CAS 2013/A/3327 Marin Cilic v. International Tennis Federation
CAS 2013/A/3335 International Tennis Federation v. Marin Cilic

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	Mr Ulrich Haas, Professor of Law in Zurich, Switzerland
Arbitrators:	Mr Jeffrey G. Benz, Attorney-at-law in Los Angeles, USA and London, UK
	Mr Romano F. Subiotto QC, Solicitor-Advocate in Brussels, Belgium and London, UK
Ad hoc Clerk:	Mr Tom Asquith, Barrister in London, UK

in the arbitration between

MR MARIN CILIC, Monte Carlo, Monaco

Represented by Mr Mike Morgan of Morgan Sports Law LLP, London, UK and Mr Howard Jacobs of the Law Offices of Howard L. Jacobs, Westlake Village, USA

Appellant/Respondent

and

INTERNATIONAL TENNIS FEDERATION, London, UK

Represented by Mr Jonathan Taylor of Bird & Bird LLP, London, UK

Respondent/Appellant

I. PARTIES

1. Mr Marin Cilic (hereinafter referred to as the "Athlete") is a professional tennis player of Croatian nationality, born on 28 September 1988.

2. The International Tennis Federation (hereinafter referred to as "ITF") is the world governing body for the sport of tennis, recognized as such by the International Olympic Committee. One of its responsibilities is the regulation of tennis, including, under the World Anti-Doping Code, the running and enforcing of an anti-doping programme.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the parties' written and oral submissions, pleadings and evidence adduced. Additional facts and allegations found in the parties' submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its award only to the submissions and evidence it considers necessary to explain its reasoning.

4. The Athlete is a very successful and experienced tennis player. In 2003, he moved to Zagreb to train at the Croatian National Tennis Centre. In 2004, he trained on an *ad hoc* basis at the tennis academy of Bob Brett in San Remo. In 2005, he started to play professionally, breaking into the top 20 of the ATP singles rankings for the first time in 2009.

5. He is familiar with anti-doping measures and had prior to 2013 been tested by the ITF on a number of occasions. He generally sourced his nutritional supplements that he used as part of his nutrition program from the Croatian Olympic Committee ("NOC") save where the NOC was unable to provide him with what he required.

6. Mr Slaven Hrvoj began to work for the Athlete from January 2011. He suggested to the Athlete that he should start to take electrolytes, protein and glucose. The Athlete procured the first two of these from the NOC. But, because the NOC did not source it, he obtained glucose from elsewhere. Mr Hrvoj recommended that the Athlete purchase it from a reputable chain store in Croatia and Germany known as "DM". The product he would buy was called "Traubenzucker", which translates as "Grape Sugar". The ingredients list contains sugar and vitamins, including a vitamin known as "Nicotinamide".

7. In or around December 2012, the Athlete started to take creatine on Mr Hrvoj's advice. Because the taste of creatine was bitter, he would occasionally mix the glucose powder with creatine in order to make it more palatable.

8. During the beginning of 2013, the Athlete was under some pressure in relation to his professional circumstances. In his witness statement, the Athlete described how he had begun to train at the tennis academy of Bob Brett from 2004. Initially, Mr Brett handled the Athlete's contracts and sponsorship deals. From 2006, he began to focus on the Athlete's training but due to other commitments rarely attended the Athlete's matches.

However, from April 2008 Mr Brett attended approximately two-thirds of the Athlete's tournaments. By June 2012, they had agreed to work together full-time. 2012 was, for the Athlete, an unsuccessful year, during which he says the Croatian media criticised his entourage including his coach. Unfortunately, the Athlete's relationship with Mr Brett became tense near the end of 2012, due to the pressure from the media and his own feelings about Mr Brett.

9. This pressure was compounded by tension between Mr Hrvoj and Mr Brett, who had differed about how best to train the Athlete, and also tension between the Athlete's parents and Mr Brett.

B. Events in Monte Carlo

10. In April 2013, the Athlete went to Monte Carlo to play in the Rolex Masters, which commenced on 15 April 2013.

11. At some point between 15 and 18 April 2013, the Athlete realised that he was running low on glucose powder. He asked his mother to obtain some more on his behalf. She went to a pharmacy at around this point and purchased a packet of Coramine Glucose tablets. The label listed a number of ingredients, including "*nicethamide"*. But the Athlete did not focus on the label until the night of 22 April 2013, by which time he had been knocked out of the Rolex Masters. At this time, the tension surrounding Mr Brett was putting the Athlete under significant pressure.

12. The Athlete says that his mother had told him that the pharmacist had told her that the tablets she had purchased were safe for professional tennis players to take.

13. At para 67 of both his witness statement dated 16 August 2013 and his statement dated 26 September 2013, the Athlete said:

The word "nicethamide" looked familiar and, unfortunately, I instantly assumed that "nicethamide" was French for "nikotinamid", a part of the vitamin B group listed as an ingredient on my usual glucose powder

I therefore did not do any further check on "nicethamide".

14. The Athlete took a photo of the box and sent it to Mr Hrvoj to check if it was okay to take. There is no dispute that the Athlete sought and received nutritional advice, not anti-doping advice, from Mr Hrvoj.

15. From 23 to 26 April 2013, the Athlete took two of the glucose tablets each morning. From 27 April 2013, he reverted to his usual glucose powder which Mr Hrvoj had brought from Croatia to Germany, to where the Athlete had travelled in order to play in the BMW Open in Munich.

