

**THE INDEPENDENT TRIBUNAL APPOINTED BY THE INTERNATIONAL TENNIS  
FEDERATION**

**Charles Flint QC**

**Dr. Barry O'Driscoll**

**Dr. José A. Pascual**

**THE INTERNATIONAL TENNIS FEDERATION**

**v.**

**MARIA SHARAPOVA**

**DECISION**

John J. Haggerty of Fox Rothschild LLP and Howard L Jacobs for Maria Sharapova  
Johnathan Taylor and Lauren Pagé of Bird & Bird LLP for the International Tennis  
Federation

**Introduction**

1. On 26 January 2016 at the Australian Open Maria Sharapova played against Serena Williams in the quarter-final. Following that match a sample was taken from Ms Sharapova under the rules of the Tennis Anti-Doping Programme 2016 ("TADP"). On 2 March 2016 Ms Sharapova received a letter from the International Tennis Federation ("ITF") giving notice of a disciplinary charge that she had committed a contravention of the TADP as her sample contained Meldonium, a substance which had been added to the Prohibited List with effect from 1 January 2016.
2. By letter to the ITF sent on 4 March 2016 Ms Sharapova promptly admitted the anti-doping rule violation set out in the notice of charge.

3. This tribunal is constituted under article 8.1.1 of the TADP. Our function is to determine the consequences which the player must bear for the anti-doping rule violation which is admitted.

#### Issues

4. The player has admitted an anti-doping rule violation under article 2.1 of the TADP in that Meldonium, a Prohibited Substance, was present in the urine sample collected from her at the Australian Open on 26 January 2016. It is also admitted that an out of competition test taken on 2 February 2016 in Moscow found Meldonium to be present in her sample. Under the rules these test results must be treated as one single anti-doping rule violation.
5. The issues in this case relate to the consequences that follow under the rules of the TADP. The issues are:
  - (1) Whether the player can establish that the violation of article 2.1 was not intentional within the meaning of article 10.2.3. If so, then the period of ineligibility to be imposed is 2 years; if not, the period of ineligibility to be imposed is 4 years.
  - (2) Whether under article 10.5.2 the player can establish that she had no significant fault or negligence, in which case the period of ineligibility may be reduced to a minimum of 1 year.
  - (3) Whether the ITF is estopped from asserting any fault on the part of the player.
  - (4) Whether the player can invoke the principle of proportionality so as to avoid or mitigate the sanctions that follow from the rules.
6. The player's case is that she did not know that the active ingredient of Mildronate, a medication which she had regularly been using for over 10 years, had been added to the Prohibited List from 1 January 2016 and she did not intentionally contravene the anti-doping rules in using Mildronate at the Australian Open. The ITF accepts that she did not know that Mildronate contained a Prohibited Substance but argues that in taking the medication she knowingly and manifestly disregarded the risk of contravening the anti-doping rules, and thus committed an intentional violation.

7. The player admits that she does bear some fault so that she cannot seek an elimination of the period of ineligibility under article 10.4, but contends that there was no significant fault on her part. She contends that she had taken due care in her use of Mildronate over a 10 year period but that the ITF failed to take reasonable steps to publicise the change in the Prohibited List which occurred on 1 January 2016.
8. The player submits that the ITF is estopped from asserting that the player bears any fault, because it failed to warn her of the inclusion of Meldonium in the Prohibited List, although the ITF knew, so it is alleged, or ought to have known that she had repeatedly tested positive for Meldonium in 2015.
9. It is also argued for the player that under the principle of proportionality the tribunal has an inherent authority to reduce the sanction and it should do so by imposing no further period of ineligibility beyond that already imposed to date under the provisional suspension which took effect on 2 March 2016.

#### Evidence and procedure

10. A hearing took place in London on 18 & 19 May. At that hearing the tribunal heard evidence from Ms Sharapova, her manager Max Eisenbud, her former physician Dr. Anatoly Skalny, and her coach Sven Groeneveld. The player also called expert evidence from Dr. Ford Vox, commenting on Dr. Skalny's diagnosis and treatment, and Richard Ings, a former chairman of the Australian Sports Anti-Doping Authority, giving evidence on the best practice for notification of changes to the Prohibited List. The ITF called evidence from Dr. Olivier Rabin, senior director for science at the World Anti-Doping Agency ("WADA"), Dr. Stuart Miller, a senior director at the ITF responsible for management of the TADP, Professor Christiane Ayotte, director of the WADA accredited laboratory in Montreal, and Courtney McBride, a lawyer employed by the Women's Tennis Association ("WTA") and also produced a written statement from Neil Robinson, a senior manager at the WTA. The tribunal also read and has taken into account a number of written statements submitted on behalf of the player testifying as to her character and her attitude to the use of performance

enhancing substances in sport. Where appropriate, references to the evidence are included in footnotes to this decision<sup>1</sup>.

11. A telephone directions hearing was held on 18 March. During that hearing the chairman raised with the parties the power of the tribunal to make an order for production of relevant documents under rule 8.4.2 of the TADP. Previously orders for disclosure have not generally been considered in anti-doping cases but the changes brought into effect by the WADA Code 2015 now require tribunals to make findings, inter alia, as to whether an athlete has acted intentionally in taking a substance on the Prohibited List. In the case of this player it was likely that she would rely on evidence about advice and assistance she had received from a number of persons. In those circumstances the determination of contested issues of fact and intention might require the production of all documents relevant to those issues.
12. In the event neither party applied for any order for disclosure of documents. The player has made her best efforts to disclose "all documents related to the use of Meldonium" and by a letter dated 28 April 2016 her lawyers responded to a request from the ITF for further disclosure. At the hearing it was confirmed on the player's behalf that such disclosure included all documents of which the player is aware that relate to her use of Meldonium, including the period from 2013 until 26 January 2016<sup>2</sup>. So in this case the Tribunal is entitled not only to reach conclusions on the documents which have been disclosed, but also to draw inferences from the absence of relevant documents.

### Meldonium

13. Meldonium is prescribed and registered as a drug for human therapeutic use in Latvia, Russia, Ukraine, Georgia and some other eastern European and CIS countries<sup>3</sup>. It is not approved for human use in the USA or the European Union. It is reported to have cardioprotective and anti-ischaemic effects. On the evidence of Dr. Rabin, it acts as a metabolic modulator, inhibiting carnitine synthesis so that cells switch to generating energy from glucose rather than fat, thus requiring less oxygen to produce equivalent energy<sup>4</sup>. It may be used for the management of ischaemic heart disease and ischaemic cerebrovascular disorders.

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<sup>1</sup> Footnote references to the transcript of evidence are given by reference to the day (D1 or D2) and page. Documents and submissions are referred to by the producing party (ITF or S).

<sup>2</sup> D1 p. 74

<sup>3</sup> ITF / Rabin / 3 p. 23

<sup>4</sup> ITF / Rabin para 11

14. Meldonium is manufactured by JSC Grindeks in Latvia and marketed under a number of brand names, including “Mildronate”. The indications stated in the instructions for use <sup>5</sup> issued by the distributors of Mildronate are principally ischaemic heart disease and cerebrovascular disorders, but also include “decreased working efficiency, intellectual and physical overstress (including in sportsmen).” It is generally supplied in a blister pack of 250 or 500 mg capsules.
15. Mildronate is promoted as having a positive effect on energy metabolism and stamina <sup>6</sup>, to be taken by athletes shortly before training. The evidence of Dr. Rabin <sup>7</sup> exhibits a number of papers which appear to demonstrate that Mildronate has a positive effect on the performance of athletes. It is not necessary for the tribunal to express a view as to whether the scientific evidence is conclusive but it is clear that there has emerged a widespread perception amongst athletes, particularly in Russia and Eastern Europe, that Meldonium does have a performance enhancing effect. At the European Games held at Baku in 2015 over 8% of samples tested positive for Meldonium. Prior to 1 January 2016 Meldonium was not a Prohibited Substance under the World Anti-Doping Code (“**WADA Code**”).

