INTERNATIONAL TENNIS FEDERATION

INDEPENDENT ANTI-DOPING TRIBUNAL

DECISION IN THE CASE OF MARIANO PUERTA

Tim Kerr QC, Chairman
Dr José Antonio Pascual Esteban

Introduction

1. This is the decision of the independent Anti-Doping Tribunal ("the Tribunal") appointed by the Anti-Doping Administrator of the International Tennis Federation ("the ITF") under Article K.1.1 of the ITF Tennis Anti-Doping Programme 2005 ("the Programme") to determine a charge brought against Mr Mariano Puerta ("the player") following a positive drug test result in respect of a urine sample no. 388198 provided by the player on 5 June 2005 at the French Open, at Roland-Garros, Paris.

2. The player was represented at the hearing before us by Mr Adam Lewis, counsel, instructed by Charles Russell, solicitors. The ITF was represented by Mr Jonathan Taylor of Hammonds, the ITF's solicitors in London. The Tribunal is grateful to both advocates for the invaluable assistance they gave us with their oral and written presentations of high quality.

3. The player did not dispute the presence in his body of a prohibited substance, etilefrine. The player asserted that he bore "No Fault or Negligence" for the offence, within the meaning of Article M.5.1 of the Programme. Alternatively he asserted that he bore "No Significant Fault or Negligence" for the offence, within Article M.5.2. Accordingly the player sought an oral hearing, which took place in London on 6 and 7 December 2005.

4. By Article S.3 of the Programme, the proceedings before the Tribunal are governed by English law, subject to Article S.1, which requires the Tribunal to interpret the Programme in a manner that is consistent with applicable provisions of the World Anti-Doping Code ("the Code"). Article S.1 further provides that the comments annotating various provisions of the Code may, where applicable, assist in the understanding and interpretation of the Programme.

The Facts

5. The player is a citizen of Argentina and was born on 19 September 1978. He has been a professional tennis player since about 1995. He joined the ATP in June 1997. In November 2000 he met Sol Nazarena Estevanez, who is now his wife ("Mrs Puerta"). She is a former assistant in television programmes. She has an older brother, Diego Estevanez, who is currently a television producer.

6. Since the age of about 15 Mrs Puerta has taken the drug "effortil" on the advice of her doctor. She uses this medication to treat hypotensive episodes, particularly during menstruation. Effortil can be purchased over the counter in pharmacies without a prescription in some countries, including Argentina and Spain. The written information supplied with the drug states that its active ingredient is etilefrine, a stimulant which is a prohibited substance under the Programme.

7. The effortil used by Mrs Puerta is contained in a bottle. Mrs Puerta's evidence is that "[i]t states on the bottle" that it contains etilefrine. It consists of colourless, odourless drops which have no or virtually no taste when mixed with water. Mrs Puerta takes effortil, normally, by dripping about 20 drops of the drug into ordinary water and then drinking the water with the drops of effortil mixed in it. She does this up to three times a day when she feels she

needs to, particularly when she has her monthly period and at times of abnormal stress, such as when her husband is playing important matches.

8. Etilefrine is potentially capable of enhancing sporting performance in the short term, though no direct study of its effect on athletic performance has been done. It is a cardiac stimulant and would thus potentially enhance athletic performance to some degree if taken in therapeutic doses as normally taken by Mrs Puerta. Etilefrine is eliminated from the body rapidly. Its pharmacokinetics and urinary excretion after the first 24 hours following ingestion are not known. It has a half-life of about two to four hours, probably nearer two hours, depending on the metabolism of the individual.

9. Etilefrine has some traits in common with ephedrine, which is prohibited where the concentration in urine exceeds 10 micrograms per millilitre, and is a "Specified Substance" under the Programme. But there are important differences: ephedrine crosses the "blood / brain barrier" and thus provides central nervous system stimulation as well as increasing cardiovascular performance, while etilefrine does not. Ephedrine is less potent than etilefrine as an agent for increasing cardiovascular performance. Ephedrine is still widely available without prescription though its availability is being curtailed because of its use in the manufacture of illegal drugs, particularly in the USA.

10. From about 2001 onwards, if not earlier, the player was aware that his wife takes medication and that she takes it more frequently at times of stress, such as when he plays in important matches. She frequently accompanies him to matches, travelling with him to many parts of the world.

11. On 13 February 2003 the player tested positive for clenbuterol, a prohibited anabolic agent, at a tournament in Chile. The then rules of the ATP governed that tournament, including its then anti-doping rules. Under those rules clenbuterol was a class 1 prohibited substance which carried a mandatory two

year period of ineligibility unless an "Exceptional Circumstances" defence could be made out by the player. Etilefrine, on the other hand, was a class 2 prohibited substance under those rules, which carried a mandatory three month period of ineligibility for a first offence and a mandatory one year period of ineligibility for a second offence, again subject to an "Exceptional Circumstances" defence.

12. In August 2003 while the charge against him was pending, the player obtained a medical exemption for the use of salbutamol by inhaler for treatment of asthma. It would not have been possible for him to have obtained such an exemption in respect of clenbuterol. On 14 November 2003, while the charge was pending, the player and Mrs Puerta were married.

13. On 1 December 2003 the hearing of the charge took place in Miami before an anti-doping tribunal presided over by Professor Richard McLaren, a distinguished sports lawyer, sitting with two scientific expert members. The panel gave its decision in writing on 29 December 2003. The "Exceptional Circumstances" defence failed but the panel imposed a period of ineligibility of nine months. It decided not to impose the mandatory two year ban provided for by the rules, applying the principle of proportionality as articulated in certain CAS jurisprudence cited by the panel.

14. On 31 December 2003 the player's medical exemption for salbutamol expired and he did not renew it. There is no evidence that he has used salbutamol since. The next day, 1 January 2004, the Code entered into force with much publicity across the world of sport. The 2004 version of the Programme adopting the Code in the sport of tennis entered into force on the same date, with much publicity within the tennis world. The player was at the time serving his nine month suspension which was due to end on 1 July 2004.

15. The Code and the Programme brought major changes. Medical exemptions were replaced by "therapeutic use exemptions" ("TUEs"). The new anti-doping regime was intended to bring uniformity and harmonisation of anti-doping rules across different sports. The player was aware of the Code and was aware of the list of banned substances under the 2004 version of the Programme. He received a wallet card which included detailed information about banned substances.

16. Under the Code rules clenbuterol was a prohibited substance under class S.1 (anabolic agents) which carried a mandatory two year period of ineligibility for a first doping offence, unless a "No fault or Negligence" or "No Significant fault or Negligence" defence could be made out by the player. In such circumstances the period of ineligibility may be reduced to a minimum of no period of ineligibility (where there is no fault or negligence) or a one year period of ineligibility (where there is no significant fault or negligence). Thus, the sanctions under the Code in the case of clenbuterol are not dissimilar to the one applied to the player in the previous case under the old ATP rules.