16. On 1 May 2013, the Athlete played his first match of the BMW Open. He lost the match.

17. Later on 1 May 2013, the Athlete underwent a doping control test.

18. On 6 June 2013, the Athlete travelled to London to participate in The Queen's Club Championships.

19. On or around 10 June 2013, the ITF informed the Athlete that the WADA-accredited laboratory in Montreal had found N-ethylnicotinamide in the urine sample, a metabolite of nikethamide (in French: *nicéthamide*), which is prohibited in competition.

20. On 26 June 2013, the Athlete admitted his anti-doping rule violation and voluntarily accepted a provisional suspension.

21. By email dated 6 August 2013, the Athlete sought a hearing before the Anti-Doping Tribunal of the ITF ("the Tribunal").

22. On 22 August 2013, the Athlete met with Dr Stephen Humphries, a consultant psychiatrist. He concluded that the Athlete had in late April 2013 been in a state of acute stress and not able to "see the wood for the trees".

23. On 24 August 2013, the Athlete submitted detailed written submissions with supporting evidence.

24. On 9 September 2013, the ITF submitted its written submissions, supported by a statement from Dr Stuart Miller, its Anti-Doping Manager responsible for operation of the Tennis Anti-Doping Programme administered by the ITF ("the Programme").

C. Proceedings before the Anti-Doping Tribunal of the ITF ("the Tribunal")

25. The hearing before the Tribunal took place on 13 September 2013 in London. On 23 September 2013, the Tribunal handed down its written reasons.

26. The Tribunal heard oral evidence from Mr Hrvoj, the Athlete, Dr Humphries and Dr Miller.

27. The Tribunal found that the Athlete did not intend to enhance his sport performance by taking the tablets during the period from 22 to 26 April 2013 (para 73).

28. The Tribunal rejected the Athlete's submission that factors apart from the degree of the athlete's personal fault must be weighed in the scales in order to apply correctly the principle of proportionality (para 98).

29. The key conclusions can be found at paragraphs 101 and following of the Tribunal's decision:

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

102. The linguistic mistakes which led him astray – mistaking "sucer" for sugar and nicéthamide for nikotinamid – were understandable but highly careless. Nikethamide had, we note, been on the prohibited list from its inception, and the potential similarity with other names cannot be considered new or unexpected. The player had a home in Monte Carlo but

had little knowledge of the main language spoken there. He should not have relied on linguistic conclusions derived from a language of which he knew little.

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

104. The product had the word "Coramine" in upper case letters on the front. The player was familiar with websites such as Google and Wikipedia. It would have taken only minutes to search under "Coramine" on those sites, and discover the danger he was in. The circumstances in which his mother had obtained the tablets made this research all the more urgent. They were not, as Mr Jacobs submitted, such as to justify a sense of security in taking the tablets.

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

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

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

30. The Tribunal imposed a period of ineligibility on the Athlete of nine (9) months, backdated to 1 May 2013, when the sample was collected. The Athlete's results at the BMW Open were disqualified, with resulting forfeiture of his ranking points and prize money won at that event. Similarly, his results, ranking points and prize money between the BMW Open and the voluntary acceptance of his provisional suspension were forfeited.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT ("CAS")

31. On 24 September 2013, the Athlete filed a Statement of Appeal with the CAS.

32. On 26 September 2013, the ITF filed its own Statement of Appeal.

33. On 5 October 2013, the Athlete filed his appeal brief and his supporting exhibits.

34. On 11 October 2013, the CAS Court Office advised the parties that the Panel will be constituted as follows:

- President: Mr Ulrich Haas, Professor in Zurich, Switzerland
- Arbitrators: Mr Jeffrey G. Benz, Attorney-at-law in Los Angeles, USA and in London, UK

  Mr Romano Subiotto QC, Solicitor-Advocate in Brussels, Belgium, and in London, UK

35. On 13 October 2013, the ITF filed its appeal brief and its supporting exhibits.

36. On 16 October 2013 a hearing was held at 4 New Square Chambers at Lincoln's Inn in London. The Athlete was present in person and assisted by Messrs Mike Morgan and Howard L. Jacobs, Counsel. The ITF was represented by Dr Stuart Miller, ITF Anti-Doping Manager, and assisted by Mr Jonathan Taylor, Counsel..

Evidence before the CAS

37. The CAS heard the testimony of the Athlete and evidence from the following:

a. Mr Slaven Hrvoj (the Athlete's trainer).

b. Professor Peter Sever (professor of Clinical Pharmacology & Therapeutics at the National Heart and Lung Institute, at Imperial College, London).

c. Dr Stephen Humphries (a consultant psychiatrist).

d. Mr Goran Ivanisevic (former/retired tennis player).

e. Dr Stuart Miller Anti-Doping Manager of the ITF.

38. The Panel will summarise some of the main parts of the evidence below.

39. Mr Hrvoj explained that he had recommended to the Athlete that he should take glucose powder in order to recover more quickly after training or a match. It was quicker to take the powder than to wait for the Athlete's next meal. He also explained how he had recommended creatine to the Athlete. He confirmed that when he commented on the photo of the Coramine Glucose product in a text message in April 2013, he was doing so from a nutritional, not an anti-doping, perspective. In cross-examination, he said he would probably agree that the product was not "glucose tablets", because there was another substance (*i.e.* nikethamide) in them.

40. Professor Sever said in his evidence that there was very incomplete data about how long the effects of nikethamide lasted. He suggested the effects would usually last one or two hours. He said it was consistent with the historical records he had considered relating to nikethamide that the Athlete would not have noticed any stimulating effect. He said it was very unlikely it would have any such effect.