#### Facts

16. In 2004, at the age of 17, Ms Sharapova won the women’s singles championship at Wimbledon. In 2005 she was suffering from frequent cold-related illnesses, tonsil issues and upper abdomen pain. Her father took her to be examined by Dr. Anatoly Skalny of the Centre for Biotic Medicine in Moscow, which describes itself as specialising in system diagnostics and treatment of medical imbalances.
17. The evidence from Dr. Skalny is that having conducted a detailed examination, considered the family medical history, which included type II diabetes and heart disorder, he caused a number of specialist consultations and analyses to be carried out which indicated, inter alia, elevated glucose and cholesterol levels and mineral imbalances. Dr. Skalny concluded that his patient had a mineral metabolism disorder, insufficient supply of nutrients from food intake and other abnormalities which made it necessary to boost the immune system. He

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<sup>5</sup> ITF 3 p. 42

<sup>6</sup> ITF 3 p. 53

<sup>7</sup> ITF / Rabin para 12

proposed a detailed medicinal and nutritional regime which at the outset comprised about 18 medications and supplements.

18. The purpose of that regime, as described in Dr. Skalny's plan, was to develop "the optimal individual plan of medical and physiological monitoring and targeted correction of functional reserves, and its implementation in the practice of the athlete's preparation and maintain the proper functional regime." Included in the regime were courses of Mildronate, for periods of 7 - 14 days, in doses of 500 mg to 1 g per day.
19. In the period from January to April 2006 Dr. Skalny sent very detailed messages to Ms Sharapova advising on her nutritional intake, including advice as to medications. The messages which have been disclosed include the following advice given in 2006 on taking Mildronate:

"Mildronate 1-2 X 10, repeat in 2 wks (before training or competition)"

"1 hr before competition, 2 pills of Mildronate"

"During games of special importance, you can increase your Mildronate dose to 3-4 pills (1 hr before the match). However, it is necessary to consult me on all these matters (please call)"

"30 minutes prior to a training session: Mildronat - 1 Capsule. 30-45 minutes prior to a tournament Mildronat 2 capsules".

20. The regime was considered a success in achieving a general improvement in the patient's health including a reduction in the frequency of cold-related and inflammatory diseases. From then on Dr. Skalny's evidence is that he recommended the periodical taking of Mildronate

"whenever complaints arose regarding fatigue related to overexertion,[or] lowering of the immune functions, appearance of inflammatory processes, lab results abnormalities in the fat and carbohydrate metabolism (glucose, cholesterol, insulin), affecting the myocardial functions (magnesium, phosphorus deficiency, elevated AST etc.)".<sup>8</sup>

21. The evidence before the Tribunal includes a report of Dr. Ford Vox who has analysed Dr. Skalny's diagnosis and treatment. Dr. Vox says that the diagnosis was immune deficiency, mineral metabolism disorder and asthenia, ie. loss of energy. He states that the Russian scientific literature supporting Mildronate's clinical use to compensate for an immune

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<sup>8</sup> This is a translation and the word "or" has been added to make it more intelligible

deficiency is strong. He does not state that Dr. Skalny actually diagnosed cardiovascular disease, the primary indication for the use of the drug, or diabetes, which is not listed as an indication by the manufacturers of Mildronate. But he does express the opinion that Dr. Skalny was, in the light of Ms Sharapova's family history, justified in prescribing Mildronate both as a cardioprotective agent and as a preventative agent for diabetes. However it is important to note that Dr. Skalny was not a cardiologist nor did he advise that Ms Sharapova had a cardiac condition which required specialist medical attention. Having reviewed the ECG results Dr. Skalny did not require a treadmill test, or any other standard diagnostic approach, which would have been the next logical step if a significant cardiac condition was suspected.

22. The width of the indications which Mildronate was apparently intended to address may appear surprising, but there is no basis for criticising the decision of the player, then aged 18, and her father to accept and act upon the clinical judgment of a reputable expert in the field of mineral imbalances. The treatment recommended must be viewed as a whole and on that basis Mildronate did not stand out as an exceptional substance in the overall regime.
23. The player, or her father, made clear to Dr. Skalny that any substances which he recommended must comply with the WADA Code. So Dr. Skalny caused the substances which he recommended to be reviewed by the Director of the WADA accredited laboratory at the Moscow anti-doping centre. On 11 January 2006 the centre reported that the 18 pharmaceutical preparations listed, including Mildronate, did not contain substances included on the 2006 Prohibited List.
24. On the evidence the Tribunal concludes that Ms Sharapova did not seek treatment from Dr. Skalny for the purpose of obtaining any performance enhancing substances, but for the treatment of her recurrent viral illnesses. All the substances recommended by Dr. Skalny did at that time comply with the anti-doping rules.
25. Ms Sharapova continued under the care of Dr. Skalny from 2006 until 2012. There would be an annual check and occasional blood and other tests as required by Dr. Skalny. He continued to obtain reports from the anti-doping centre in Moscow certifying that all the substances which he was recommending did comply with the WADA Code. The last such

certificate in evidence is dated 11 March 2010 <sup>9</sup>. By that time the list of substances recommended by Dr. Skalny had grown from 18 to 30, including Magnerot, Riboxin and Mildronate. The certificate makes clear that all such substances should be purchased from authorised distributors.

26. By the end of 2012 Ms Sharapova had decided to follow a different approach to her nutritional intake. She found the taking of lots of pills overwhelming and she thought there was a better way to handle her health than by taking a large number of pills <sup>10</sup>. So she retained a nutritionist, Nick Harris, as part of her team and ceased to follow the regime prescribed by Dr. Skalny. She informed Dr. Skalny that she was not going to continue working with him <sup>11</sup>.
27. However Ms Sharapova took her own decision to continue to use 3 of the substances previously recommended by Dr. Skalny, namely Magnerot, Riboxin and Mildronate. Magnerot is a mineral supplement which contains magnesium. Riboxin contains inosine, a natural compound which may have some anti-ischaemic benefit. That decision to continue to use those 3 substances from Dr. Skalny's list of 30 was taken without the benefit of any medical advice, either from Dr Skalny or from any other medical practitioner. So Ms Sharapova did not seek any advice about the therapeutic need to continue using Mildronate, nor the possible side effects of doing so. She did not know the ingredients of Mildronate and had not read the manufacturers' instructions for use <sup>12</sup>.
28. When asked in evidence to explain why she particularly selected these 3 substances she stated that she believed that Dr. Skalny had put special emphasis on those substances to protect her heart and for her magnesium deficiency <sup>13</sup>. However her evidence is that she had not discussed specific substances with Dr. Skalny during his treatment <sup>14</sup> and she does not recall having had any discussion with Dr. Skalny about her decision to continue using Mildronate <sup>15</sup>. When asked why she did not consult any other doctor for advice about her continuing use of the three substances <sup>16</sup> she stated that she did not need another doctor to

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<sup>9</sup> S / 159

<sup>10</sup> D1 / 83 D1/146

<sup>11</sup> D1/162

<sup>12</sup> D1 / 124, 127

<sup>13</sup> D1 / 132 D1 / 146

<sup>14</sup> D1 / 118

<sup>15</sup> D1/162

<sup>16</sup> D1 / 162



oversee her medical or health plan, but instead hired a nutritionist <sup>17</sup>. However she did not inform her nutritionist that she was continuing to take Mildronate <sup>18</sup>, or, it seems, Magnerot or Riboxin.

