not bring his case within Article 10.4.

52. The ITF produced its written response to the player's submissions on 9 September 2013, supported by a witness statement from Dr Miller, its Anti-Doping Manager responsible for operation of the Programme. The ITF accepted the player's explanation as to how nikethamide entered his system, but put him to proof, to the comfortable satisfaction of the Tribunal, and with corroborating evidence beyond his word, of lack of intent to enhance sport performance, as required to bring his case within Article 10.4.

53. The ITF did not agree that the degree of the player's fault was slight, made detailed factual submissions on the player's evidence and contended for a period of ineligibility of up to two years, in the appropriate range, depending whether or not the player could succeed in bringing his case within Article 10.4. The ITF accepted that if Article 10.4 did not apply, the case fell within Article 10.5.2 (no significant fault or negligence), with a consequent reduction of up to half the otherwise mandatory two year period of ineligibility.

54. The hearing was held at the offices of Bird & Bird, solicitors, in London, from about 9am to about 4.20pm on Friday 13 September 2013, with a break from about 1pm to 1.30pm. The proceedings were recorded and transcribed. The Tribunal heard oral evidence from Mr Hrvoy, the player, Dr Humphries and Dr Miller. We also had written statements from those witnesses, and other witnesses who did not give oral evidence, but whose written statements we took into account.

55. After hearing the evidence and closing submissions, the Tribunal deliberated in private and, with the agreement of the parties, announced the result, without

reasons, at about 4.10pm, on the understanding that the written decision with reasons would follow as soon as practicable.

The Tribunal's Conclusions, With Reasons

56. The following matters were either formally agreed or not contested and uncontroversial:

(1) that the Programme is binding on the player;

(2) that nikethamide is prohibited in competition;

(3) that a doping offence has been established by the presence of nikethamide in the player's body;

(4) that nikethamide is a "Specified Substance" within Article 10.4 of the Programme;

(5) that the player's account of how nikethamide entered his body is accepted as correct;

(6) that this was the player's first offence;

(7) that unless the player could bring himself within Article 10.4 or 10.5, there would be a mandatory period of ineligibility of two years;

(8) that the player's results must automatically be disqualified, and his ranking points and prize money forfeited, in respect of the BMW Munich Open (see Article 9.1);

(9) that the player's results must automatically be disqualified, and his ranking points and prize money forfeited, in respect of events in which he competed between 1 May 2013 and 26 June 2013, assuming that any period of ineligibility would start on 1 May 2013; and

(10) that the start date for any period of ineligibility should be 1 May 2013, the date of the sample collection (see Article 10.9.3(b)). The ITF also proposed 26 June 2013 as an alternative (pursuant to Article 10.9.3(a)) but did not object to 1 May 2013, provided the player "actually serves" at least half the period of ineligibility (Article 10.9.3(b)).

57. The written and oral submissions of the parties made it clear that the contentious issues the Tribunal has to decide, or may have to decide, are these:

(1) whether the player can, with corroborating evidence in addition to his word, establish to the comfortable satisfaction of the Tribunal that he did not intend to enhance his sport performance (Article 10.4);

(2) if not, whether the player can establish that he bore "No Significant Fault or Negligence", in the sense of that term as defined in Appendix One to the Programme (Article 10.5.2); and

(3) if the Tribunal has discretion to reduce the otherwise mandatory two year period of ineligibility, what period of ineligibility should be imposed in this case: from no period to two years (see (1) above) or in the range from one year to two years (see (2) above).

The first issue: absence of intent to enhance sport performance

58. The player submitted that he was able to satisfy all the conditions for the application of Article 10.4 of the Programme. He pointed out that the source of the nikethamide is accepted by the ITF as being the tablets purchased by his mother from the pharmacy in Monte Carlo. He submitted that we should be comfortably satisfied, on the basis of corroborating evidence as well as his word (see his written submissions, paragraph 5.10) that he did not take the specified substance, nikethamide, with intent to enhance his performance.