41. He did not consider the Coramine Glucose product to be a medicine, despite what was written on the box about it being an authorised product. He could not think of any clinical condition which he or his colleagues would prescribe it for.

42. Dr Humphries addressed paragraphs 105 and 106 of the Tribunal's decision. He said that the Tribunal was wrong to rely on the fact that the Athlete had been able to drive a car on 22 April 2013 as relevant to his cognitive state. He said that such an activity relied on learned behaviour. It was an activity which people under stress could undertake, but they would be more likely to make mistakes. He also said that the Athlete's cognitive function was only one part of his overall psychological disturbance at the time.

43. Mr Ivanisevic's evidence went to his assessment of the Athlete as a tennis player and the effect on him that would result from a 9 month suspension.

44. Dr Miller was asked by Mr Jacobs about various matters, such as his view of the Athlete's explanation of what happened on 22 April 2013. However, whilst Dr Miller was no doubt doing his best simply to answer the questions he was asked, such testimony seems to the Panel to be comment, rather than evidence which may assist the Panel to resolve the issues before it.

45. The Athlete described the history of his tennis career. He explained the stress he was suffering in and around April 2013. He spoke of his understanding of the general anti-doping obligations which he was under. He said that it did not occur to him that glucose could be considered a "supplement". It was something he would find next to chocolate and biscuits in the DM chain in Croatia.

46. He said that when he saw the Coramine Glucose box on 22 April 2013, he noted the two ingredients which seemed familiar – "glucose powder" and "nikethamide". He said he thought he had seen it before and that in his head he was sure what it was. He said if he had not seen it before, he would have checked. He could not recall whether he looked further down the packet. He did not look at the side panels.

47. He said he only saw the leaflet in June 2013, after he had received the results of the test, because he emptied the box and the leaflet came out. There had been five packs of tablets so he had not seen the leaflet when he first opened the box.

48. In cross-examination, the Athlete accepted that he knew some products could be contaminated. He said that he knew prohibited substances could be found in supplements and/or medications, whether or not they were purchased over the counter.

49. He said the main benefit of the glucose had been to improve the taste of the creatine. He had later found out that taking glucose assisted with the absorption of the creatine.

50. He said in his head he had been sure that the second ingredient of Coramine Glucose was nikotinamide, which was something he had only previously seen in glucose powder. He was taken to page 104 of the transcript of the hearing before the Tribunal and asked if that remained his evidence. He said that it was and that in his head he had been sure that it was nikotinamide. The Panel will discuss this factual issue in further detail below.

The CAS Award

51. At the conclusion of the hearing, at the request of the Athlete, the Panel indicated that it would communicate the operative part of its Award to the parties, prior to communicating its reasons, as soon as possible in accordance with R59 of the Code of Sports-related Arbitration (hereinafter the "Code").

52. The operative part of the Award was communicated to the parties on Friday 25 October 2013. This document constitutes the reasoned award of the Panel in respect of both the Athlete's appeal and the ITF's appeal.

IV. SUBMISSIONS OF THE PARTIES

The Athlete's submissions

53. In his Appeal Brief, the Athlete requested relief as follows:

12.2 The Appellant respectfully requests that the CAS grants the following relief:

(a) annulment of the Decision of the IADT.

(b) confirmation that:

(i) any sanction imposed on him be limited to a warning and a reprimand and no period of ineligibility (notwithstanding the fact that the Appellant will already have served over 3 months' of a provisional suspension by the date of the appeal hearing);

(ii) the only results to be disqualified and ranking points to be forfeited will be those of 1 May 2013; and

(iii)all results, ranking points and prize money earned between 2 May 2013 and 26 June 2013 (inclusive) are undisturbed (and therefore reinstated).

12.3 An order that the ITF reimburses the Player' legal costs

54. The Athlete's submissions, in essence, may be summarized as follows:

(a) The Athlete's breach was of a purely technical nature:

a. Nikethamide is prohibited only in competition because its effects are transient.

b. The Athlete inadvertently ingested nikethamide out of competition, when it was perfectly legal for him to do so. His inadvertent "use" was therefore not a violation of any rule.

c. There was no nikethamide in the Athlete's system by the time he played his match on 1 May 2013. All that remained in his system were traces of the metabolite N-ethylnicotinamide, which is not a prohibited substance.

(b) The Athlete's degree of fault should be considered in the context of the circumstances leading up to the breach. Relevant circumstances include:

a. The Athlete's understanding and experience of glucose as an everyday, natural sugar product.

b. The nature of glucose as compared to other types of supplements which might ordinarily heighten suspicions such as "JACK3D" and "Hyperdrive".

c. The fact that the Athlete had started to take glucose approximately two years previously upon recommendation from his trainer, had checked then that the ingredients of glucose powder were safe for him to take and had never previously had any incident.

d. The Athlete had also previously taken glucose tablets during Davis Cup matches without incident.

e. The fact that glucose tablets are commonly and openly used among tennis players both on the Tour generally and within the Athlete's training group, which would have reassured the Athlete about use of the tablets.

f. The extraordinary coincidence that the legal vitamin "nikotinamid" ("nicotinamide" in English), an ingredient of the glucose powder the Athlete had been taking for two years, is a metabolite of "nikethamide" and that the two words sound phonetically similar and look alike.

g. The Athlete is generally careful about what he ingests and is not cavalier about his anti-doping obligations.

h. The substance was ingested out of competition and is not prohibited out of competition. It was ingested five days before the Athlete was due to play his next competitive match.

i. The offending glucose tablets looked and tasted the same as glucose tablets the Athlete had previously taken. He did not notice any side effects which might have raised suspicions.