29. After Ms Sharapova ceased in early 2013 to be under the care of Dr. Skalny there is no evidence that any medical practitioner was consulted about or prescribed the taking of Mildronate, or that the use of Mildronate was disclosed to any of the medical practitioners, with one exception, who were consulted by Ms Sharapova between 2012 and 2015. During this period Ms Sharapova was under the general care of her family doctor in California to whom she would go for treatment when she became sick. She also relied on the medical practitioners provided by the WTA from whom she would seek medical advice when she suffered injury or became sick in competition. She also underwent MRI scans and ECG tests and examination by a number of specialists during this period, particularly in 2015. To none of the medical practitioners or specialists who treated her over 3 years did she disclose the fact that she was taking Mildronate. Her explanation in evidence is that none of them had asked what medication she was taking <sup>19</sup>.
30. The one exception is that in 2015 she did consult Dr. Sergei Yasnitsky, the team doctor to the Russian Olympic team, whom she retained for advice on her general health problems which had returned, including a stomach virus and sinusitis. She says she disclosed her use of Mildronate to him because he asked her what medication she was taking <sup>20</sup>. Her evidence is that he did not ask why she was taking this medication, nor give any advice or comment but just responded that it was OK.
31. So by the end of 2015 Ms Sharapova was continuing to use Mildronate in the manner which had been recommended in 2006 by Dr. Skalny. She would take 500 mg of Mildronate on match days in tournaments. However she was not following Dr. Skalny's advice that Mildronate be taken only 30 or 40 minutes before matches, but instead took two capsules in the morning of match days, because taking pills just before a match did not give her a good feeling <sup>21</sup>. Nor did she follow Dr. Skalny's advice to take Mildronate in the course of a long

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<sup>17</sup> D1/163

<sup>18</sup> D1 / 70

<sup>19</sup> D1 / 170

<sup>20</sup> D1 / 165

<sup>21</sup> D1 / 136,150

match because, she stated, she did not feel comfortable with putting pills in her mouth during a match<sup>22</sup>.

32. On the evidence of her manager this use of Mildronate by Ms Sharapova was not known to any of Ms Sharapova's team, except for her father and, from 2013, Mr. Eisenbud himself. It was not known to her coach, her trainer, her physio who was responsible for recommending recovery drinks during and post match, her nutritionist who was responsible for her food and supplement intake, nor any of the doctors she consulted through the WTA. It is remarkable that in the documents disclosed by the player the only documents which refer to Mildronate are documents from Dr. Skalny between 2006 and 2010. There is no document after 2010 in the player's records which relates to her use of Mildronate. Nor was the use of Mildronate disclosed to the anti-doping authorities on any of the doping control forms which Ms Sharapova signed in 2014 and 2015.

#### The addition of Meldonium to the Prohibited List

33. By 2015 there was evidence of substantial use of Meldonium by elite athletes. At the 2012 London Olympic Games five national teams had declared that they were using Meldonium. Scientists at the WADA-accredited laboratory in Moscow reported that significant numbers of athletes were declaring the use of Meldonium on their doping control forms.
34. On 29 September 2014 WADA published on its website the 2015 Prohibited List and related documents. Those documents included a notice on the 2015 Monitoring Programme stating that a number of substances had been placed on the monitoring programme including Meldonium, both in and out of competition. WADA also published a summary of major modifications and explanatory notes on the 2015 Prohibited List, including a statement that Meldonium, a drug with potential cardiac effects, had been added to the monitoring programme to assess the abuse of this substance. The ITF also published these documents on its website.
35. Meldonium was detected in approximately 6% of the urine samples included in the 2015 monitoring programme. The preliminary results obtained from the monitoring programme

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<sup>22</sup> D1 / 133, 134

were considered by the WADA Health Medical and Research Committee in September 2015, following which it was decided that Meldonium would be added to the 2016 Prohibited List. On 29 September 2015 WADA published the 2016 Prohibited List. The website included a 2 page summary of major modifications document which included the statement:

“Meldonium (Mildronate) was added because of evidence of its use by athletes with the intention of enhancing performance.”

On the second page it was stated that Meldonium had been removed from the Monitoring Program and added to the Prohibited List. It was unusual for WADA to give not only the chemical name (or international non-proprietary name) for a substance, but also a brand name of the medication under which it was marketed.

36. That summary of modifications was included in the information on the Prohibited List published by the ITF on its website on about 7 December 2015<sup>23</sup>. The website entry was headed “Prohibited List” and stated that a summary of changes to the 2015 version was included. The documents accessible on that site included the WADA summary of modifications. So any player who wished to check through the ITF website the changes made to the Prohibited List was directed to the WADA summary of modifications document, which document clearly stated that Meldonium (Mildronate) had been added to the list.
37. The ITF issues annually a wallet card which lists on one page substances and methods prohibited in and out of competition. The 2016 wallet card did include Meldonium in the list of prohibited substances under the heading of metabolic modulators. The wallet card is available digitally but is also intended to be available in hard copy to players. The hard copy is issued in a plastic wallet including a USB pen drive which would enable a recipient to read on a device the WADA documents, including the summary of modifications. The ITF’s practice is to send hard copies to the ATP and the WTA for distribution to their members.
38. There is a dispute on the evidence as to when and where Neil Robinson of the WTA handed to Sven Groeneveld, Ms Sharapova’s coach, two of the plastic wallets at some time in January 2016. It is unlikely that either could, in the circumstances of an international event, reliably recollect whether or not one or two wallet cards had been handed over and when,

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<sup>23</sup> ITF / Miller para 32

still less what use had been made of them. In any event the coach says he did not hand either of the wallet cards to Ms Sharapova. His evidence is that he keeps a wallet card in case any of his players wishes to check with him whether a substance is on the Prohibited List, but none ever has <sup>24</sup>. Ms Sharapova's evidence is that she never read or consulted the information on the wallet card in 2016, or in prior years <sup>25</sup> .

39. On 18 December 2015 the WTA sent an email headed Player News. There was a reference to the 2016 Tennis Anti-Doping Programme but no notice that there had been any change to the Prohibited List. The email included a link to the WTA Playerzone on Anti-Doping. In December 2015 that link did not include the summary of modifications published by WADA, so it did not give any player notice that Meldonium had been added to the Prohibited List.
40. On 22 December 2015 the ITF sent emails to a number of players, including Ms Sharapova, and players' agents, including Alex Schilling of IMG who as Mr. Eisenbud's assistant is responsible for information about the player's whereabouts which is required to be supplied under the TADP. That email purported to give notice of changes to the Tennis Anti-Doping Programme for 2016. The three changes listed concerned matters of procedure and the availability of the wallet cards from the ITF website. The email gave players and agents a reminder that the details of the Anti-Doping Programme could be downloaded from the website. There was a link to the anti-doping pages of the ITF website, which, as set out above, included the WADA summary of modifications document. However the email did not give notice to players or agents that there had been changes to the Prohibited List, still less a warning that Meldonium had been added.
41. The player argues that a warning should have been given because the ITF actually knew, or ought to have known, that Ms Sharapova and a number of other tennis players had tested positive for Meldonium in 2015 and thus should have taken special steps to advise her, or all tennis players, of the addition of Meldonium to the Prohibited List.
42. The first step in that argument was that the ITF knew that 24 samples taken from tennis players had tested positive for Meldonium in 2015. The ITF could not have had that

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<sup>24</sup> D1 / 256  
<sup>25</sup> D1 / 97

knowledge in December 2015 as the results of the testing were only sent to the ITF in March 2016, a point which was conceded by counsel for the player in final argument. The figures showed that Meldonium was detected in just over 1% of samples in tennis, and a number of those samples might have been given by the same player. Of the 24 samples which tested positive 5 were from Ms Sharapova. So even if the ITF had been notified of the results of the testing under the monitoring programme it would not necessarily have concluded that there was in tennis, in contrast to some other sports, widespread use of Meldonium.