17. Etilefrine, on the other hand, is a prohibited substance under class S.6 (stimulants) carrying a mandatory 2 year period of ineligibility for a first offence and a lifetime period for a second offence, except as described above where the defences of No Fault or Negligence or No Significant Fault or Negligence can be proven. In such a case the period of ineligibility for a second offence may be reduced to a minimum of no period of ineligibility (where there is no fault or negligence) or an eight year period of ineligibility (where there is no significant fault or negligence).

18. The player was aware of his wife's medication and was acutely aware that he had to be very careful. He was aware that it contained etilefrine and he was aware that etilefrine was a prohibited substance under the Programme, as it had been under the ATP rules applicable in 2003. He had checked the position on

the packaging or label of his wife's effortil and he checked a website. He was aware of the need to avoid inadvertently ingesting his wife's effortil. He had seen her take effortil but she tended to take it when he was not present, to minimise the risk of contaminating him with it.

19. After his return to tennis from 1 July 2004, the player worked hard, played well and achieved good results. His ranking improved. By the start of Roland-Garros in May 2005 he was ranked in the top 30 in the world. The highest ranking he has achieved is 10th in the world.

20. He understood that he could face a life ban if he were found to have committed a further doping offence after the end of his suspension. He was careful. He took supplements but only those he was familiar with and which had never produced any positive test result when tested. He also takes caffeine in the form of coffee. He declared these substances on doping control forms when tested, having failed to declare his medication containing clenbuterol in 2003. He was tested about three times between July 2004 and May 2005, each time with negative result.

21. On 1 January 2005 the current Programme entered into force. The player generally knew and knows about the Programme and its effect. For example, he knows what a TUE is. He had good reason to ensure he knew about the Programme as he knew he must unfailingly comply with it.

22. On a date unknown, probably in about March or early April 2005, the player filled in an entry form to enter Roland-Garros. He did not take much care when filling in the form. He did not specify which competitions he wished to enter. He did not write the date next to his signature, nor did he print his name. He even inadvertently signed the part of the form which would signify withdrawal from the competition.

23. The player did not expect to reach the final of Roland-Garros. His target was to reach the second week of the competition. This he achieved. Losers in the quarter finals and semi-finals, but not winners, are tested as a matter of course. Both the winner and loser of the final are tested. Therefore a player who wins a semi-final at Roland-Garros (unlike a player who loses) would not expect to be tested then, but only after the final. However a player progressing through the last three rounds would know that he must inevitably be tested sooner or later. The player is usually careful and well informed. We infer that he was aware of these things.

24. On Friday 3 June 2005 the player played in the semi-final and won. He was not tested. Mrs Puerta says in evidence that she did not take effortil that day. Professor Forrest, the expert instructed by the player to assist the Tribunal, accepted that it was possible – though he thought unlikely in view of the low concentration of etilefrine found in the player's A and B samples – that the player could have taken or been contaminated with effortil in a high dose (relative to the dose if contaminated on the day of the final) on the day of the semi-final.

25. The final was due to take place two days later on Sunday 5 June 2005. Mrs Puerta's evidence is that she began to menstruate in the early morning of 5 June 2005. The player's evidence was that he does not recall being aware of this as his mind was on the final. Mrs Puerta's evidence is that she took effortil at about 7.30am on 5 June, not in the presence of the player.

26. The player travelled with Mrs Puerta from their hotel to the stadium. At about 12 noon the player warmed up on the court. He then had a shower and had lunch in the mens' room. He knew the final was due to start at 3pm. He then spent time sitting with his family at the players' cafeteria. Mrs Puerta, her brother Diego Estevanez, her brother's fiancée and her mother were present. The player drank coffee and mineral water.

27. They sat at a small table on which were coffee cups and glasses for water, all of the same appearance. A lot of people came to greet the player. The atmosphere became increasingly chaotic as the start of the final approached. The player was animated and did not stay sitting on his chair. The start of the match was still some time away. We heard evidence that the player and his wife believed the start of the final was delayed, which on the undisputed evidence is not correct. But we do not think the exact times matter. We do not doubt that time passed slowly for the player.

28. We accept the evidence that shortly before the start of the final the player said goodbye to his wife and her family and went to the changing room to prepare for the match. We accept that he was told by his coach that he was too early and that he went back to his wife and her family at the cafeteria. We accept that his wife would not have expected to see or speak to him again until after the final and that she had gone to the toilet with her mother and her brother's fiancée when the player returned, and that the only one of the party present was the player's brother in law Mr Estevanez. We accept that the player then left to play in the final without seeing Mrs Puerta again.

29. Mrs Puerta's evidence was that after the player departed but before she went to the toilet, she sat in the chair previously occupied by him and poured about 20 drops of effortil into a glass she believed to be the glass she, not her husband, had been using; that she then added water and drank the mixture, draining or almost draining the glass. The player's evidence is that when he returned to the table and met Mr Estevanez only – the ladies having gone to the toilet – he poured a little water from a bottle he carried with him – a bottle he had not left unattended and unsealed – into the glass from which he had been drinking minutes earlier, and drank it. His evidence is that to him the glass seemed empty but that he now believes it contained a very small quantity of effortil and water.

30. We are concerned that the evidence of the player and his wife concerning the contamination of the player's glass with effortil is not reliable. We do not say that it is deliberately misleading but we do not accept on the balance of probabilities that it is the complete or correct explanation of how etilefrine entered the player's body. We considered carefully the demeanour and narrative of the player and Mrs Puerta. We are concerned that her account and that of the player constitute a self-serving speculative theory derived from the necessity of explaining the positive test as required under the Code and the Programme.

31. The events they describe are not commonplace and not such as to be likely to happen in the ordinary course of life. Even though the table was small, we do not see any reason why Mrs Puerta would use a glass which corresponded to the chair on which her husband had been sitting, rather than the glass she herself had been using. We are concerned that if the player and Mrs Puerta were sure of their account concerning the transmission of effortil to the player via the glass in question, they would have put that account forward much sooner than they did.

32. As explained below, the player was aware from 21 August 2005 that etilefrine was the substance found in the player's A sample; yet it was not until the week of 10 November 2005 – over two and a half months later – that the player's legal representatives first stated, tentatively and without committing themselves, that effortil may be the culprit. Yet, when the player and his wife signed their witness statements on 18 and 17 November 2005, and when giving their oral evidence, their conclusion was firm and their recollection apparently flawless and detailed in relation to events that had happened over five months earlier.