(c) With regard to the degree of care, the Athlete:

a. Did not seek a finding of "no fault or negligence".

b. Did seek a finding that his degree of fault or negligence was, in the circumstances, small. He believed he had fulfilled his anti-doping obligations by virtue of the fact that:

i. The glucose tablets came from a trustworthy source – a pharmacy next to Monte Carlo Country Club that the Athlete's family knew well. The product was sold without any prescription.

ii. The Athlete's mother checked with the pharmacy before purchasing the product that the product was safe for a professional tennis player to take.

iii. The Athlete made his own visual check of the ingredients listed on the front of the packaging. There were just two ingredients "glucose"

and "nikethamide". The Athlete instantly believed they were "glucose" and "nikotinamid" (an ingredient of the glucose powder which he had been taking for the two past years). As a result, he did not take any additional steps.

iv. The Athlete sent a photo of the package to his trainer, who did not raise any concerns.

v. The Athlete did not notice the leaflet contained in the package (which stated that the tablets contained an "active product which could a positive test in case of an anti-doping control") until 13 June 2013.

c. Relied on the fact that he was in the midst of a particularly stressful period in his life (with regards to the relationship with his coach, Mr Brett, as outlined above).

(d) Any sanction must be proportionate to the harm caused, bearing in mind the rule which has been breached. In this case:

a. The substance was ingested out of competition, which was not in itself a breach of a rule.

b. There was no nikethamide in the Athlete's system by 1 May 2013, only a trace of its metabolite.

c. The metabolite N-ethylnicotinamide could not have positively affected the Athlete's performance at his match on 1 May 2013, which in any event he lost.

d. No sporting advantage was sought and none was obtained.

(e) The case before the CAS was different to that before the Tribunal. In particular, the Athlete had not explained to the Tribunal the fact that was present in the Athlete's sample was not nikethamide itself, but a metabolite of it.

(f) There were similarities between this case and the cannabis cases in that the substance was prohibited only within competition. But this case should be treated even more leniently, because in those cases, the athlete a) had acted against the law and b) knew that the product was banned in competition.

(g) In a case involving an inadvertent breach, the sanction should be lower.

(h) The CAS should not forget that the Athlete was an individual who had already suffered serious consequences in terms of his drop in rankings and the characterization of him in the media. Proportionality was a factor.

The ITF's submissions

55. In its Answer brief and Appeal Brief, the ITF requested as follows:

65. For the reasons set out above, the ITF respectfully requests that the CAS Panel uphold the ITF's appeal, dismiss Mr Cilic's appeal, and:

65.1 confirm Mr Cilic's commission of an anti-doping violation under TADP Art 2.1 (presence of a metabolite of nikethamide, a banned stimulant, in the urine sample collected from Mr Cilic immediately after his match at the ATP tournament in Munich on 1 May 2013);

65.2 confirm the automatic disqualification of Mr Cilic's results from the Munich event, and forfeiture of the points and prize money he won there, in accordance with TADP Art 9.1;

65.3 impose a period of ineligibility on Mr Cilic under TADP Art 10.4 that is commensurate with Mr Cilic's degree of fault; and

65.4 (if it back-dates the commencement of his ban to 1 May 2013) confirm the disqualification of Mr Cilic's results obtained between that date and 26 June 2013 (the date he accepted a provisional suspension), and forfeiture of the points and prize money that he won by those results, in accordance with TADP Art 10.8.

56. The ITF's submissions may be summarized as follows:

(a) The sanction to be imposed must be based solely on the Athlete's fault. In this context, the CAS Panel had to consider (according to the Code and the CAS decisions on the Code):

   a. The extent to which the Athlete departed from his duty to use utmost caution to keep prohibited substances out of his body.

   b. To the extent that the Athlete failed to use utmost caution, whether there was a valid excuse for that failure.

(b) The CAS Panel should not consider:

   a. The extent to which the Athlete's ingestion of nikethamide did or did not enhance his performance.

   b. The extent to which he is sorry for what happened.

   c. The adverse impact (financial or otherwise) he will suffer from being excluded from the sport for a period.

(c) As to the extent to which the Athlete departed from his duty to use utmost caution, the ITF stated: the only step the Athlete took to check that the Coramine Glucose tablets did not contain any prohibited substances was to read the list of ingredients on the front of the package. He did not read the side panels or back of the packet. He did not read the information leaflet inside the packet. He did not use his ITF wallet card or call the ITF product helpline. He did not call the Croatian Olympic Committee. He did not search the name of the product or its ingredients on the internet. Taking any of the above steps would have alerted him to the fact that nikethamide was a prohibited substance.

(d) The Athlete's duty of care should relate to the kind of product he was taking. Whilst this was not a product such as "Bodysurge", nor was it glucose. It was a medication.

It was taken to help the Athlete absorb creatine. The purpose in taking the tablet was an important factor.