43. The second step was to argue that the ITF ought to have obtained from WADA laboratories the identities of tennis players who had tested positive for Meldonium, so that they could be individually warned to cease taking the medication. That argument was based on the evidence of Richard Ings who was responsible for anti-doping at the ATP in 2003. He gave evidence of the steps he took to warn certain ATP tennis players that they had tested positive for cannabis prior to the drug being added to the Prohibited List, for which warning they were apparently very grateful. His evidence lost some of its force from appreciating that this took place prior to the application of the WADA Code to the ATP and that his evidence did not take into account the rules applying to confidentiality of results under the 2015 monitoring programme, nor data protection laws. He seemed to be of the view that any sports governing body which conceives it to be in the interest of a player or players to obtain access to their sensitive personal data should be entitled to do so. He makes the assumption that “WADA and by extension the ITF were aware that Ms Sharapova had Meldonium in her sample(s)” in 2015, an assumption which is incorrect in fact. He made frequent reference to the fact that the results for the player had been put in evidence in this case, to support the argument that they could have been obtained by the ITF in 2015. The basis on which the 2015 results were obtained by the ITF in March 2016 is explained by Professor Ayotte as resting on the request made by the player’s lawyers for the purpose of her defence in this case and the information thus became part of the results management process <sup>26</sup>.
44. Article 4.5 of the 2015 WADA Code is very clear, as it has consistently been in all previous versions, in providing that results from the programme are to be reported only on an aggregate basis and that “WADA shall implement measures to ensure the strict anonymity of individual Athletes is maintained with respect to such reports.” The WTA forms signed

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<sup>26</sup> ITF / Ayotte para 10

annually by players contain an anti-doping consent <sup>27</sup>. That form gives consent to testing under the TADP and management by the ITF of the programme. That consent would not allow the ITF to obtain disclosure from laboratories of individual data other than for the results management process. It would have been a serious infringement of a player's rights for a WADA accredited laboratory to have provided individual results derived from the monitoring of Meldonium, without the consent of the player from whom the sample had been taken. So the argument in the evidence of Richard Ings that best practice required the ITF to obtain access to the identity of players who had tested positive for Meldonium under the monitoring programme, so that they could be warned, is inconsistent with the WADA Code and the legal requirement to respect the rights of players to confidentiality in their sensitive personal data.

45. So the tribunal rejects the argument that the ITF knew or ought to have known in 2015 that Ms Sharapova was using Meldonium.

#### The evidence of Ms Sharapova and Max Eisenbud

46. The facts set out above are substantially accepted by both parties. The main contentious issues on which the tribunal is required to make findings of fact are:

- (1) Whether Ms Sharapova deliberately failed to disclose her use of Mildronate on doping control forms;
- (2) What steps Ms Sharapova took, or caused to be taken, to ensure that the substances which she was taking were not on the Prohibited List;
- (3) Whether Ms Sharapova took Mildronate for medical reasons, or to enhance her performance in competition.

47. The underlying factual puzzle in this case is how an elite player in the position of Ms Sharapova, with the assistance of a professional team including the very best sporting and medical advice obtainable, could ever have placed herself in the position of taking a Prohibited Substance, as is admitted, before each of the five matches she played at the Australian Open. The case advanced for the player in her written submissions did not explain why, even if Ms Sharapova was not personally aware of the inclusion of Meldonium

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<sup>27</sup> ITF exhibit CM-1 page 2

on the 2016 Prohibited List, her team did not warn her. Mr. Eisenbud's first witness statement, at paragraph 20, gave the clear impression that if any member of her team had discovered that Meldonium had been added to the 2016 Prohibited List then the player would have ceased to use Mildronate. He characterises this as an administrative error, for which he takes the blame, but without explaining how it happened. It only emerged in evidence at the hearing that no member of Ms Sharapova's team, apart from Mr. Eisenbud, actually knew that she was taking Mildronate.

48. Doping control forms require the player in her own hand to make a declaration as to medication or supplements taken. The requirement is headed "**DECLARATION OF MEDICATION/SUPPLEMENTS**" and requires a

"List of any prescription/non-prescription medications or supplements, including vitamins and minerals, taken over the past 7 days (include substance, dosage and when last taken)."

It is very important that players give proper disclosure of such medications or supplements in case those substances affect the results of the testing. Cases have occurred where athletes have taken substances not on the Prohibited List in order to mask the presence of a Prohibited Substance in the sample taken.

49. The player admits that she did not disclose her use of Mildronate on any doping control form which she completed between 2014 and 2016. The 7 doping control forms in evidence were completed and signed by Ms Sharapova between 22 October 2014 and 26 January 2016. They did disclose some medications and vitamins, but did not disclose that she had, within the last 7 days, ingested capsules of Mildronate. That she had in fact taken Mildronate in the 7 days prior to signing at least 4 of these forms is evidenced by:

- (1) her evidence that she continued to follow Dr. Skalny's advice to use Mildronate prior to matches;
- (2) the laboratory test results in 2015 which show the presence of Meldonium in significant quantities in the samples taken in competition on 9 July (Wimbledon), 27 October (WTA Finals, Singapore) and 14 November (Fed Cup Final, Prague);
- (3) the admission in the letter dated 28 April 2016 that she took 500 mg of Mildronate on 18, 20, 22, 24 and 26 January 2016, that is before each of the 5 matches she played at the Australian Open.

In each of these forms she has ticked the box refusing to allow her sample to be used for the purpose of research. On its own that is a small point but in context it does indicate a careful consideration of the form and an unwillingness to allow her sample to be scrutinised to any extent beyond that legally required under the programme.

50. Ms Sharapova was cross-examined on the failure to disclose Mildronate on the list of medications she provided on doping control forms. Her explanation was that she understood the form only to require her to disclose a medication or supplement if she had taken it every day for the last seven days, because otherwise the list would be very long. She said:

“I did not feel it was a huge responsibility of mine to write all those medications down. As I said before, in hindsight, this is a mistake of mine. .... I did not feel it was a responsibility to have to write down every single match drink I was taking, gel, vitamin that I was taking, even if I took it once during the last seven days. I did not think it was of high importance.”

In fact at Wimbledon 2015 she had used Mildronate 6 times in the past 7 days, and, at the Australian Open 2016, 5 times in the past 7 days. On the forms in evidence she had disclosed taking a number of substances including vitamin C, Omega 3, Biofenac and Voltaren (anti-inflammatories which may be taken orally or in gel form), Veramyst (a nasal spray containing a corticosteroid) and Melatonin (a hormone). In most cases she declared only 2 of those substances on each form so that the list would not have been very long if she had added Mildronate.