59. The ITF put the player to proof of that proposition, and in particular suggested that the player may have taken the specified substance, nikethamide (albeit believing it to be innocuous glucose), with intent to help his body to absorb creatine (a permitted substance) and thereby enhance his performance in training in the days leading up to the BMW Open in Munich, and in that competition itself.

60. As the CAS panel pointed out in *Kutrovsky v. ITF*, CAS 2012/A/2804, at paragraph 9.10, there are two questions of interpretation arising in respect of the issue as to whether a player intends to enhance his sport performance within the meaning of Article 10.4. The first is: what must he show to prove that he did not so intend? The second is: what is meant by enhancement of sport performance?

61. As to the first of those two issues, the sports arbitration community has for some years now been split over what was called the *Foggo*/*Oliveira* debate, now sometimes referred to as the *Oliveira*/*Kutrovsky* debate. The issue has been considered in several lower instance tribunals and at CAS level in decisions such as *WADA v. FIB and Berrios*, CAS/2010/A/2229 and *UCI v. Kolobnev*, CAS/2011/A/2645.

62. Putting the matter simply, proponents of the *Oliveira* approach (see *Oliveira v. USADA*, CAS 2010/A/2107) hold that that an athlete cannot intend to enhance sport performance through the ingestion of a specified substance unless the athlete is aware that he has ingested the substance in question; while proponents of the *Foggo* or *Kutrovsky* approach hold that an athlete who ingests a product intends to ingest whatever it contains, even if ignorant of what it contains or that what it contains is prohibited.

63. Although it was hoped by some that Mr Kutrovsky's appeal to the CAS would provide the opportunity to lay the debate to rest, this did not prove correct. The CAS panel's decision on the correct approach to interpretation of Article 10.4

was by a majority, and a subsequent CAS panel comprising an eminent sole arbitrator, Professor Ulrich Haas, declined to follow the approach of the majority in *Kutrovsky*, preferring to follow *Oliveira*: see *WADA v. JBN, Dennis de Goede & Dopingautoriteit*, CAS 2012/A/2747, at paragraph 7.10 ff.

64. The jurisprudential chasm is now so deep that it is unlikely to be resolved except by amendments to the WADA Code, which are not expected to take effect until 2015. As in *Kutrovsky*, it would be undesirable for a first instance tribunal such as this to attempt to resolve conflicting CAS authority unless there is no other way of deciding the case.

65. The player submits that we need not resolve the conflict because, even assuming that the interpretation least favourable to him is correct, he is still able to meet all the conditions for the application of Article 10.4. The Tribunal therefore starts by assuming that the approach of the majority in *Kutrovsky* is correct, and thus that "an athlete's knowledge or lack of knowledge that he has ingested a specified substance is relevant to the issue of intent but cannot … of itself decide it" [in the athlete's favour] (paragraph 9.15).

66. Applying that proposition to the present case, we propose to assume that the player cannot show the requisite lack of intent by his ignorance that the tablets he took contained nikethamide, without more evidence. We shall assume he cannot say he did not intend to take nikethamide; but that, rather, he intended to take nikethamide because he intended to take the tablets which in fact contained nikethamide, even though he did not know it.

67. The question is then, did he take those tablets with intent to enhance his sport performance? What is meant by enhancement of sport performance? This was the second question of interpretation posed by the CAS panel in *Kutrovsky*. As to that, the CAS panel unanimously decided (paragraph 9.20) that enhancement is a synonym for improvement, and does not carry any connotation of cheating.

68. So far as intent to enhance performance in competition is concerned, the present Tribunal reiterates the approach adopted at first instance in *Kutrovsky*, which led to the conclusion on the facts confirmed on appeal by the majority of the CAS panel:

(1) The question is whether on the facts an athlete can show, with corroborating evidence over and above his own word, to the Tribunal's comfortable satisfaction, that he did not intend to use the substance he took to enhance his sport performance.

(2) The issue is one of intention, concerned with the player's state of mind. But an objective evaluation of the facts must be carried out in order to reach the correct conclusion about what the player's state of mind was.