(e) As to why the Athlete departed from his duty to use utmost caution, the ITF submitted as follows:

a. The Athlete could not plead lack of experience or education.

b. The reassurances his mother received were vague and nothing was known about the pharmacist's qualifications. It was wrong to draw comfort from such reassurances.

c. The advice from his trainer that Coramine Glucose was "fine" to take was in the context of nutritional advice, not anti-doping advice, and therefore irrelevant.

d. Though the Athlete had said that he thought Coramine Glucose was just sugar, he knew it was not, because he had seen the reference to nikethamide as an ingredient. Further, he knew that glucose powder generally may contain prohibited substances.

e. It was unreasonable to assume that, because 'nicethamide' 'looked familiar', it was the same as the product the Athelete was familiar with. The Coramine Glucose tablets were completely different from the Athlete's usual powder in terms of form, source, manufacturer, name and packaging. The box stated the product was a 'medicament'. There were 'red flags' to warn the Athlete.

f. It would have been very easy for the Athlete to check his assumption. The ITF circulates a wallet card to each player with a list of prohibited substances for just this kind of situation.

(f) As to the ITF's appeal case, it submitted that given the Tribunal's findings it could not understand how the Tribunal arrived at a suspension term of 9 months and not a higher term. In its written brief, the ITF did not seek to persuade the CAS to impose a specific term of even a range within which we could find a correct term. By default, the ITF's submission was that the appropriate term was between 10 and 24 months. At the start of the hearing the Panel invited the ITF to do so. In its closings, the ITF said that the proper term should be in the upper half of the range available to the Panel, which is to say between 12 and 24 months. Mr Taylor then added that this was not a case in which 24 months would be appropriate. Accordingly, the Panel took the ITF's submission to be that the Athlete should have been suspended for between 12 and 23 months.

(g) In closing submissions the ITF :

a. Expressed concern that the Athlete's evidence had changed since the hearing before the Tribunal. Mr Taylor said that in the hearing below the Athlete had said he had checked the product to ensure that there were no prohibited substances in it and his mother had done the same. He said that the Athlete had said in his written evidence that nicethamide looked familiar and he had assumed it was the same as nikotinamid. He asked us to consider the Tribunal's findings and explain why we disagreed with them, if we did.

b. Said that proportionality was not relevant.

c. Submitted that the purposes here were to hide the taste of creatine and to improve its absorption. These purposes were relevant to the amount of care needed, the risk of prohibited substances being in the product and the steps the athlete needs to take.

d. Relied on the fact that the Tribunal below had characterized the Athlete's mistake as highly careless.

e. Said that any stress the Athlete was under should be given little weight.

V. JURISDICTION

57. Article R47 of the Code provides as follows:

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

The parties relied on Article 12 of the Programme as conferring jurisdiction on the CAS.

58. According to Article R57 of the Code the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.

59. In light of the foregoing, the CAS has jurisdiction to rule on the present matter.

VI. ADMISSIBILITY

60. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

61. Although the Tribunal informed the parties of the operative part of its decision on 13 September 2013 (the day of the hearing), its reasoned decision was transmitted to the parties on 23 September 2013. The Athlete's appeal is dated 24 September 2013 and the ITF's appeal is dated 26 September 2013.

62. Therefore both appeals have been brought within time and are admissible.

VII. APPLICABLE LAW

63. Article R58 of the Code provides as follows:

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

64. Accordingly, the Panel decide this dispute with reference to the Programme and, given the fact that the ITF is domiciled in England, subsidiarily the law of England & Wales. Neither party took issue with this approach.

VIII. MERITS

65. Both Parties agree that Article 10.4 of the Programme is applicable in the case at hand, since nikethamide is a Specified Substance within the meaning of the provision and because the Athlete had established how the prohibited substance had entered his system. Furthermore, both Parties are in agreement that the Athlete did not act with the intent to enhance his sport performance.

66. The ITF made clear in its submissions that, whether it was successful or not in this case, it would welcome guidance on how to approach the determination of sanctions within the 0-24 month range specified in Article 10.4. It invited the setting out of principles which could guide a hearing panel's discretion to encourage consistency. The Panel has accepted that invitation, since it agrees that it would be helpful to have guidelines to assist stakeholders when considering the application of Article 10.4.

A. Principles of general application

a. Introduction

67. Article 10.4 of the Programme reads as follows:

Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specified Circumstances:

10.4.1 Where the Participant can establish how a Specified Substance entered his/her body or came into his/her possession and can further establish, to the comfortable satisfaction of the Independent Tribunal, that such Specified Substance was not intended to enhance the Player's sport performance or to mask the Use of a performance

enhancing substance, the period of Ineligibility established in Article 10.2 shall be replaced (assuming it is the Participant's first antidoping offence) with, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, a period of Ineligibility of two (2) years.

10.4.2 To qualify for any elimination or reduction under this Article, the Participant must produce corroborating evidence in addition to his/her word that establishes, to the comfortable satisfaction of the Independent Tribunal, the absence of an intent to enhance sport performance or to mask the Use of a performance-enhancing substance.

10.4.3 Where the conditions set out in Articles 10.4.1 and 10.4.2 are satisfied, the Participant's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

68. Its origin can be traced to the World Anti-Doping Code 2009 (hereinafter referred to as "WADC"), and it is a mandatory provision required to be adopted in the internal anti-doping rules of all international sports federations who are bound by the World Anti-Doping Code.

b. Principles applicable to the length of the period of ineligibility

69. The breadth of sanction is from 0 – 24 months. As Article 10.4 says, the decisive criterion based on which the period of ineligibility shall be determined within the applicable range of sanctions is fault. The Panel recognises the following degrees of fault:

a. Significant degree of or considerable fault.

b. Normal degree of fault.

c. Light degree of fault.