51. In the tribunal’s judgement this justification advanced for the failure by Ms Sharapova to disclose her regular use of Mildronate before championship matches is untenable. The wording of the doping control form was clear and could not reasonably be misunderstood. She must have known that taking a medication before a match, particularly one not currently prescribed by a doctor, was of considerable significance. This was a deliberate decision, not a mistake. Taken together with the evidence that over a period of 3 years she did not disclose her use of Mildronate to her coach, trainer, physio, nutritionist or any medical adviser she consulted through the WTA, the facts are only consistent with a deliberate decision to keep secret from the anti-doping authorities the fact that she was using Mildronate in competition.
52. Ms Sharapova and Mr. Eisenbud were very familiar with the facility to ask the WTA for advice as to whether a substance which she proposed to take was prohibited in or out of



competition. Documents in evidence showed that the player and Mr. Eisenbud requested and received information as to whether a substance was prohibited on a number of occasions between 2011 and 2015<sup>28</sup>. In some cases the WTA was sent a photograph of the label of the product in question. One typical example is an email sent by Ms Sharapova, copied to Max Eisenbud, on 10 June 2015 to Kathleen Stroia of the WTA<sup>29</sup>:

“Hi Kathleen,  
The doctor here prescribed this nasal spray for me for my sinus issues and I just wanted to make sure the ingredients are ok to take ?  
Thanks.”

The replies to such requests sometimes reminded Ms Sharapova and Mr. Eisenbud of the various ways of checking whether a substance was prohibited by requesting advice from a WTA medical adviser, submitting a product information form to the results management company, checking against the wallet card or using the 24 hour ITF hotline. Ms Sharapova accepts that she knew that the composition of the Prohibited List could change and that it was necessary that it be checked annually. If at any time she had wanted to check whether Mildronate was prohibited nothing would have been easier than sending a short email to the WTA.

53. Ms Sharapova denies that she was aware of the ingredients of Mildronate but has not produced a sample of the packaging under which she acquired the medication, or the instructions for use which would have accompanied it. In the letter from her lawyers dated 28 April 2016 it is stated that she did not obtain Mildronate online and she has not retained the box containing the capsules she took in January 2016, as the packaging was destroyed before 2 March 2016 and she has no photographs of the Mildronate box. The player has not identified the precise source of the medication which her father collected for her in Russia. The ITF has been able to purchase a box of Mildronate which displays the word Meldonium in Russian in large script on the outside.
54. Max Eisenbud is a Vice President at IMG, the world’s leading sports agency. He states that he has represented Ms Sharapova exclusively and full time since 1999 under an agreement between IMG and the player. As manager he has a very close relationship with Ms Sharapova and he is one of the few people in whom she confides about topics relevant to her

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<sup>28</sup> S / pages 626, 629, 630-633, 646, 650, 670, 675

<sup>29</sup> S / 680

success on court. At paragraph 15 of his first witness statement he states that she kept him informed regarding medication she was prescribed, taking or planning to take. At paragraph 16 he states that she has “a team of people, myself included, committed to guaranteeing that all of her medications, vitamins and supplements are permitted under the WADA Anti-Doping Code”. He then states:

“Maria’s medical team is incredibly diligent about confirming that any new substance she ingests is thoroughly checked against the WADA Prohibited List.”

He states that if he or another member of her team had discovered and informed Ms Sharapova that Mildronate contained Meldonium then she never would have taken the substance at the 2016 Australian Open . He describes the ingestion of Meldonium at the Australian Open as an “administrative misstep” for which he bears the fault as her manager.

55. Mr. Eisenbud’s first statement raised as many questions as it answered. It did not state when he first became aware that Ms Sharapova was taking Mildronate, nor whether her medical team in 2016 was aware of that fact. His statement at paragraph 16 implies that the medical team would check new substances but not all substances that the player was currently taking. The statement did not give any evidence as to what steps were taken routinely, or at the end of 2015, to monitor changes to the Prohibited List.
56. In his second witness statement signed on 11 May he stated that he had assumed the responsibility to check Ms Sharapova’s medications and supplements against the WADA Prohibited List, after the player had left Dr. Skalny’s care in 2013. His explanation as to why he failed to discharge his responsibility is as follows. In November 2013 and 2014 he printed out a copy of the Prohibited List for the forthcoming year to take it with him on his vacation in the Caribbean so that it could be checked. In 2015 he separated from his wife, did not take his annual vacation in the Caribbean and due to the issues in his personal life failed to review the 2016 Prohibited List.
57. In his oral evidence Mr. Eisenbud stated that he first heard the word Mildronate in 2013 <sup>30</sup>. He had a conversation with Ms Sharapova who gave him a list in Russian of three or four items that she was taking, which list he had translated. She did not give him any

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<sup>30</sup> D1 /39.

information about these substances or why she was taking them, and he asked no questions and did no research <sup>31</sup>. His system for checking was as follows:

“My system ... in November of every year I would go on vacation in the Caribbean, after the championships. I would have my assistant print out the most updated doping prohibited list, along with the new proposed WTA and ATP rules, the calendar for next year. I would make a file. I would go on vacation and sit at the pool, with all the substances that my players were taking, and then sit there and just cross-check, to make sure that everybody, what they were doing, was not prohibited. In 2015 I didn't go on vacation for obvious reasons.”<sup>32</sup>

He also performed the same function for three other players whom he represented, but only one of them was actually taking a substance which required to be checked <sup>33</sup>. He appeared to be unaware of the distinction between the brand names of the medications under which pharmaceutical drugs are marketed and the chemical names used in the Prohibited List <sup>34</sup>. He did not know the ingredients of Mildronate <sup>35</sup>, or their chemical properties, so that if he had checked against the Prohibited List he would not have known, for example, whether any of the substances he was purportedly checking could be classified as falling within the class of hormones and metabolic modulators. He made no records of the checks he carried out and he did not report back to Ms Sharapova. He was asked to produce the list he had used for checking. On the second day of the hearing there was produced a copy of a list in Russian of 21 substances, the products Mildronate, Magnerot and Riboxin being circled in an unknown hand. The document appears to be a photocopy of the second page of a certified list of substances provided by the anti-doping centre in Moscow dated 13 October 2006 <sup>36</sup>. That document provides no corroboration of Mr. Eisenbud's evidence.

58. Ms Sharapova's evidence on this issue was very vague. She recalls asking Mr. Eisenbud to check a list of substances <sup>37</sup> and knowing that he was going on vacation at a time when the new Prohibited List was available <sup>38</sup>. She did remind him to print and take out the list once

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<sup>31</sup> D1 / 43,44

<sup>32</sup> D1 / 29

<sup>33</sup> D1 /49

<sup>34</sup> D1 / 52

<sup>35</sup> D 1 /55

<sup>36</sup> S / 524

<sup>37</sup> D1 / 84, 166

<sup>38</sup> D1 / 168

or twice, but did not do this in 2015<sup>39</sup>. She does not state that he ever reported to her that he had carried out checks or confirmed that Mildronate was not on the Prohibited List.