33. That said, we are satisfied on the balance of probabilities that the etilefrine contained in the effortil taken by the player's wife is the source of the positive test result. We accept the evidence that she takes effortil and we think it would be too much of a coincidence if its active ingredient found its way into the player's body from some other unrelated source. We believe that the player came into contact with effortil in the two days before the final.

34. We have considered the possibility that on the day of the semi-final the player deliberately doped himself with effortil, intending to enhance his performance through etilefrine, knowing that he would only be tested if he lost, and gambling that he would win, would therefore not be tested until two days later and that the substance, which is rapidly eliminated from the body, would have disappeared from his body by the day of the final.

35. After careful thought, we reject this explanation on the balance of probabilities. We accept the player's evidence that he did not deliberately dope himself. We accept on the balance of probabilities that the player's contamination with effortil was inadvertent. We do not think he would be so unwise as to risk his career, even though he was playing the biggest match of his life on 3 June 2005. We take into account the negative tests undergone by the player after the end of his suspension. We take into account Professor Forrest's view that it would be improbable that any etilefrine would remain in the player's body by the evening of 5 June when the test was administered.

36. We find on the balance of probabilities that the player was contaminated by effortil and that this occurred during the period of about one to two days before the final at a time and place unknown, and with a dose that is unknown, and in circumstances that are unknown save that we find the source was Mrs Puerta's medication. We do not believe on the balance of probabilities that the player was aware of the contamination. We consider that it must have occurred through the negligent or deliberate act of an unknown person. We think that is

more likely to be the case than the theory of contamination via use of the player's glass by Mrs Puerta for her medication.

37. We recognise that contamination via Mrs Puerta's use of the player's glass as alleged by the player is not impossible. We do not rule it out. It is but one of the possible explanations, and, we find, not the most likely. Another would be deliberate doping by a corrupt person without the knowledge of the player, with the intention of protecting the player from such knowledge and with the intention that in the event of a positive test innocent the player would able to assert innocent and non-negligent contamination by effortil. Another would be that the player and his wife carelessly shared a glass in their hotel.

38. We will return shortly to the consequences of our findings. First, we continue our narrative of the facts. The player lost the final in four sets. His performance was not, we accept, enhanced. The amount of etilefrene in his body was too small to have any effect on his performance. It later transpired that the approximate concentration was in the region of 192 ng/ml, which is about 50 times less than the reporting threshold of 10 micrograms per millilitre for ephedrine.

39. After the match, the player gave a urine sample, at 7.24pm. He declared various supplements, and caffeine, on his doping control form. The A sample was analysed at the WADA accredited laboratory in France and found to contain etilefrine. The concentration was not determined. The certificate of analysis was dated 20 June 2005. The full laboratory report was received by International Doping Tests and Management ("IDTM") in Sweden on 5 July 2005. Mr Sahlström of IDTM convened a Review Board in accordance with the Programme. By 27 July 2005, after some enquiries, all three members of the Review Board had concluded that there was a case to answer.

40. Accordingly Mr Sahlström wrote to the player on 28 July 2005 informing him of the positive test result and of his right to have the B sample analysed. The player was competing in Sopot, Canada and Cincinnati during the first half of August and did not receive the letter until 21 August when he returned to Buenos Aires before travelling to the US Open. The second line of the letter informed him that the substance found in the A sample was "Etilefrine". We consider that the player is sufficiently intelligent that it must have crossed his mind on 21 August, as soon as he read the letter, that there was at least a possibility that his wife's effortil was responsible for the positive test result.

41. The player's evidence is that he thought at that time that a "laboratory error" was responsible and that analysis of the B sample would expose the error. He says it did not occur to him until after the B sample result in mid-September that his wife's medication could be responsible for the positive test. This evidence is unconvincing. The player stood to lose much if convicted of a doping offence. He and his advisers would not be slow to make the link between the prohibited substance found in his A sample and the same prohibited substance which he knew to be present in his wife's medication, even if, which we do not find easy to accept, she did not tell him until after the B sample result that she had taken effortil on the day of the final.

42. On 2 September 2005 the player and an adviser by the name of Iacobelli emailed Professor de Ceaurriz at the Paris laboratory, in order to seek a postponement of the B sample analysis so that the player's representative, an expert not then yet located, could be present. The second line of the email referred to "Etilefrine" as the substance found in the A sample. By 13 September a Mr Brasero had been instructed to attend the B sample analysis as the player's representative. He did so when the analysis took place on 15 September 2005. The presence of etilefrine was confirmed. On 21 September 2005 the player was formally charged with the doping offence which is the subject of this decision.

43. Mrs Puerta says it did not occur to her that her medication could be the culprit until after the charge letter dated 21 September 2005. We find this evidence unconvincing, particularly when set against the clarity with which she apparently recalled the events of 5 June 2005, at the time of giving evidence to us on 6 December 2005. According to her evidence, the thesis that contamination of the player occurred minutes before the final began, first emerged over a month after the player discovered that the substance in question was one which he had known for years to be contained in his wife's medication, and at a time when Mrs Puerta needed to recall a fleeting moment over 3½ months earlier.

44. On 30 September 2005 the player's solicitor wrote to the ITF saying that he was not yet in a position to say whether the explanation for the positive test results lay in a failure of the chain of custody, contamination or deterioration of the samples, an error in the science of the testing, or in the innocent ingestion of a prohibited substance. No mention was made of effortil in that letter even though expert evidence was not needed to postulate a link between effortil and the etilefrine known by the player and his wife to be present in it, and indeed shown by the label and packaging (without expert evidence) to be present in it. We consider that the player and his advisers had not yet decided, as at 30 September, whether to run the "effortil contamination" defence.

45. It was not until the week of 10 November 2005 that the player, through his solicitor, informed the ITF of the player's case that the most likely explanation was inadvertent ingestion of his wife's medication. Then on 10 November, in an email addressed to the Chairman of the Tribunal, the player's solicitor stated:

> "… we have learned that the player's wife has for many years taken the prescription drug Effortil. We have learned that the active ingredient of the medicine is etlilefrine. Accordingly, the most likely explanation for the positive from what we know at the moment is that the player unknowingly

ingested some of his wife's medicine, especially as she has said she took some of it in the restaurant at the stadium on the day of the match."

46. The player continued competing after being notified of his positive test result, as he is entitled to do but not encouraged to do under the Programme. He played in the US Open at Flushing Meadow in late August and early September 2005 and in tournaments in Hungary, Vietnam, Japan, Spain and France from September to November 2005. He earned substantial prize money and ranking points from the singles and doubles competitions in which he competed. From Roland-Garros, he earned either US $552,000 or 440,000 euros from the singles competition[1], and just over US $4,000 from the doubles competition. In subsequent singles competitions he earned about US $306,000, and in subsequent doubles competitions about US $24,700.