(3) A line must be drawn. On one side of it are cases where the connection between use of the product (out of competition) and participation in competition is sufficiently remote to enable the player to satisfy the test. On the other side are cases where the connection between use of the product and taking part in competition is too close.

(4) For example, where a player takes the product to get a "boost" just before a match, it is extremely unlikely that he could satisfy the tribunal that he lacked the requisite intent. Conversely, if he only takes the product between competitions with a long gap between the competition and taking the product, he could (with corroborating evidence) comfortably satisfy the tribunal that he lacked the requisite intent.

(5) In deciding which side of the line a case falls, the tribunal's attention is directed to the commentary to Article 10.4 of the WADA Code, which lists as relevant factors the nature of the substance taken; the timing of its ingestion; open use or disclosure of use of the substance, and thus, declaring it on the doping control form; and any medical evidence supporting a therapeutic explanation for the ingestion.

69. However, the present case also raises the issue of intent to enhance performance in training by taking stimulants prohibited only in competition. In *Kutrovsky* the CAS panel noted at paragraph 9.24:

> The question whether those stimulants (not prohibited in competition only [sic]) can be lawfully used to enhance the intensity of training, which indirectly will enhance performance in some future competition, need not be resolved in the present case. It seems to the Panel that this involves questions not dissimilar to those which arise in the field of remoteness of damages in tort.

70. On that issue, the sole CAS arbitrator in *WADA v. JBN* (cit. sup.) observed at paragraph 7.16 that the taking of a substance out of competition that is only prohibited in competition is not a doping offence unless the substance remains present in the athlete's body when the competition starts. Therefore, he reasoned:

> … an athlete only acts intentionally within [Article 10.4] ... if his intention covers both, the ingestion of the substance and it being present in-competition".

71. However, that reasoning proceeds from the premise that the general approach to intent derived from *Oliveira* should be followed because "the drafters of the WADC wanted to exclude the applicability of art. 10.4 only if the anti-doping rule violation was committed intentionally". It is not clear that this reasoning would be accepted by proponents of the *Foggo*/*Kutrovsky* approach. It stands uneasily with the reasoning of the majority in *Kutrovsky*, which is the approach we are assuming to be correct in this case.

72. In considering the question of enhancing performance in training, an approach should be adopted which is similar to that which applies when considering issues of remoteness of damage in tort, as suggested (unanimously) by the CAS panel in *Kutrovsky*. The connection between the taking of the substance and a future competition must be objectively evaluated. The degree of proximity between the training and the competition is important: the closer the competition, the more likely the player will fail to show the requisite lack of intent.

73. Turning to the facts here, and applying the approach outlined above, which is the approach least favourable to the player and is assumed against him to be correct, we are comfortably satisfied by the evidence of the player corroborated by the evidence of Mr Hrvoj, and by the evidence of Professor Sever as to the nature of nikethamide and its likely impact on performance having regard to the timing of ingestion and the dose, that the player did not intend to enhance his sport performance by taking the tablets during the period from 22 to 26 April 2013.

74. We accept that the substance taken is by nature performance enhancing, but it is only performance enhancing for a short time. It was intended to help the player's body absorb creatine, a non-prohibited substance. That in itself cannot be enough to constitute intent to enhance sport performance; otherwise, as Mr Jacobs pointed out, Article 10.4 would in practice be virtually deprived of meaningful content.

75. Here, the tablets were first taken when the player knew he would not be competing until nine days later; and were last taken when he knew he would not be competing until five days later. Even attributing to him an intention to obtain the effect of nikethamide and not merely of glucose, he could not have expected the tablets to have any significant continuing effect after Friday 26 April 2013, when he stopped taking them and flew to Zagreb to celebrate his girlfriend's birthday.

76. The player did not take the Coramine tablets once he had arrived in Munich on Saturday 27 April; he took glucose powder. On an objective evaluation of the degree of remoteness between his ingestion of the Coramine tablets and his participation in the BMW Open, we are comfortably satisfied that the requisite lack of intent has been demonstrated.