70. Applying these three categories to the possible sanction range of 0 – 24 months, the Panel arrive at the following sanction ranges:

a. Significant degree of or considerable fault: 16 – 24 months, with a "standard" significant fault leading to a suspension of 20 months.

b. Normal degree of fault: 8 – 16 months, with a "standard" normal degree of fault leading to a suspension of 12 months.

c. Light degree of fault: 0 – 8 months, with a "standard" light degree of fault leading to a suspension of 4 months.

71. In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities.

72. The Panel suggests that the objective element should be foremost in determining into which of the three relevant categories a particular case falls.

73. The subjective element can then be used to move a particular athlete up or down within that category.

74. Of course, in exceptional cases, it may be that the subjective elements are so significant that they move a particular athlete not only to the extremity of a particular category, but also into a different category altogether. That would be the exception to the rule, however.

aa) The objective element of the level of fault

At the outset, it is important to recognise that, in theory, almost all anti-doping rule violations relating to the taking of a product containing a prohibited substance could be prevented. The athlete could always (i) read the label of the product used (or otherwise ascertain the ingredients), (ii) cross-check all the ingredients on the label with the list of prohibited substances, (iii) make an internet search of the product, (iv) ensure the product is reliably sourced and (v) consult appropriate experts in these matters and instruct them diligently before consuming the product.

75. However, an athlete cannot be reasonably expected to follow all of the above steps in every and all circumstances. Instead, these steps can only be regarded as reasonable in certain circumstances:

a. For substances that are prohibited at all times (both in and out-of-competition), the above steps are appropriate, because these products are particularly likely to distort competition. This follows from Article 4.2.1 WADC which states: "*The Prohibited List shall identify those Prohibited Substances and Prohibited Methods which are prohibited as doping at all time (both In-Competition and Out-of-Competition) because of their potential to enhance performance in future Competitions …*". As a result, an athlete must be particularly diligent and, thus, the full scale of duty of care designed to prevent the athlete from ingesting these substances must apply.

b. For substances prohibited in-competition only, two types of cases must be distinguished:

i. The prohibited substance is taken by the athlete in-competition. In such a case, the full standard of care described above should equally apply.

ii. The prohibited substance is taken by the athlete out-of-competition (but the athlete tests positive in-competition). Here, the situation is different.

The difference in the scenario (b ii) where the prohibited substance is taken out-of-competition is that the taking of the substance itself does not constitute doping or illicit behaviour. The violation (for which the athlete is at fault) is not the ingestion of the substance, but the participation in competition while the substance itself (or its metabolites) is still in the athlete's body. The illicit behaviour, thus, lies in the fact that the athlete returned to competition too early, or at least earlier than when the substance he had taken out of competition had cleared his system for drug testing purposes in competition. In such cases, the level of fault is different from the outset. Requiring from an athlete in such

cases not to ingest the substance at all would be to enlarge the list of substances prohibited at all times to include the substances contained in the in-competition list. CAS jurisprudence supports the view that the level of fault in case (b ii) differs. The Panel in this respect is mindful of the decision in the case CAS 2011/A/2495 in which it is held: *"Of course the athlete could have refrained from using the [product] at all, but it can hardly be a fault (or at least a significant one) to use a substance which is not prohibited"* (para 8.26). It follows from this that if the substance forbidden in-competition is taken out-of-competition, the range of sanctions applicable to the athlete is from a reprimand to 16 months (because, in principle, no significant fault can be attributed to the athlete). The Panel would, however, make two exceptions to this general rule. The principle underlying the two exceptions is that they are instances of an athlete who could easily make the link between the intake of the substance and the risks being run. The two exceptions are:

(α) Where the product that is advertised/sold/distributed as "performance enhancing". Here a particular danger arises, that calls for a higher duty of care. If – eg – the athlete ingests a product called "Muscle Pro" or a product that is designed and/or advertised to be sold to body builders, then the athlete has to comply with a higher duty of care. The decisive criterion is not whether the substance is a supplement, because that word is devoid of any helpful meaning in this context. Instead, the decisive criterion is the purpose of the product (which is usually to be ascertained by considering how it is advertised on the box or discussed on the internet or used by the community in practice).

(β) Where the product is a medicine designed for a therapeutic purpose. Again, in this scenario, a particular danger arises, that calls for a higher duty of care. This is because medicines are known to have prohibited substances in them. Not everything which is purchased in a pharmacy, however, is a "medicine", within the terms used here (see CAS 2011/A/2495, para. 8.19). For example, a caffeine pill taken by an athlete out-of-competition to stay awake or to overcome tiredness (and containing a substance prohibited in-competition) is not a medicine (see CAS 2011/A/2495, para 8.18 and CAS 2013/A/3075, para 9.6).

bb) The subjective element of the level of fault

76. Whilst each case will turn on its own facts, the following examples of matters which can be taken into account in determining the level of subjective fault can be found in CAS jurisprudence (cf. also LA ROCHEFOUCAULD, CAS Jurisprudence related to the elimination or reduction of the period of ineligibility for specific substances, CAS Bulletin 2/2013, p. 18, 24 et seq.):

a. An athlete's youth and/or inexperience (see CAS 2011/A/2493, para 42 et seq; CAS 2010/A/2107, para. 9.35 et seq.).

b. Language or environmental problems encountered by the athlete (see CAS 2012/A/2924, para 62).

c. The extent of anti-doping education received by the athlete (or the extent of anti-doping education which was reasonably accessible by the athlete) (see CAS 2012/A/2822, paras 8.21, 8.23).

d. Any other "personal impairments" such as those suffered by:

i. an athlete who has taken a certain product over a long period of time without incident. That person may not apply the objective standard of care which would be required or that he would apply if taking the product for the first time (see CAS 2011/A/2515, para 73).

ii. an athlete who has previously checked the product's ingredients.

iii. an athlete is suffering from a high degree of stress (CAS 2012/A/2756, para. 8.45 seq.).

iv. an athlete whose level of awareness has been reduced by a careless but understandable mistake (CAS 2012/A/2756, para. 8.37).

cc) Other factors

77. Elements other than fault (such as CAS 2012/A/2924, para 62) should – in principle – not be taken into account since it would be contrary to the rules. Only in the event that the outcome would violate the principle of proportionality such that it would constitute a breach of public policy should a tribunal depart from the clear wording of the text.