59. Before commenting on the more remarkable features of this evidence it is necessary to note that Mr. Eisenbud was well aware of the facility to ask the WTA whether a medication was permitted in or out of competition (as noted at paragraph 52 above) and it is evident from such communications that, contrary to his evidence, he must have known that it is the chemical ingredient of the product, not the brand name which requires to be checked<sup>40</sup>.
60. At the end of his evidence Mr. Eisenbud stated that he had no training to understand the composition of the Prohibited List. On his evidence he professed not to have the basic understanding, which is required of every athlete subject to the WADA Code, of how the Prohibited List works. With only the brand names of 3 products and no knowledge of their ingredients he could not sensibly have begun to check those substances against the list. His evidence did not explain why with that lack of understanding and expertise he was prepared to accept the important responsibility of checking whether Mildronate was prohibited, why he did not delegate this task to his assistant who could easily have made the necessary enquiries, or why it was necessary to take a file to the Caribbean to read by the pool when one email could have provided the answer. The absence of any documents or records evidencing Mr. Eisenbud's system speaks for itself. Critically he does not explain why the 3 substances inherited from Dr. Skalny's regime were treated so differently from all the other medications and supplements which were vetted by the player's medical team, not by him, and recorded in emails and medical records.
61. The ITF has not directly challenged the veracity of Mr. Eisenbud's evidence that he was asked by Ms Sharapova to be responsible for checking whether Mildronate was prohibited, but the evident implausibility of his account of how it was done was clear from the cross-examination. On the main issues which the tribunal has to decide the burden of proof lies on the player, not the ITF. The tribunal is not required to accept evidence which it finds to be wholly incredible. The idea that a professional manager, entrusted by IMG with the management of one of its leading global sporting stars, would so casually and ineptly have checked whether his player was complying with the anti-doping programme, a matter

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<sup>39</sup> D1 / 168 - 169

<sup>40</sup> See for example S / 631, 662

critical to the player's professional career and her commercial success, is unbelievable. The tribunal rejects Mr. Eisenbud's evidence.

62. It follows that on the tribunal's assessment of the evidence Ms Sharapova had no system in place to make any checks on Mildronate or the other substances inherited from Dr. Skalny's regime. As she accepted in cross-examination she carried out no checks of her own on Mildronate or its ingredients. She never looked at a wallet card <sup>41</sup>, never checked any substances through the ITF website and never asked the WTA for advice on Mildronate. When asked about her assertion that her general procedure was to confirm with the WTA whether a product was permissible to use she said:

"The WTA did not have the list of medication that I was taking with Dr. Skalny. But the WTA was not in charge of my medical conditions."

But from 2013 onwards Dr. Skalny was no longer her doctor. She has no excuse for failing to disclose her use of Mildronate or to seek advice from a specialist doctor as to whether its continued use in competition was permissible. The tribunal finds it hard to credit that no medical practitioner whom she consulted over a period of 3 years, with the exception of Dr. Yasnitsky, would, in accordance with standard medical practice, have asked her what medications she was taking. In any event Ms Sharapova should have disclosed that she was regularly using Mildronate in case there was a possibility of adversely affecting another treatment prescribed.

63. That leaves the issue as to why Ms Sharapova was systematically using Mildronate before matches, and in particular at the Australian Open in 2016. In the tribunal's view the answer is clear. Whatever the position may have been in 2006, there was in 2016 no diagnosis and no therapeutic advice supporting the continuing use of Mildronate. If she had believed that there was a continuing medical need to use Mildronate then she would have consulted a medical practitioner. The manner of its use, on match days and when undertaking intensive training, is only consistent with an intention to boost her energy levels. It may be that she genuinely believed that Mildronate had some general beneficial effect on her health but the manner in which the medication was taken, its concealment from the anti-doping authorities, her failure to disclose it even to her own team, and the lack of any medical

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<sup>41</sup> D1 / 97

justification must inevitably lead to the conclusion that she took Mildronate for the purpose of enhancing her performance.

#### Whether the contravention was intentional

64. Meldonium is not a specified substance. Accordingly under article 10.2.1 the period of ineligibility shall be four years “unless the Player ... establishes that the Anti-Doping Rule Violation was not intentional.” As the burden of proof on this issue is placed on the player she must establish a lack of intention to contravene the rules.

65. Guidance as to the meaning of “intentional”, as “meant to identify athletes who cheat”, is given in the first sentence of article 10.2.3. The article then provides:

“The term, therefore, requires that the Player or other Person engaged in conduct that he/she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk.”

66. The ITF accepts that the player did not engage in conduct that she knew constituted an anti-doping rule violation. The basis of that concession is that she would not have continued to take Mildronate after 1 January 2016 if she had known that its active ingredient was on the Prohibited List, because she would inevitably be tested at the Australian Open <sup>42</sup>. That concession resolves any question under the first limb of the definition of “intentional”.

67. The case put by the ITF under the second limb of the definition is that the player cannot discharge the burden of disproving that she knew that there was a significant risk that taking Mildronate might constitute an anti-doping rule violation, and manifestly disregarded that risk. The basis of that submission is the suggestion that “she knew there was a significant risk that (Meldonium) might have been banned, and manifestly disregarded that risk”<sup>43</sup>.

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<sup>42</sup> ITF written submissions para 2.4

<sup>43</sup> ITF written submissions para 3.14

68. It is clear from the wording of article 10.2.3 that whether conduct is intentional is to be judged on the actual knowledge of the player, not on the basis of what she ought to have known or understood. It is accepted by the ITF that her belief was that Mildronate was not a Prohibited Substance. On that basis of belief she did not know she was running a risk in taking Mildronate. She understood that the Prohibited List might from time to time be amended but she did not know or believe that it had been changed to make Mildronate a Prohibited Substance.
69. The ITF argument conflates the two elements of the test prescribed by the second limb of article 10.2.3. The first element is based on knowledge, the second on manifest disregard of the known risk. The second element may involve considering what steps the player took or ought to have taken, but the first element depends on the actual knowledge of the player. The factors relied on in the argument for the ITF include the point that the player failed to heed warnings and failed to check that the Prohibited List had not been changed to include Meldonium. Those considerations are not relevant to the question whether the player had sufficient knowledge to establish that her conduct was intentional, but may be relevant in considering whether there had been manifest disregard of a known risk. The classic case for application of the second limb of article 10.2.3 is where an athlete uses a contaminated supplement. In some such cases an athlete may be found to have knowingly taken a risk of committing an actual violation and acted regardless of that risk. In such cases the known risk is that the substance ingested might contain an ingredient which is prohibited. In this case the player, on the ITF's concession, knew that she was taking Mildronate but did not know that its main ingredient was actually prohibited.
70. The effect of the ITF's submissions would be to import into article 10.2.3 consideration of whether a player did know or ought to have known that the rules might have changed so as to render conduct impermissible which she believed to be in compliance with the rules. That would be an important extension of the scope of article 10.2.3 which is only intended to apply to the conduct of athletes who intend to cheat. The risk that the rules might have changed from those which the player believed to be in force is not the type of risk to which the second limb of article 10.2.3 is directed. The relevant risk is that the conduct might constitute or result in a violation of the rules as they were known to the player. If the player was genuinely mistaken as to the rules then she did not intend to cheat.

71. On the facts of this case the concession that the player did not know that she was taking a Prohibited Substance resolves both elements of article 10.2.3. On neither basis was the conduct of the player intentional.

No significant fault or negligence

72. The player has admitted that she bears some fault for the violation so that article 10.4, which allows for the elimination of the period of ineligibility where there is no fault or negligence, does not apply.

73. Article 10.5 provides for a reduction in the period of ineligibility where the player establishes that she bears No Significant Fault or Negligence. If that threshold is passed then the period of ineligibility may be reduced by reference to the degree of fault of the player, but not to less than one half of the applicable period of ineligibility.

74. No Significant Fault or Negligence is defined as :

“The Player establishing that his/her Fault or negligence, when viewed in the totality of circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Anti-Doping Rule Violation. Except in the case of a Minor, for any violation of Article 2.1 the Player must also establish how the Prohibited Substance entered his/her system.”

The criteria for No Fault or Negligence as set out in the definition of that term are:

“... 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 ... the Prohibited Substance.”

The word Fault is defined as “... any breach of duty or any lack of care appropriate to a particular situation”.