47. The player gave evidence that he and his family would suffer serious financial hardship if he has to forfeit that prize money. We understand that the player's income is not the only measure of his wealth and that it is necessary to consider his outgoings as well. We also accept as self-evident the proposition that hardship is likely to result from compulsory forfeiture of substantial sums of money. For reasons further developed below, we do not need to go into more detail in relation to that aspect of the case.

The Proceedings

48. The player was charged with a doping offence by letter dated 21 September 2005 from the ITF's Anti-Doping Administrator, Mr Jonathan Harris. In accordance with Article K.1.7 of the Programme, a telephone directions hearing took place on 13 October 2005. The player was represented by Mr Patrick Russell, assisted by Mr James Pheasant, both of Charles Russell, solicitors in London. The International Tennis Federation ("the ITF") was represented by

[1] Both figures appear in the documents. If they are different the figure is likely to be capable of agreement.

Mr Jonathan Taylor, assisted by Mr Iain Higgins, of Hammonds, the ITF's solicitors in London.

49. A timetable was set for the submission of written briefs in accordance with Article K.1.7 of the Programme, and the oral hearing fixed to take place in London on 6-7 December 2005. By email dated 14 October 2005 the player's solicitors confirmed that they had no objection to the composition of the Tribunal.

50. The ITF submitted its written brief on 19 October 2005, arguing that a doping offence under Article C.1 had incontestably been committed; that this was a second offence; that accordingly there must be mandatory disqualification of the results obtained at the French Open; that there should be disqualification of results in competitions since the French Open; and that a period of ineligibility for life should be imposed, unless the player could establish a defence of "No Fault or Negligence", or "No Significant Fault or Negligence".

51. The player submitted his answering brief on 18 November 2005, advancing the following main contentions:

(1) He confirmed that he did not dispute the presence of the prohibited substance in his body.

(2) He asserted that he bore "No Fault or Negligence" for the offence, alternatively that he bore "No Significant Fault or Negligence" for the offence.

(3) He asserted that if the Tribunal accepted the defence of "No Fault or Negligence" there must be no period of ineligibility and no disqualification of results subsequent to the French Open.

(4) He contended that if the Tribunal accepted the defence of "No Significant Fault or Negligence" the player's offence must be considered a first not a second offence.

(5) He contended that whether the offence were considered a first or second offence it would be disproportionate and unlawful to impose the mandatory periods of ineligibility provided for in the Programme (namely one year for a first offence and eight years for a second offence); and that accordingly a lesser, proportionate, sanction must be imposed.

(6) He asserted further that on the footing of either "No Fault or Negligence" or "No Significant Fault or Negligence", disqualification of results, ranking points and prize money in respect of the French Open singles competition would be unlawful and disproportionate.

(7) On either footing, he asserted further that in the absence of any enhancement of his performance he should not suffer disqualification or results, ranking points and prize money in respect of the French Open doubles competition.

(8) Finally he asserted that on either footing it would be unfair, alternatively disproportionate and unlawful, to apply Article M.7 so as to disentitle the player from his prize money and ranking points in respect of competitions subsequent to the French Open.

52. The ITF submitted its written reply brief on 2 December 2005. The ITF put the player to proof of his factual defences and disputed the proposition that the Tribunal could adjust or disapply the mandatory sanctions provided for in the Programme by applying the principle of proportionality. The ITF argued that the Programme and the Code provided for a judicious mix of discretionary and

mandatory sanctions with the opportunity for the player to displace the mandatory sanctions where specific uniform defences apply. The ITF accordingly submitted that the Tribunal's obligation is to apply the Programme and not to disapply it or adjust it. The ITF further disputed the proposition that the player's offence was a first offence and not a second offence for the purposes of the Programme.

53. The Tribunal heard the matter on 6 and 7 December 2005 in London. We heard oral evidence from the player, Mrs Puerta and Professor Robert Forrest, Professor of Forensic Chemistry and Consultant in Clinical Chemistry and Forensic Toxicology. We also had written statements from several other witnesses who did not give oral evidence.

54. During the hearing on 6 December 2005 it became clear that Professor Lereim, a member of the Tribunal, was unable to continue hearing the case the next day as he had to return to Oslo that evening to deal with urgent business the next day, which had not been foreseen at the time the hearing dates were fixed. Professor Lereim is medical director of the largest hospital in Scandinavia. By consent, the Chairman ruled pursuant to Article K.1.6 that the two remaining members of the Tribunal should be authorised to hear the case on their own.

55. Accordingly Professor Lereim did not take part in the hearing from 4.30pm on 6 December onwards, when he had to leave to return to Oslo. He did not take any further part in the proceedings and did not take part in the deliberations of the Tribunal. The exact terms of the Chairman's ruling given orally on 6 December 2005 may be found in the transcript of the proceedings (day 1, pages 121-2).

The Tribunal's Conclusions, With Reasons

56. The player has admitted the commission of a doping offence under Article C.1 of the Programme. Accordingly pursuant to Article K.5.1 of the Programme,

we confirm the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 21 September 2005.

57. The player asserts that he bears "No Fault or Negligence", or alternatively "No Significant Fault or Negligence" for the offence. To succeed in either of theses defences, he must first show, on the balance of probabilities, "how the Prohibited Substance entered his … system …": see Article M.5.1 and M.5.2. In its decision in *Burdekin*, ITF Anti-Doping Tribunal dated 4 April 2005, the tribunal pointed out (at paragraph 76) that a player cannot do this:

> "by merely denying wrongdoing and advancing an innocent explanation. He must go on to show that the innocent explanation is more likely than not to be the correct explanation, and to do so he must show what the factual circumstances were in which the substance entered his system, not merely the route by which it entered his system."

58. In *Burdekin* the player had ingested cocaine and the issue was whether he had done so voluntarily or by means of sabotage. The theory of sabotage was merely deduced by the player by a process of elimination, as the only possible explanation consistent with his denial of voluntary ingestion. Here, the player has succeeded in proving on the balance of probabilities that the source of the etilefrine was his wife's medication and that he became contaminated by his wife's medication, by ingesting it in liquid form, during the period of about 48 hours before the Roland-Garros final. That is more than just a deduction from denial of wrongdoing.

59. It is true that the player has not proved all the factual circumstances in which etilefrine entered his system. We have not accepted as more likely than not the explanation that contamination occurred via common use of the player's glass during the minutes before the final began. Nevertheless, because the player has proved the source of the etilefrine, we find that he has done just enough to discharge the onus on him of showing on the balance of probabilities how the

Prohibited Substance entered his system. In the present case it is the source of the Prohibited Substance that is the most important feature.