77. We add that on an objective evaluation, it does not matter that the player switched to glucose powder by chance and not because of anti-doping concerns.

We consider that his ingestion of Coramine tablets from 22-26 April 2013 when training in Monte Carlo and San Remo is too remote from his participation in the BMW Open tournament in Munich for him to have intended to enhance his sport performance.

78. For those reasons, we conclude that the player has succeeded in comfortably satisfying us, with corroborating evidence beyond his own word, that he took nikethamide without intent to enhance his sport performance, even applying the interpretative approach least favourable to the player. Accordingly, the conditions for the application of Article 10.4 are met and the Tribunal has discretion to impose, at one end of the scale, a warning and reprimand and no period of ineligibility and, at the other, a period of ineligibility of two years.

The second issue: No Significant Fault or Negligence

79. For the reasons given above, the second issue does not arise and it is unnecessary for us to determine it. The conditions for the application of Article 10.4 being established, the period of ineligibility may be from zero to two years' duration. The application of Article 10.5.2, if established, would require the Tribunal to impose a period of ineligibility in the range from 12 to 24 months' duration.

80. It is therefore unnecessary for the Tribunal to consider whether the approach of the CAS panel in *Kutrovsky* to this aspect of the case was correct or not and whether, if we are of the view that it is incorrect, we should decline to follow it as other first instance tribunals have done on two occasions. We do not think it would assist the debate for a first instance tribunal such as this to add to that debate in a case where it is not necessary for our decision.

The third issue: length of period of ineligibility

81. The third and final issue we have to decide is how long any period of ineligibility should be. The player submitted that it should be of short duration,

such that it should end at around the time of our decision, taking account of backdating to either 26 June 2013 or 1 May 2013. The ITF submitted that it should be considerably longer, taking account of the gravity of the player's fault.

82. The player's main submissions were these. He submitted that, while under Article 10.4.3 of the Programme, the Tribunal has to consider the Player's degree of "fault" in assessing what reduction should be applied, the sanction ultimately applied must be proportionate and consistent having regard to the totality of the circumstances; that we are first required to consider the context in which the violation arose; and that this is because "fault" is not measured in a vacuum: rather, a player's level of caution is "calibrated" by the circumstances leading up to the violation.

83. The player submitted that here, the relevant circumstances included the following:

(1) his understanding and experience of glucose as an everyday natural sugar product and not a stimulant;

(2) that the product name did not alert suspicion, unlike in cases involving Jack3d, Hyperdrive, TestoBoost and other products whose very names obviously connote performance enhancement;

(3) that he had started to take glucose some two years previously on the recommendation of his physical trainer and had checked then that the ingredients were safe, as they proved to be when he tested negative;

(4) that he had also previously taken glucose in tablet form as well as powder form, without incident;

(5) that glucose tablets are commonly and openly used among tennis players on the Tour generally and within the Player's own training group, which gave him a sense of reassurance; and

(6) the linguistic similarity between the vitamin "*nikotinamid*", a harmless substance, and "*nikethamide*";

(7) that the player is generally careful about what he ingests and is not cavalier about his anti-doping obligations;

(8) that the substance in question was lawfully ingested out of competition, is only prohibited in competition and was last ingested five days before he was due to play his next competitive match; and

(9) that once he started to take the tablets, he did not notice any side-effects which might have raised his suspicions.

84. Mr Jacobs submitted that the simple linguistic error of equating "nicétamide" with "nikotinamid", once made, rendered irrelevant the ITF's elaborate edifice of anti-doping measures, namely the telephone helpline, the wallet card, and internet resources; because once the mistake was made, there was no reason to enquire again about substances already found to be harmless, any more than when buying a second bottle of aspirin having made diligent enquiries before buying the first bottle.