B. Application of the general principles to the instant case

78. The Panel now applies the general principles set out above to the case before it.

a. The starting point

79. In this case the Athlete ingested a substance out-of-competition which is forbidden only in-competition. Accordingly, at the time of ingestion, he did not commit any anti-doping rule violation.

80. Neither of the exceptions referred to above under b i or ii apply. The Coramine Glucose was not a product which was sold as performance enhancing. Nor, as Professor Sever attested (see above), was it a therapeutic medicine.

81. In this case the Athlete sought and purchased a glucose product. Glucose is a product which is bought by all kinds of people. It is not advertised as enhancing sporting capability. No prescription is necessary for its purchase. It is not designed for therapeutic purposes. The mere fact that the product in this case was purchased in a pharmacy does not mean that it constitutes a medicine.

82. Nothing turns on the fact that the Athlete consumed the glucose with creatine. Creatine is not forbidden.

83. Therefore, the range of sanctions applicable to the Athlete is from a reprimand to 16 months (because, in principle, no significant fault can be attributed to the athlete). In other words, the Athlete falls within either the light degree or normal degree of fault categories.

b. The level of objective fault

84. To determine into which of the light degree and normal degree of fault categories the Athlete falls, it is necessary to look at the level of objective fault.

85. The Panel notes that the Athlete did take some precautions (even though they were not enough to prevent the antidoping rule violation):

a. The Athlete asked his mother to purchase the product from a safe environment, namely a pharmacy.

b. The Athlete's mother did try to ascertain from the pharmacist whether or not the Coramine Glucose would be safe for the Athlete as a competitive tennis player.

c. The Athlete looked at and read the label on the product. He looked for and noted the two ingredients.

d. The Athlete took only a limited number of the pills in the box and stopped taking the product a couple of days prior to the Munich Open.

86. The Panel concludes that the Athlete's degree of objective fault falls into the light degree category (which is 0 – 8 months suspension).

c. The level of subjective fault

87. As noted above, the level of subjective fault determines where within a category an athlete falls (save in exceptional cases where it may entail an athlete moving between categories).

88. In this case, the Panel notes in the Athlete's favour the following mitigating factors:

a. He spoke some French, but not enough and thought that "nicethamide" was French for "nikotinamid".

b. He was under considerable stress at the material time (though this is not a factor to which the Panel attributes any significant weight).

c. He had already taken glucose over a long period of time without incident, which made him feel safe in taking it and less aware of the dangers involved.

d. Most importantly, when the Athlete read the ingredients, he immediately assumed that nicethamide was nikotinamid, which was a substance the Athlete had previously checked and discovered to be harmless. This initial error, which the Panel finds to be careless but not highly careless, is a) plausible and b) responsible for reducing the Athlete's subjective capacity to act according to the required standards.

89. In relation to this last point, the Panel further notes that the counsel for the ITF submits that the Athlete's version of events as presented to the CAS was different to that before the Tribunal. The Panel assumes that counsel for the ITF refers to the Athlete's oral evidence since the material parts of the Athlete's written evidence on this point are identical. Since we have preferred the Athlete's case on this point, we set out below our reasons.

90. In the Panel's view, the Athlete's oral evidence on this point has also been consistent. The relevant part of the transcript of the Tribunal hearing includes the following exchanges:

MR TAYLOR: What did you rely on? You checked the pack you said it said "comprimés à sucer", and you thought that was sugar.

A: Yes.

Q: You saw nicethamide?

A: I saw nikotinamid and glucose and I instantly assumed that nikethamide was an ingredient for my glucose powder.

...

Q: You read that and you said that is nikotinamid.

A: Yes, I assumed it was nikotinamid.

Q: Remember I asked you about the Creatine and what the ingredient was, you said that is mono something, but when you thought back to the glucose powder you said that is nikotinamid. You remembered precisely.

A: Yes. Basically, I thought it was nikotinamid.

Q: My question I guess is, you could remember precisely the ingredient of the glucose powder, nikotinamid.

A: If I would know exactly, I would not mistake the....

Q: There are two things. One is whether this word is like nikotinamid. The other one is, did you remember specifically it was nikotinamid or did you remember it was something like that?

A: I assumed that it was the vitamin like nikotinamid, but I am not sure if I knew exactly if it was nikotinamid exactly.

Q: I am sorry, I am pressing this because it is an important distinction for me. That looks like you could be saying, "That looks like the ingredient I looked up on the glucose powder. I cannot remember precisely what it was, but it was something like that." You could be saying that. You could be saying, "I remember like a laser it was nikotinamid and that is what that is, or it could be something in between".

A: No, I did not exactly know that it is nikotinamid, otherwise I would know it is different.

Q: But it sounded like your memory of what the ingredient was from the glucose powder?