75. The duties of a player are set out at article 1.12 which reads:

“It is the sole responsibility of each Player

1.12.1 to acquaint him/herself, and to ensure that each Person [defined as a natural person or organisation] from whom he/she takes advice (including medical personnel) is acquainted, with all the requirements of the Programme;

1.12.2 to know what constitutes an Anti-Doping Rule Violation under this Programme and what substances and methods are prohibited;



1.12.3 to ensure that anything he/she ingests or Uses, as well as any medical treatment he/she receives, does not give rise to an Anti-Doping Rules Violation under this Programme ...”

76. These duties are distinct from, and in addition to, the strict liability principle, set out at article 2.1, to ensure that no Prohibited Substance enters the player’s body. It is clear that a player can only discharge these duties under article 1.12 if she properly discloses to her advisers, and any medical personnel whom she consults, the medication which she is using and the reasons for which it is being used.
77. Under article 1.15 any manager, coach, trainer, medical personnel or any other person assisting a player in her sporting capacity is defined, inelegantly, as “Player Support Person”. Those persons are required under article 1.16 to know what substances are prohibited, and under article 3.1.2 to be familiar with the most current version of the Prohibited List.
78. Article 10.5 requires consideration of the player’s moral fault, judged against the necessarily strict standards set by the requirement for utmost caution. The player has a personal responsibility, from which she cannot be absolved by reliance on others. It is the sole responsibility of each player to acquaint herself with all the provisions of the rules. Any player has a clear duty to check whether any medication being taken, of which only she may be aware, is permitted under the anti-doping rules. It is fundamental to the strict liability anti-doping regime that a player is responsible for any prohibited substance found to be present in her body and that ignorance of the rules or of the nature of any substance administered or ingested can be no defence. The decision of CAS in *WADA v. Lund* (CAS OG 06/001) at paragraph 4.11 makes clear that a player who is taking medication has a continuing duty to check properly whether that medication is permitted under the anti-doping rules.
79. If the player fails to meet the high duty of care she may be regarded as having borne some fault, but it may not be significant. That word in its context connotes a lack of serious or substantial moral fault or blameworthiness, so that the rigorous application of these very strict anti-doping rules is tempered in the case of an excusable and understandable failure to have foreseen or prevented the doping offence where the conduct of the player was not culpable, but failed to meet the standard of utmost caution. The comment in *Knauss v. FIS*

(CAS 2005/A/847) at paragraph 7.3.5 that the test must not be set excessively high is to be borne in mind.

80. Thus the task of the tribunal is to consider the totality of the relevant circumstances, assess the conduct against the duty of utmost caution, and decide whether any breach of duty or lack of care was significant in relation to the admitted breach of the rules. The burden of proof on this issue is placed on the player and under article 8.6.2 the standard of proof is by a balance of probability. The player has established how the Prohibited Substance entered her system by her admission, which is accepted, that she took 500 mg of Mildronate before each of the five matches she played at the Australian Open.
81. The main argument for the player was that, although she did bear some fault, viewed against the failure of the ITF properly to warn Ms Sharapova that Meldonium was to be added to the Prohibited List her fault was not significant. The argument that the ITF knew or ought to have known that the player was using Meldonium has been considered at paragraphs 41 to 45 above. There remains the argument that the ITF was in breach of its duty under article 3.1.3 to take reasonable steps to publicise any amendments made by WADA to the Prohibited List. That is in addition to the requirement under WADA Code 4.1 to take appropriate steps to distribute the 2016 Prohibited List.
82. The obligation under article 3.1.3 is to take reasonable steps to publicise amendments to the Prohibited List, not to give advice or warnings to players. By publishing on its website from 7 December 2015 the WADA summary of modifications, which very clearly stated that Meldonium (Mildronate) had been added to the 2016 Prohibited List, the ITF discharged that duty. It is correct that the ITF did not in its emails sent on 22 December 2015 give any notice of the changes which had been made to the Prohibited List, but it did provide a link to the ITF's anti-doping website. Any reasonably diligent medical practitioner, adviser, agent or manager acquainted with the WADA Code, as Ms Sharapova's advisers should have been, could easily have discovered that Meldonium was, from 1 January 2016, a Prohibited Substance. The same applies to Ms Sharapova.
83. The ITF also discharged its duty under WADA Code 4.1 to take appropriate steps to distribute the 2016 Prohibited List, by publishing the Prohibited List on its website and in its wallet cards. Any player who had any doubts as to whether a substance was included

within the Prohibited List had the ability to carry out a word search of the WADA documents, or to seek advice through the ITF's 24 hour hotline.

84. Even if it had been established that the ITF had failed properly to publicise amendments to the Prohibited List that could not mitigate the fault of the player. Article 3.1.3 is expressly subject to the responsibility of each player and her advisers to be familiar with the most current version of the Prohibited List. So in principle any failure by the ITF properly to publicise changes to the list cannot excuse the failure of the player to take any reasonable steps to check whether a substance had been included. As a matter of fact Ms Sharapova did know that she had a duty to make annual checks of the Prohibited List but on the findings of the tribunal, as set out at paragraph 62 above, she did not do so. So any failure on the part of the ITF properly to publicise changes to the Prohibited List would have had no causative effect on the contravention of rule 2.1.

85. The player also argues that her fault is not significant because she had been using Mildronate for 10 years, having taken reasonable steps to ascertain, at least up to 2010, that it was not on the Prohibited List. Strong reliance is placed by the player on the cases of *ITF v Hood* (2006) and *WADA v. Lund* (CAS OG 06/001), where athletes had continued to use Finasteride, a product to treat hair loss, in ignorance of the fact that it had been added to the Prohibited List. As was noted in *Hood* at paragraph 13:

“However these cases all tend to be very fact specific, and as illustrations of how other tribunals have applied the Rules, or similar WADA Code based rules, in other circumstances they are of limited value.”

There is certainly not a general principle to be derived from the Finasteride cases that where a substance is only added to the Prohibited List after the athlete has started to use it then the fault should be considered to be less culpable. The factual contrast between this case and *Lund*, where the substance was not used to enhance performance and its use was openly declared on doping control forms, is stark. This case must be decided on the totality of the particular circumstances in which this player came to commit a violation.

86. Reliance was also placed on the CAS decision in *ITF v Cilic* (CAS 2013/A/3327) in support of an argument, based on paragraph 97 of that decision, that once the player had carried out initial checks on a substance there is a lesser duty to make further checks. The case of *Cilic* was not applying the test of no significant fault or negligence but was considering the degree of fault applicable to Specified Substances cases under the WADA Code 2009.

Paragraph 97 of that decision is dealing with a quite different factual situation from the facts of this case. The other cases cited on this point, *Kendrick v ITF* (CAS 2011/A/2518) and *UCI v Bascio* (CAS 2012/A/2924), were also not directed towards the application of the test of no significant fault required under article 10.5. The tribunal accepts that all these cases apply the same concepts of degree of fault as would apply if no significant fault or negligence were established, but on the threshold issue under article 10.5 they do not establish any principle.