85. In that factual context, the player submitted that the degree of his fault was small. The tablets came from a trustworthy source, a pharmacy the player's family knew well, not an obscure website. He relied on the steps his mother took while in the pharmacy to check it was safe for a professional tennis player to take. He carried out a visual check of the ingredients, albeit that he erred in identifying them correctly. He photographed the front of the package. His trainer raised no concerns. He does not understand much French.

86. The player further submitted that the extent of his fault was mitigated by the cognitive impairment from which he was suffering on 22 April 2013 due to the situation with his coach. The player drew an analogy with the stress taken into account by a CAS panel in favour of the player in *Kendrick v. ITF*, CAS 2011/A/2518 at paragraph 10.20b, where the panel noted that the birth of his first child was imminent and he was preparing for the last year of his career.

87. The player submitted, further, that the ITF was seeking a period of ineligibility that went beyond a period that would be proportionate to the offence, for the purpose of deterring others, because the ITF believed past bans had been too short. He disputed the thesis that non-fault based factors must be disregarded in assessing the appropriate sanction, asserting that they must be taken into account in order to produce a sanction that will "meet the justice of the case in the round" (player's written submissions paragraph 6.34).

88. He therefore argued that the Tribunal must have regard to the loss of ranking points and prize money already occasioned by his voluntary provisional suspension, which has led to him missing two Grand Slam tournaments, Wimbledon and the US Open; and to the fact that no unfair sporting advantage was intended to be obtained, nor was obtained, so that there was no unfairness to other players.

89. The ITF's main submissions (on the basis of various well known CAS authorities which we need not recite fully here), were to the following effect:

(1) that the only criterion for assessing the appropriate reduction below the maximum period of ineligibility of 24 months, is the criterion of fault;

(2) that fault is not confined to cheating but extends to a departure from the required standard of care;

(3) that the standard of care required is high because of the need for sport to be clean and fair to all competitors;

(4) that the starting point is always the player's responsibility for what he ingests;

(5) that special care is needed where supplements are taken because the industry is largely unregulated;

(6) that the ITF had gone to considerable trouble and expense to provide a high level of anti-doping education for its players, removing ignorance as a possible mitigating factor;

(7) that the player had access to the NOC and other professional advice but did not take it;

(8) that the steps required to discover the presence of a banned substance in the tablets were simple and swift; the player did not even read the side of the package or the leaflet inside it;

(9) that the player took no precautions to check the worth of such assurance as Mrs Čilić had obtained from the pharmacy, and that the assurance she obtained was worthless;

(10) that the photograph of the package sent to Mr Hrvoj was not sent for the purpose of checking the product from an anti-doping perspective but for extraneous reasons;

(11) that, while the player was under stress because of the situation with his coach, that mitigated his fault only to a small extent: he was able to function to the extent of photographing and discussing the product with Mr Hrvoj for non-doping related purposes;

(12) that the duty to exercise caution extends to substances taken out of competition, in that caution must be exercised to ensure the substance is absent when the competition starts;

(13) that the absence of intent to enhance performance in competition cannot be relied upon twice over, to mitigate fault, having already been relied upon to establish lack of intent to enhance performance;

(14) that factors unrelated to the player's personal fault are irrelevant to mitigation; e.g., loss of prize money, lack of intent to enhance performance; the sporting calendar; and any apology and contrition.

90. In response to the suggestion that the ITF, believing that previous bans had been too short, was seeking an exemplary punishment for deterrence purposes, going beyond what would be proportionate to the offence, Mr Taylor argued that deterrence is a legitimate aim of the Programme and that a ban which is insufficient to achieve that aim would be disproportionately low, not disproportionately high. He put it pithily thus in oral argument: "if the ban does not deter people, then it has not gone far enough to achieve the purpose of the rules" (transcript, page 175).

91. We carefully considered and evaluated the evidence and those submissions before reaching our conclusion, announced to the parties on the day of the hearing. We find it difficult to derive much assistance from the case law. Consistency in the decisions is elusive. The CAS itself has recognised that "although consistency of sanctions is a virtue, correctness remains a higher one: otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interests of sport" (*Kutrovsky*, cit. sup., paragraph 9.52.3).