A: Yes.

Q: Nikethamide sounds like what was in the glucose powder. That is what you said.

A: Yes.

91. In cross-examination, Counsel for the ITF asked the Athlete whether he was sure, when he looked at the Coramine Glucose, that the ingredient other than glucose was "nikotinamid" or whether it sounded like it. He said that before the Tribunal the Athlete had said it sounded like "nikotinamid". The Athlete's response was that he was sure it was "nikotinamid". In response to the Panel's questioning, he confirmed he was "convinced" it was nikotinamid.

92. Whilst the Panel understands that counsel for the ITF was trying to make the point that the Athlete did not know that nicethamide and nikotinamid were the same substance, but rather only that they sounded similar, no doubt so that he could say that the Athlete, being in a state of doubt, should have made further enquiries, the Panel rejects that submission for the following reasons:

    a. First, whilst the Athlete did in cross-examination concede that he thought nicethamide sounded like nikotinamid, the Panel does not understand that concession to be anything more than to say that the two words sound similar to each other and not identical to each other.

    b. Secondly, that concession is entirely consistent with the Athlete's written evidence which says "I instantly assumed that "nicethamide" was French for "nikotinamid". He acknowledges that the two words are different in language, spelling and sound. It is not his case that he thought the words were identical.

    c. Thirdly, the Athlete's concession in cross-examination before the Tribunal that the *words* were similar is consistent with his oral evidence before us that he was sure/convinced the *substances* were identical.

93. Accordingly, the Panel finds that there was no conflict between the various testimonial or written evidence given by the Athlete (whether that conflict be said to exist between his written and oral evidence or between his evidence before the Tribunal and before the Panel).

94. The Panel is supported in this view by the fact that:

    a. It is consistent with the Athlete's prior conduct. He has shown himself to be careful in his conduct relating to doping risks in the past. For example, when previously he found himself in Australia unable to find his usual electrolyte drink, he did not use a different one he had come across until he asked his NOC to check and confirm that it did not contain any prohibited substances.

b. The Tribunal found at para 8 that the Athlete was "an honest and truthful man" and that his testimony to the Tribunal was full, frank and accurate, as was that of all the witnesses who gave oral evidence."

95. Returning to the question of sanction, we find that the exacerbating and mitigating factors in this case are of roughly equal weight. The Panel therefore find this to be a "standard" case of light degree of fault. In considering where in the range of 0 – 8 months suspension the Athlete, the Panel finds that, after considering the degree of the athlete's fault here ("standard" case of light degree of fault) and the prior cases attributing fault to an athlete as presented to the Panel by the parties, the appropriate amount of time is situated in the middle of the applicable range of 0 – 8 months, i.e. four (4) months.

d. Reasons for disagreement with the Tribunal below

96. As noted above under the heading of the ITF's submissions, counsel for the ITF invited the Panel to explain why it differed from the Tribunal's reasoning, if it did so. Because the Panel has undertaken a different process to the Tribunal when it comes to sanction, applying some general principles which the Panel has sought to establish for the first time in this case, which principles were (inevitably) not before the Tribunal, the Panel does not think it is helpful or necessary to compare and contrast in detail its Award with the Tribunal's decision. Given the provisions of Article R57 of the Code guaranteeing parties a *de novo* review of the decision below, the Panel also does not think this is an appropriate analysis.

97. However, the Panel would say that (and it should be apparent from the above reasoning) a key difference between its analysis and that of the Tribunal is that whereas the Tribunal found the player's fault to be "quite high" (para 101 of the Tribunal's decision), the Panel did not. This is in large part due to the fact that, unlike the Tribunal (see para 103), the Panel largely accept Mr Jacobs' submission that once the Athlete had made his initial mistake in relation to thinking nicethamide was the same product as nikotinamid, it is not reasonable to impose upon the Athlete the same expectation to take steps such as making online searches and considering the ITF wallet card. As noted above, once the initial mistake had been made, the Athlete's subjective capacity to comply with his objective duty was reduced.

IX. COSTS

98. (…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Marin Cilic on 24 September 2013 is partially upheld.

2. The appeal filed by the International Tennis Federation on 26 September 2013 is dismissed.

3. The *International Tennis Federation Independent Anti-Doping Tribunal's* decision on sanction (found at subparagraphs (2), (3) and (6) of paragraphs 108) of 23 September 2013 is set aside and replaced with the following:

    a. Mr Cilic's individual results shall be disqualified in respect of the BMW Open in Munich, and in consequence any prize money and ranking points obtained by Mr Cilic through his participation in that event must be forfeited;

    b. Mr Cilic is declared ineligible from participating in any capacity in any event or activity (other than authorised anti-doping education or rehabilitation programmes) or competition authorised, organised or sanctioned by the ITF or any of the other bodies referred to in Article 10.10.1(a) of the Programme for a period of four months commencing on 23 September 2013. The period of Provisional Suspension (26 June 2013 until 23 September 2013) served by Mr Cilic shall be credited against the total period of ineligibility to be served.

4. All results, ranking points and prize money earned between 2 May 2013 and 25 June 2013 (inclusive) are undisturbed (and therefore reinstated).

5. (…).

6. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Operative part of the award issued on 25 October 2013

Full award issued on 11 April 2014.

THE COURT OF ARBITRATION FOR SPORT

Ulrich **Haas**
President of the Panel

Jeffrey G. **Benz**
Arbitrator

Romano **Subiotto** QC
Arbitrator

Tom **Asquith**
Ad hoc clerk