60. The player asserts, within the meaning of Article M.5.1, that he bears No Fault or Negligence for the offence. To establish "No Fault or Negligence" for the purpose of eliminating the otherwise applicable period of ineligibility, the player must establish (according to the definitions in Appendix One to the Programme) that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered with the prohibited substance. Mr Lewis, for the player, urged us to find that this defence was made out on the basis of the factual account of the player, his wife and (in written form only) his brother-in-law.

61. We have no difficulty in finding that the player fails to make out this defence. The circumstances in which the contamination occurred are not clear, but we cannot see how it need have occurred at all if the player had exercised the utmost caution. There is no evidence of sabotage. The evidence is that the player knew of the risk and that he had to guard against it by taking precautions. The case is not one of the rare and exceptional ones of the type mentioned in the commentary to the provision in the Code corresponding to Article M.5 of the Programme. It is well established that the player is responsible for what he ingests, and any negligence on the part of his wife must for this purpose be imputed to him, as she forms part of his circle of associates.

62. Indeed, even on the basis that the explanation advanced by the player and his wife is accepted as the most likely explanation, the player failed to exercise the utmost caution by picking up and using a glass located on a small table among other glasses of identical appearance. He could not be sure which glass he had been using. He had just been absent from the cafeteria and when he returned his glass was unattended except for the presence of his brother-in-law, of whom he made no enquiry. The circumstances were increasingly chaotic with

numerous people circulating, so that the player could not know what might or might not have been already in the glass, or placed in the glass, during his absence. He ought to have drunk directly from his bottle of water to avoid any risk of contamination.

63. We note that Mr Taylor for the ITF, after hearing the oral evidence, stated that it would be open to us to find that this was one of those truly exceptional cases in which the player succeeds in discharging the onus of proving No Fault or Negligence. Mr Taylor submitted that the question was whether any further precautions beyond those taken by the player could be regarded as going beyond what it is reasonable to expect of the player. However, we consider that the Programme itself, with its criterion of the "utmost caution", asks a lot of players, and that we are bound to apply that criterion. We consider that the degree of fault here was at least as great as that in *Koubek v. ITF*, CAS/2005/A/828, where the defence failed: see paragraphs 59-61 of the sole arbitrator's decision.

64. We therefore turn to consider whether the player can establish the defence of No Significant Fault or Negligence. In order to establish this defence, for the purpose of achieving a reduction in the otherwise applicable minimum period of ineligibility, the player must establish that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for "No Fault or Negligence", was not significant in relation to the offence. The Tribunal takes as its starting point the approach of the CAS in *Knauss v. FIS*, CAS/2005/A/847 and the other cases therein cited at paragraphs 7.3.4 - 7.3.8 of the decision.

65. The Tribunal accepts that in this case the player has succeeded in establishing the defence. The exact circumstances in which the player ingested etilefrine are not clearly known. However we have accepted that he did not do so deliberately. He was faced with a more difficult task than most athletes in

protecting himself against contamination. He was necessarily in constant close proximity to his wife and thus to her medication. Most athletes do not live with a constant source of possible contamination. This player does. The risk of contamination is heightened by the fact that she takes it in the form of drops, not tablets. That feature differentiates the case from one where, for instance, contaminated supplements are taken without proper checking of the ingredients.

66. We also take into account that the concentration of etilefrine in the player's A and B samples was so low as to be incapable of enhancing performance. We understand that the consequences of an error are not the same thing as the gravity of the fault that caused it to be committed, but it is relevant that the nature of the player's fault was not such as to lead to a high and performance enhancing dose of etilefrine being administered or inadvertently ingested. We take into account also that the likelihood of the player's wife taking her medication – and thus the risk of contamination - was increased above the norm at the time of the semi-final and final of Roland-Garros because of the tension of the occasion.

67. Finally, we take into account the fact that this was not a case where the player had failed to educate himself about anti-doping rules. He had taken care to familiarise himself with the relevant anti-doping rules, checked the list of Prohibited Substances, established that etilefrine was on the list, taken the trouble to ascertain the active ingredient in his wife's medication, and made conscious efforts to guard against contamination. He was not cavalier in his attitude to anti-doping rules.

68. We must then turn to the question of disqualification of results and forfeiture of any medals, titles, ranking points and prize money. This question first arises in relation to the French Open itself, and within it, the singles competition in which the player was the runner-up. Under Article L.1 of the Programme, it is provided that an in-competition doping offence automatically leads to

disqualification of the individual result obtained by the player in that competition with all resulting consequences, including forfeiture of any medals, titles, computer ranking points and prize money obtained in that competition.

69. The player, through Mr Lewis, argued that the principle of proportionality precluded the Tribunal from lawfully imposing disqualification. He pointed out that the principle of proportionality must apply to all consequences of a doping offence, not only to any period of ineligibility. He submitted that it is disproportionate and unlawful to disqualify the player's result in the singles competition given that performance was not enhanced in any of the matches in which the player played; though he accepted that the same argument had failed in *Baxter v. IOC* , CAS 2002/A/376, at paras 30-35. He contended that automatic disqualification where there is no enhancement of performance, actual or intended, violated the principle of proportionality because it did not correspond to any legitimate aim.

70. He sought to characterise as a "fine" the forfeiture of prize money, stressed the relatively high amount of the prize money at issue and submitted that severe financial hardship to the player and his family would unjustifiably ensue if Article L.1 were applied to this case. He submitted, in the alternative, that only a "proportionate" part of the prize money should be forfeited, not the whole of it. The player maintained these submissions even on the footing that, as we have found, the player failed in the defence of No Fault or Negligence but succeeded in the defence of No Significant Fault or Negligence.

71. For the ITF, Mr Taylor argued that the player's submissions were untenable as they were contrary to all the case law and contrary to the well established principle of automatic disqualification of results where a doping offence is committed, which was necessary to preserve the integrity of sporting competition. That principle, Mr Taylor submitted, would be undermined if it were necessary to prove enhancement of performance in each individual case.

As to the forfeiture of prize money, Mr Taylor submitted that it would be wrong in principle for the Tribunal to take into account for this purpose the amount of money at stake, since that would mean that a high earning athlete would be more favourably treated under the rules than a low earning athlete.

72. The Tribunal has no difficulty in accepting the ITF's submissions on this aspect of the matter. The CAS in its case law has accepted many times that there must be automatic disqualification of results of a competition where a doping offence is committed in the course of that competition. The Tribunal regards the player's contrary contentions as without substance. Nor do we accept that it is correct to characterise as a "fine" the prize money gained by the player through performance in a competition in which he has committed, whether inadvertently or otherwise, a doping offence. From the moment that etilefrine entered his system during the French Open, the player lost his entitlement to whatever prize money he would otherwise have been entitled to as a result of playing in the French Open.