92. Both parties accepted that each case turns on its own facts, that the facts of each case are likely to be unique, and that comparison with other cases as factual precedents is of limited value, unless the facts are virtually the same (see. e.g. *FINA v. Cielo*, CAS 2011/A/2495, paragraphs 8.2 and 8.3). Despite that acceptance both parties, inevitably, cited other cases for the purpose of

submitting that the degree of blame in those cases was more than, or less than, the degree of blame on the player's part in this case.

93. The ITF cited (among other cases) *Edwards v. IAAF*, CAS OG 04/003 (two year ban for the same substance as in this case, purchased by the athlete's trainer over the counter in Martinique); and *Oliveira v. USADA*, CAS 2010/A/2107 (18 month ban for use by a cyclist of "Hyperdrive" containing a banned stimulant, to combat fatigue). The ITF submitted that in both cases the degree of fault on the athlete's part was less than the player's in this case. The player submitted the contrary.

94. The player cited, among other cases, *UCI v. Bascio & USADA*, CAS 2012/A/2924 (three month ban for "minor" violation where US athlete bought a product over the counter from pharmacy in Italy, to treat cold and sinus symptoms; the athlete received assurance from the pharmacy that the product was safe but a warning in the leaflet stated otherwise); and the ATP Tour Anti-Doping Tribunal's decision in the appeal of *Graydon Oliver* (two month ban, on a scale of zero to 12 months, for a tennis player who took a contaminated sleep aid to combat jetlag). The player submitted that the degree of fault in each case was higher than in the present case. The ITF did not agree.

95. We found these factual examples of cases at one end of the spectrum or the other to be of little or no assistance. They do not form part of a cohesive and coherent body of case law enabling the Tribunal to derive an appropriate range or bracket within which the sanction should fall; still less anything approaching a "tariff" or conventional duration for cases falling within particular categories.

96. The player also relied on various cannabis cases (see paragraph 6.39 of his written submissions) to support his contention that fault is not the only criterion to be applied, and that the Tribunal must have regard to the degree of harm done by ingestion of the banned substance. We do not accept that we are materially assisted by any analogy from the cases involving deliberate

recreational drug use for pleasure, rather than for sport related reasons, general health or medicinal purposes.

97. The Tribunal is concerned to note that the case law is not consistent on the appropriate length of the period of ineligibility in a case such as the present one, as demonstrated by the disparate lengths of the bans imposed in some of the cases just mentioned, and other cases not specifically mentioned here. Inconsistent decisions cannot all be correct. While each case turns on its own facts, the case law should, over time, show consistency, i.e. bans of approximately equal length for approximately equal degrees of fault.

98. With the above points in mind, we return to the facts of the present case and our evaluation of the parties' rival contentions. We do not accept the player's contention that factors apart from the degree of his personal fault must be weighed in the scales in order to apply the principle of proportionality correctly. In all but the rarest of cases, proportionality is already achieved by applying the rules themselves, which are flexible, confer discretion on the Tribunal and represent a broad consensus in the world of sport.

99. To take account, when setting the length of a ban, of non-fault based factors such as the absence of any unfair sporting advantage, the loss of prize money and ranking points, the sporting calendar, the player's sense of contrition and any apology, and the absence of harm done to the sport by his use of the prohibited substance, would compromise the integrity of the rules and would be contrary to the wording of Article 10.4.3 of the Programme.

100. Nor do we accept the suggestion that a period of ineligibility which is set at such a length so as to have a significant deterrent effect on others, necessarily infringes the principle of proportionality because it penalises the player more severely than he deserves on the facts of his individual case. Those facts include the broader context, including the proposition that responsibility to

prevent ingestion of banned substances has to be enforced in a way that protects the integrity of the sport and fairness to other participants.

101. In this case, we are of the view that the degree of the player's fault was quite high. This was not a minor and trivial infringement of the rules. The player had received considerable anti-doping education. He had easy access to professional expert advice. He took no steps to verify a vague and flimsy assurance from his mother that the substance was safe. He had the means of discovering the truth with the simplest of enquiries: by reading the side of the package, opening it and reading the leaflet inside, or searching online. He did none of these things.