87. The player can point to paragraph 91 of the decision in *Lea v USADA* (CAS 2016/A/4371) in which the panel stated, in summary, that although a higher standard of care is required in dealing with therapeutic medicines, that higher standard may not apply in circumstances where a long-time trusted sports medicine physician prescribes a substance permissible out of competition without any warning regarding the risk of a positive in competition test. A similar point might be made if at the time of the violation the player had been under the care of Dr. Skalny and using a medicine prescribed by him. But that was not the case at the time of this violation.
88. It is of course relevant to consider that the player had for 10 years used a substance which was not prohibited. But she appreciated that she had a continuing duty to review the Prohibited List each year and from at least 2013 onwards did not take any steps to do so.
89. It was argued that in some cases panels have not attached any adverse significance to the failure of an athlete to have declared the substance on the doping control form. That may be the correct approach if there is an inadvertent failure to declare, but that is not this case. The commentary in the WADA Code to article 10.5.1.2 states that in a contaminated substance case the fact that an athlete declared the product would be favourable to him in assessing the degree of fault. It must follow that it is relevant in assessing fault to consider whether and why an athlete failed to declare a substance on the doping control form.
90. On the findings of fact set out above the player cannot prove that she exercised any degree of diligence, let alone utmost caution, to ensure that her ingestion of Mildronate did not constitute a contravention. To the contrary her concealment from the anti-doping authorities and her team of the fact that she was regularly using Mildronate in competition for performance enhancement was a very serious breach of her duty to comply with the rules. Her conduct was serious in terms of her moral fault and significant in its causative effect on the contravention. If she had been open with the anti-doping authorities, her team or the

doctors she consulted, then the probability is that she would have been warned of the change to the Prohibited List and avoided a contravention.

91. Even if the Tribunal had accepted the evidence of Mr. Eisenbud it would follow that the player had failed in her duty to ensure that each person from whom she took advice was acquainted with all the requirements of the programme. The player had no reasonable basis for considering that Mr. Eisenbud had the expertise or qualifications to give advice on whether particular medicines were covered by the Prohibited List. The completely inadequate manner in which he claimed to have carried out his checks could not come close to discharging the player's duty of utmost caution.
92. For those reasons the player has not established that she bears No Significant Fault or Negligence in relation to the violation of article 2.1. Accordingly a period of ineligibility of two years must be imposed.

#### Estoppel

93. The basis of the estoppel invoked by the player is that despite the fact that the ITF knew, or should have known, that the player had tested positive for Meldonium under the monitoring programme in 2015, the ITF (a) failed to notify her of the test results obtained in 2015 (b) failed to distribute the Prohibited List to her and (c) failed to publicise the amendments to the Prohibited List.
94. The factual premise of that argument was not supported by the evidence. That the ITF did not know that the player had tested positive for Meldonium in 2015 was accepted in final submissions for the player. As to the submission that the ITF ought to have known that the player had regularly been using Meldonium in 2015 that is rejected, for the reasons given in paragraphs 41 to 45 above.
95. It is argued that the case of *ATP v Ulihrach* (ATP Tour Tribunal 2003) supports the principle of estoppel as applying to this case. At paragraph 26 of that decision it is said:

“Equitable estoppel is to be applied as a matter of fairness and good conscience to estoppe the person whose conduct has brought the situation about from asserting their legal rights.”

It is not necessary to decide whether that very wide principle is consistent with English law, which by article 1.8 applies to these rules, or whether such a principle could be applied to WADA Code provisions, save in the most exceptional circumstances. On the latter point this tribunal would agree with the comments in *ATP v Perry* (ATP Tour Tribunal 2015) at paragraph 49.

96. On the facts of this case it is only necessary to state that the ITF did not bring about the situation in which the player decided to take Meldonium at the 2016 Australian Open. There was no representation or assurance giving rise to any legitimate expectation on the part of the player that she could safely continue taking Meldonium before matches, a fact of which the ITF was unaware. The finding as to the player's deliberate and sustained non-disclosure of her use of Meldonium on doping control forms precludes any reliance on the principle of good conscience.
97. Even if, contrary to the findings made above, the ITF had not adequately publicised changes made to the Prohibited List this would not excuse the serious fault of the player, nor give rise to any estoppel, by representation or otherwise.
98. For all those reasons no estoppel can be invoked which prevents the ITF from asserting in this case that the player should face the consequences which are required under the rules.

#### Proportionality

99. It is argued for the player that this tribunal has an inherent authority to reduce the applicable sanction based on the principles of proportionality in the context of extreme and unique circumstances. This case does not evidence any such unique circumstances in relation to the contravention of article 2.1. Cases where an athlete has failed to exercise any due care in checking the Prohibited List are regrettably common.
100. The tribunal does not accept that there is a general discretion to vary the sanction applicable under the rules on the grounds of proportionality. *Puerta v ITF* (CAS 2006/A/1025) did not establish a general principle and the decision on the facts of that case could only be justified on the basis that there was a *lacuna* in the rules. That cannot be applied to this case where the

concept of fault is clearly defined and its application to the facts raises no difficulties in principle.

101. The case of *FINA v Mellouli* (CAS 2007/A/1252), described by the panel as an isolated act of negligence and decided prior to the 2015 WADA Code, cannot establish a general principle that the sanction may be reduced in any case which a tribunal considers to be exceptional. The tribunal must proceed on the assumption that the WADA Code, in particular in allowing for reductions of sanction on grounds of lack of intent and lack of any or significant fault, does properly reflect the principle of proportionality.
102. It is argued that any period of ineligibility would disproportionately affect Ms Sharapova in causing her a very substantial loss of earnings and sponsorships, exclusion from the 2016 Olympics, and irreparable damage to her reputation. There is nothing unfair in the rules being fairly and equitably applied to this player as to any other athlete subject to the WADA Code, whether professional or amateur. The rules<sup>44</sup> are clear in stating:

“ ... the fact that a Player would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Player only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.”

The rules cannot be circumvented by invoking the principle of proportionality. It would be contrary to the principles underlying the code, in particular respect for the rules which must apply equally to all, to allow an unprincipled exception to or waiver from the rules on the grounds of proportionality of sanction as it affects the particular circumstances of this player.

#### Commencement of the period of ineligibility

103. Under article 10.10.3 (b) a player who promptly admits the anti-doping rule violation may seek to have the commencement of the period of ineligibility back-dated so that it is deemed to commence, at the earliest, on the date of the violation. The player did promptly admit the charge, by letter dated 4 March 2016, and should be entitled to the mitigation of sanction allowed for by this rule.

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<sup>44</sup> Definition of Fault in the TADP

## Conclusion

104. The contravention of the anti-doping rules was not intentional as Ms Sharapova did not appreciate that Mildronate contained a substance prohibited from 1 January 2016. However she does bear sole responsibility for the contravention, and very significant fault, in failing to take any steps to check whether the continued use of this medicine was permissible. If she had not concealed her use of Mildronate from the anti-doping authorities, members of her own support team and the doctors whom she consulted, but had sought advice, then the contravention would have been avoided. She is the sole author of her own misfortune.

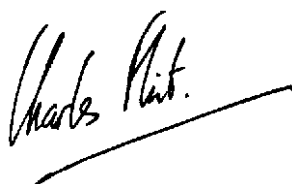


## Decision

For the reasons given above, the Tribunal unanimously makes the following decision:

- (1) An anti-doping rule violation contrary to article 2.1 of the TADP was committed by Maria Sharapova as a result of the presence of Meldonium in the samples collected from her at the Australian Open on 26 January 2016 and out of competition in Moscow on 2 February 2016;
- (2) Under article 9.1 the player is automatically disqualified in respect of her results in the 2016 Australian Open Championship, forfeits 430 WTA ranking points and prize money of AUS\$281,633 obtained in that competition;
- (3) Under article 10.2 the period of ineligibility to be imposed is 2 years;
- (4) Under article 10.10.3(b) the period of ineligibility shall commence on 26 January 2016.

Under article 12 this decision may be appealed to the Court of Arbitration for Sport.

A handwritten signature in black ink that reads "Charles Flint." The signature is written in a cursive style and is underlined with a single horizontal stroke.

Charles Flint QC

Chairman of the Independent Tribunal

6 June 2016

Blackstone Chambers, London