73. At the oral hearing the player accepted (see paragraph 47(c) of the player's written closing submissions) that if the Tribunal were to reject his defence of No Fault or Negligence, he could not rely separately on Article M.1.2 of the Programme so as to preclude disqualification from the doubles competition at the French Open on the ground that the ITF is unable to show that his results in the doubles competition were likely to have been affected by the doping offence.

74. At the oral hearing, the ITF, indeed, accepted that it could not show that the doping offence was likely to have affected the player's results in the doubles competition, in which he and his doubles partner lost in the first round. However, as we have rejected the defence of No Fault or Negligence, and as we have rejected the player's argument that proportionality precludes disqualification of results, it follows that the player's results in the doubles as

well as the singles competition must be disqualified, and any medals, prize money and ranking points must be forfeited.

75. We turn, next, to consider the question whether the doping offence here is a first offence or a second offence within the meaning of the Programme. The player submitted that the words "Second offence" in Article M.2 of the Programme (and elsewhere) referred to a second doping offence under the Programme itself, and did not apply where a previous offence had been committed under different anti-doping rules.

76. The player accepted that if a first offence had been committed under the 2004 version of the Programme, a second offence could be committed under the 2005 version. But he asserted that if, as in this case, the previous offence is committed under pre-Code and pre-Programme rules, the offence must be regarded as a first offence for the purpose of the sanctions provided for in the Programme.

77. In support of his construction, the player made the following main points:

(1) If the rules are ambiguous, they must be construed against the grantor and in favour of the player; especially where they are penal in nature, as in this case.

(2) The rules must not be construed in a manner that gives them retroactive effect. To treat the current offence as a second offence would do so in the sense that under the 2003 ATP rules, under which the previous offence was committed, a second offence involving ingestion of etilefrine carried only a one year ban.

(3) The natural meaning of the provision is that an "offence" means an offence under the Programme itself. The old pre-Code rules were substantially different.

(4) It would have been easy to provide expressly for previous offences under different rules to count, but that has not been done. Indeed, that was done in the old ATP anti-doping rules governing the player's previous offence.

(5) The "savage and intemperate" nature of the sanction (in Mr Lewis's vivid phrase) for a second offence should incline the Tribunal to construe the Programme in such a way as to treat this as a first offence.

78. The ITF disputed the player's submissions and contended that the current offence was a "Second offence" within the meaning of Article M.2 of the Programme. Mr Taylor accepted that if the player's first offence had been committed in the course of practising a different sport, such as badminton or squash instead of tennis, the current offence would be a first offence under the Programme. But, he submitted, a previous offence committed under predecessor pre-Code and pre-Programme anti-doping rules within the same sport, namely tennis, counted as a first offence notwithstanding that it was committed under different anti-doping rules.

79. In support of its case the ITF advanced the following main propositions:

(1) The provisions of the Programme are not ambiguous. It must have been plain to all athletes who had already been convicted of a doping offence when the Programme and the Code entered into force (as, incidentally, it was to this particular player) that they faced the sanctions applicable to a second offence, should they commit another.

(2) It would be contrary to the spirit of the rules and would seriously undermine the fight against doping in sport if the "slate were to be wiped clean" on entry into force of the Code and the Programme. It would be an undeserved windfall if this player and others were to be treated as first offenders.

(3) There is no retrospective effect where the consequences of the first offence are not altered; only the consequences of the second offence were altered, and that occurred before, not after, the second offence was committed. Players such as this one were on notice from 1 January 2004 when the Programme and the Code entered into force what the consequences of a second offence would be.

(4) There is nothing unfair about provisions which, prospectively not retrospectively, make the régime stricter than before. Consequently it is irrelevant that a second offence involving etilefrine carried only a one year ban under the old ATP rules.

(5) There is no precedent for treating the Code as bearing the construction the player advances; in other cases - albeit the point does not appear to have been taken by the athletes concerned - lifetime bans have been imposed for second offences where the first offence pre-dated the Code.

(6) The sanctions provided for by the Code and the Programme are not in the ordinary sense penal: they are rules of sporting conduct breach of which gives rise to ineligibility to participate in the sport in question.

(7) The Code and the Programme are not substantially different from the old rules. The structure of the old ATP rules was similar in that it used strict liability, uniform defences and mandatory sanctions.

80. During the oral hearing, it was noted that the expression "Doping Offence", defined in Article C.1, could be contrasted with the expression "Second offence", "Third offence", etc, in Articles M.1 and M.2. In the former case capital letters are used in the word "Offence"; in the latter, not. We also noted that the provisions governing multiple offences in Article M.6 appear clearly to refer to "Doping Offences", defined as such, and committed under the Programme itself. The Tribunal notes that for the purpose of sanctions provided for in Article M.2, M.3 and M.4 the word "offence" does not start with a capital letter.

81. We have come to the conclusion that the ITF's construction is correct and the player's is too technical, and is incorrect. We prefer the ITF's submissions to those of the player. We do not think there is any real ambiguity in the provisions. If there had been, it would have had to be resolved in favour of the player. We consider that the Programme must be construed sensibly in its sporting context, which was, undeniably, the implementation of a policy of bringing together tough anti-doping sanctions across different sports. We do not think any athlete would or should seriously have expected, reading the words "second offence", to be treated as not having committed a first offence just because his or her first offence was committed under different rules.

82. Our conclusion would have been different if instead of the word "offence" in Article M.2, M.3 and M.4 the words "Doping Offence", with upper case letters at the start of each word, had appeared. The fact that the word "offence" without a capital "O" is used in M.2, M.3 and M.4 leads us to the clear conclusion that the "offence" means a doping offence committed by a tennis player, whether under the Programme or under previous rules. The conclusion is not altered by an analysis of other provisions, such as those in Article M.6, governing the inter-relationship of "Doping Offences" that are, necessarily, ones committed under the Programme.

83. We now come to the most difficult part of the case. Our findings and conclusions thus far lead inexorably to the applicability of Article M.2 and Article M.5.2 of the Programme. It is common ground that, if they apply to this doping offence (as we find they do) and if they are to be applied as written (which we consider below), the combined effect of those provisions is that the player must be subject to a period of ineligibility of no less than eight years.

84. Mr Lewis, for the player, submitted using strong language that such a result would be unlawful, disproportionate and unjust. He said that it would mean the law is something worse than an ass, but rather, that it is vindictive, unpleasant and indeed a scandal. He predicted that unless the severity of the sanction could be tempered by consideration of the individual circumstances of the player and of the offence, the Code would not survive long because the fragile consensus on which it was built would shatter; the sport of association football would never sign up to the Code and the sports of rugby football and cricket would not long adhere to it.