102. The linguistic mistakes which led him astray – mistaking "sucer" for sugar and nicéthamide for nikotinamid – were understandable but highly careless. Nikethamide had, we note, been on the prohibited list from its inception, and the potential similarity with other names cannot be considered new or unexpected. The player had a home in Monte Carlo but had little knowledge of the main language spoken there. He should not have relied on linguistic conclusions derived from a language of which he knew little.

103. We do not accept Mr Jacobs' submission that the player's anti-doping resources were not relevant because, having made the mistakes he made, the player had no reason to make use of those resources. This was not a case in which an athlete purchases a product identical to one he has previously consumed safely. He was obtaining a new and unknown product from an untrustworthy source, a pharmacy. It was precisely the kind of situation in which the wallet card was intended to be used.

104. The product had the word "Coramine" in upper case letters on the front. The player was familiar with websites such as Google and Wikipedia. It would have taken only minutes to search under "Coramine" on those sites, and discover the danger he was in. The circumstances in which his mother had

obtained the tablets made this research all the more urgent. They were not, as Mr Jacobs submitted, such as to justify a sense of security in taking the tablets.

105. We accept that on 22 April 2013, the player was under stress as a result of the difficulties in his and his parents' relations with his coach. We accept this as a mitigating factor. We do not, however, think that the stress the player was suffering is a factor of great weight. As accepted by Dr. Humphries, the impact of the situation on the player's behaviour was 'mild'. Conditions in the highest echelons of professional sport are inherently stressful.

106. The player's situation was more stressful than usual, but the degree of his cognitive impairment was not enough to make him unfit to drive a car, nor to prevent him discussing the situation with the commentator earlier that day, nor to prevent him discussing the situation with his parents that evening, nor to prevent him from photographing the package, sending it to Mr Hrvoj and engaging in a text conversation about its qualities and nutritional benefits when taken with creatine.

107. Plainly, this is not a doping offence at the most serious end of the scale. But neither is it a venial offence. Weighing the factors tending to increase or decrease the degree of the player's fault, we have come to the conclusion that the appropriate period of ineligibility is one of nine months, which should start from the date agreed between the parties, 1 May 2013.

<u>The Tribunal's Ruling</u>

108. Accordingly, for the reasons given above, the Tribunal:

(1) confirms the commission of the doping offence charged in the ITF's letter to the player dated 10 June 2013, namely that a prohibited substance, nikethamide, was present in the urine sample provided by the player at the BMW Open in Munich on 1 May 2013;

(2) orders that the player's individual results must be disqualified in respect of the BMW Open in Munich, and in consequence rules that any prize money and ranking points obtained by the player through his participation in that event must be forfeited;

(3) orders, further, that the player's individual results (including ranking points and prize money) in events in which the player competed up to 26 June 2013 shall be disqualified and all prize money and ranking points in respect of those competitions shall be forfeited;

(4) finds that the player has succeeded in establishing by a balance of probability how the prohibited substance entered his body;

(5) finds that the player has succeeded in establishing to the comfortable satisfaction of the Tribunal that his use of the prohibited substance leading to the positive test result in respect of the sample taken on 1 May 2013 was not intended to enhance his sport performance; and

(6) declares the player ineligible for a period of nine months commencing on 1 May 2013 and expiring at midnight (London time) on 31 January 2014 from participating in any capacity in any event or activity (other than authorised anti-doping education or rehabilitation programmes) or competition authorised, organised or sanctioned by the ITF or any of the other bodies referred to in Article 10.10.1(a) of the Programme.

109. This decision may be appealed to the Court of Arbitration for Sport by any of the parties referred to in Article 12 of the Programme, in accordance with the provisions of Article 12.

Tim Kerr QC, Chairman
Dr José Antonio Pascual
Dr Barry O'Driscoll
Dated: 23 September 2013