85. He clarified that he was not submitting that the relevant Articles in the Programme were absolutely void, nor that they are "voidable" in the English law sense of the doctrine of restraint of trade, but that the principle of proportionality, as developed in the CAS case law, meant that it would be unlawful to apply the rules in their full rigour to this offence, where an eight year ban would be out of all proportion to the gravity of the player's fault and of the offence. He submitted that unless the rules were capable of being disapplied where they produced a grossly unfair result, then they would be absolutely void. He submitted that we should, in the normal way, strive to construe them in such a way that they survive rather than fall (*ut res magis valeat quam pereat*).

86. Mr Lewis pointed out that an eight year ban is normally, and in this case, long enough to bring a player's career to a premature end, thus depriving him of his

livelihood. He submitted that the sanction would be particularly savage here if it were combined with forfeiture of prize money in amounts running to several hundreds of thousands of euros and US dollars. He pointed to the lack of any intention to enhance performance and to the very low concentration of etilefrine in the present case, which was inconsistent with any enhancement of performance. He noted that if the substance had been ephedrine (a Specified Substance) and not etilefrine, the concentration was so low that it would have been about one fiftieth of the reporting threshold.

87. In support of his submissions, Mr Lewis relied strongly on well known CAS case law establishing that anti-doping tribunals are entitled and indeed obliged to apply the principle of proportionality and have routinely done so in cases that arose before the advent of the Code. He pointed out that the Code cannot of itself override or become a substitute for the principle of proportionality, for that would be contrary to the rule of law. He accepted that the regulatory régime - here, the Code - was one of the factors that could influence the impact of applying proportionality to the facts of the case.

88. Mr Lewis relied particularly on *Squizzato v. FINA*, CAS/2005/A/830. He submitted that it authoritatively establishes (at paragraphs 10.16 – 10.28) the power of the CAS to alter the mandatory sanctions provided for under the Code (and rules implementing it), as well as in pre-Code cases. He submitted that it was necessary to the decision in *Squizzato* that the CAS had considered doing so, albeit that on the facts they declined to do so and upheld a one year ban in the case of a swimmer's first offence, which involved "No Significant Fault or Negligence".

89. Mr Taylor, for the ITF, submitted that the Tribunal was bound to apply the mandatory sanctions provided for in the Programme. He submitted that the principle of proportionality had already been taken into account and satisfied by means of the system of uniform defences and discretions built into the

regulatory régime. He contended that the passages in *Squizzato* suggesting that in the post-Code era tribunals such as this retain discretion to alter mandatory sanctions by applying the doctrine of proportionality, were *obiter dicta* and should not be followed. He pointed out that in no case had CAS ever disapplied the sanctions provided for in the Code, and that in *Squizzato* the question whether it would ever do so was expressly left open.

90. He pointed out that the CAS had recognised in *Knauss* (cit. sup.), at paragraph 7.5.2, that it was not unlawful for the Code to require anti-doping tribunals to disregard the individual circumstances of an offence and of the athlete who has committed it. He contended that the objective of harmonisation was only achievable if the rules provided for uniformity. He submitted that if tribunals such as this were able to rewrite the rules, there would be a "Wild West" in which uniformity and harmonisation would be replaced by the discredited serendipity of varying rules and penalties in different sports.

91. In support of his proposition that proportionality was capable of being satisfied even without consideration of the individual circumstances of the player and of the offence, Mr Taylor cited the commentary on the provision in the Code corresponding to Article M.5.2 of the Programme, which sets out the rule-making history and states that the approach of allowing uniform defences of "No Fault or Negligence" and "No Significant Fault or Negligence":

> "is consistent with basic principles of human rights and provides a balance between those Anti-Doping Organizations that argue for a much narrower exception, or none at all, and those that would reduce a two year suspension based on a range of other factors even when the athlete was admittedly at fault."

92. In short, Mr Taylor's submissions amount to the proposition that uniformity and standardised penalties, even where they operate harshly in an individual case, are the necessary price of measures which can actually win the fight against drugs in sport; while Mr Lewis's submissions amount to the assertion

that the very same uniformity will lose that fight by destroying the weapons needed to win it. So both parties submit that acceptance of their contentions, and rejection of the other side's contentions, is necessary to assist the fight against doping in sport. This does not make our task any easier.

93. We have given very careful and anxious consideration to the parties' rival contentions outlined above. We see force in both sides' arguments. In the end, we have concluded as follows. First, we accept that as a matter of principle the Code cannot guarantee a proportionate result in every thinkable individual case. We accept the player's submission that there could be a case where the principle of proportionality requires a tribunal such as this to reduce or disapply sanctions provided for by the Code. It is plainly established by pre-Code CAS case law that a proportionate result on the facts must be reached in each case. It would be contrary to the rule of law if the Code were able to substitute itself for the principle of proportionality.

94. Secondly, however, it does not follow that applying the principle of proportionality to a case governed by the Code will produce the same result as would be reached if the principle were applied to the same offence, committed in the same factual circumstances, but governed by pre-Code rules. It is incontestable that the Code makes a proportionality argument more difficult to sustain. The CAS in *Squizzato* and other prior cases cited to us, has made this clear. It is not sufficient that the Tribunal has an "uncomfortable feeling" (paragraph 10.26 of *Squizzato*) about the severity of the sanction provided for under the Code.

95. In the present case, we have to ask ourselves whether the prospect of imposing a period of ineligibility of eight years (or more) on the player, when coupled with the financial and other sanctions he stands to suffer, lead us to conclude that by doing so we would be acting as an instrument of oppression and

injustice to the player of such severity that we should be persuaded not to impose it.

96. In analysing the present case, we have also considered in what other circumstances where no significant fault or negligence is found, a period of ineligibility of eight (or more) years would be considered not too harsh or accepted as proportionate without doubt. The fact that a sanction as harsh as an eight year ban can apply to a case where the negligence is not "significant" indicates that the Code is intended to be severe. We also bear in mind that the World Anti-Doping Agency clearly states in its introduction to the Code that "Anti-doping rules, like competition rules, are sport rules governing the conditions under which sport is played."

97. In approaching the question of proportionality we also have to give appropriate weight to the question of fairness to other players who have not, and who have, committed doping offences (intentionally or otherwise); and to the element of deterrence that is a necessary part of the scheme of the Code. Deterrent punishments are by definition harsh but are not thereby per se in violation of the principle of proportionality. We do not give much weight to the relatively large amounts of money that the player stands to lose in this case. If that factor were to be given a lot of weight, wealthy players would be treated more favourably under the Programme than players of modest achievements and means.

98. In the end, after much anxious thought, we have concluded that we should not disapply the written provisions of the Programme applicable to this case. We do have an uncomfortable feeling about the severity of the sanction, even a very uncomfortable one. But that is not enough. Our reasons for so concluding are briefly these.

99. We consider that the real thrust of the player's complaint is, on analysis, directed at the rule itself and not just its application in his case. We appreciate that the player disavows any generalised attack on the validity of the rule, and that he limits his argument to attacking its application to his case. He argues that this is a truly unique and extreme case on its facts.

100. We do not agree that this is a truly extreme and unique case on its facts. In our view, if the application of the rules is to be condemned as disproportionate in the present case, it must also be disproportionate in many other cases and would in effect be virtually inoperable.

101. In the present case, the player has already committed one doping offence meriting, according to the Tribunal, a suspension of nine months under the then applicable rules. In many cases where a second offence is committed, there will be mitigating circumstances. It is not uncommon for players to be unintentionally guilty of doping offences. Already, a number of cases have arisen under the Code in which the defence of No Significant Fault or Negligence has, as here, succeeded.

102. In many such second offence cases, the mitigating circumstances will include factors such as those invoked by the player here: a low concentration in the urine, a lack of intent to enhance performance, an honest mistake, a low degree of fault, and so forth. Indeed, some of these were the very factors which the CAS considered in *Squizzato*. The real question is whether it is open to international sporting federations to adopt rules which provide for an eight year suspension for two doping offences committed by mistake, i.e. whether eight years for two mistakes is disproportionate.

103. In the circumstances of the arduous fight against doping in sport, we are not persuaded that it is. The hard choice in sport is whether to have truly deterrent uniform sanctions for doping, or whether to have open-ended discretion in each

case. The signatories to the Code have chosen the former, not the latter. In our view it was open to them lawfully to do so. The inexorable logic of having done so is that there will be hard cases like this one. It is very hard on the player, as we recognise. We do not say that as an individual he deserves to suffer so severely. But he knew the risks, or must be taken to have known them, and we do not think it is unlawful for him now to have to take the consequences.

104. Accordingly we decide to impose a period of ineligibility of eight years on the player in accordance with Article M.2 and M.5.2 of the Programme. We do so with a heavy heart. Mr Lewis submitted that it would be unsatisfactory for a tribunal such as this to make a harsh decision and then combine it with an expression of regret. We are not expressing regret in the sense of believing our decision to be intrinsically unjust. We consider it to be correct on the facts and under the rules. We do however wish to express our ordinary human sympathy for this player, on whom the punishment is harsh, and who has extraordinary talent which he will sadly not be able to deploy for a very long time, unless our decision is altered on appeal.

105. We turn to consider other matters. The first is the question of disqualification of results, and forfeiture of prize money and ranking points, in respect of competitions subsequent to the French Open in which the player competed. This issue is governed by Article M.7 of the Programme. Mr Lewis submitted that it would be unlawful and disproportionate to deprive the player of his results, prize money and ranking points obtained subsequent to the French Open.

106. We do not agree. As observed in *Bogomolov*, ITF Anti-Doping Tribunal decision dated 26 September 2005, disqualification is the norm and not the exception. At paragraphs 102-116 in *Bogomolov* the tribunal considered the issue of subsequent competitions and the approach of other tribunals to the

issue, in other cases. It did so in the context that the substance at issue was a Specified Substance in respect of which the player had had a TUE, though it had expired at the time of the doping offence. He faced, on any view, a relatively short period of ineligibility and in the event the period was only one and a half months.

107. In the present case the substance for which the player tested positive is not a Specified Substance. There was no abnormal delay in this case in notifying the player of the positive test in respect of his A sample. Once he received notification of the positive test, he had a strong incentive to cease competing. Had he done so, the period of voluntary abstinence from competition would have counted towards his period of ineligibility; see Article M.8.3(a) of the Programme.

108. Thereafter, the player continued competing in the full knowledge that he faced a possible charge, knowing that the money he was earning was liable to be forfeited. His decision not to admit the offence and to require testing of the B sample led to delay in the notification of the charge and in consequence to delay in the setting up of this Tribunal and the hearing of the charge. That was the player's responsibility.

109. We accept that there is no evidence that the player derived or sought to derive any sporting advantage in competitions in which he competed subsequent to the French Open. But where the substance in question is not a Specified Substance, the player knows that he may well face a more lengthy period of ineligibility than in a case (such as *Bogomolov*) where it is obvious that Article M.3 is likely to apply, i.e. where the substance in question is a Specified Substance.

110. The incentive to refrain from competing should be correspondingly stronger. Accordingly we have decided that the player's results in competitions in which he took part subsequent to the French Open should be disqualified, and that the

prize money, computer ranking points and any medals gained from those competitions should be forfeited.

111. However, because of the length of the period of ineligibility, we consider that fairness requires us to exercise our power under Article M.8.3(b) to determine that the starting date of the period of ineligibility should be the date of the sample collection, namely 5 June 2005. We appreciate that the length of the period of ineligibility is not a factor that falls within the words in Article M.8.3(b): " … delays in the hearing process or other aspects of Doping Control not attributable to the Player …". But those factors are preceded by the words "such as in the case of …" and are thus only examples of factors that may induce the Tribunal to start the period of ineligibility earlier than the date of its decision.

112. We are aware that our decision is likely to be appealed to the CAS. We would welcome that, because on our findings of fact this case raises in very stark form the jurisprudential dilemma faced by tribunals such as ours in the era of the Code. It is important for the fight against doping in sport that anti-doping tribunals do not assume powers to decide each case on its facts irrespective of the rules in play, including rules providing for uniform sanctions.

113. On the other hand those rules can, as in this case, operate very harshly against individuals. The result is particularly harsh here because etilefrine is characterised by factors which might well have led to it becoming a Specified Substance, as ephedrine is. It is readily available, as shown by the fact that the player's wife did not need a prescription to purchase it. It is not very likely to be successfully abused as a doping agent, because of its pharmacological profile, and indeed in the present case the dose accidentally ingested was so minute it could not have enhanced the player's performance.

The Tribunal's Ruling

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

(1) confirms the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 21 September 2005, namely that a prohibited substance, etilefrine, has been found to be present in the urine sample that the player provided at the 2005 French Open on 5 June 2005;

(2) orders that the player's individual results in both the singles and doubles competitions must be disqualified in respect of the 2005 French Open, and in consequence rules that the prize money (half the prize money awarded to the doubles pair, in the case of the doubles competition) and ranking points obtained by the player through his participation in those competition must be forfeited;

(3) orders, further, that the player's individual results in all competitions subsequent to the French Open shall be disqualified and all prize money and ranking points in respect of those competitions forfeited;

(4) declares that the player shall be ineligible for a period of eight years commencing on 5 June 2005 from participating in any capacity in any event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised by the ITF or any national or regional entity which is a member of or is recognised by the ITF as the entity governing the sport of tennis in that nation or region.

Tim Kerr QC, Chairman

Dr José Antonio Pascual Esteban

Dated: 21 December 2005