CAS 2016/A/4643 Maria Sharapova v. International Tennis Federation

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

President: Mr Luigi Fumagalli, Professor and Attorney-at-Law, Milan, Italy

Arbitrators: Mr Jeffrey G. Benz, Attorney-at-Law, Los Angeles California, USA and London, United Kingdom

Mr David W. Rivkin, Attorney-at-Law, New York, New York, USA

between

MARIA SHARAPOVA, Florida, USA

Represented by Mr John J. Haggerty, Esq., Attorney-at-Law, Fox Rothschild LLP, Warrington Pennsylvania, USA, Mr Howard L. Jacobs, Esq., Attorney-at-Law, Law Offices of Howard L. Jacobs, Westlake Village California, USA, and Mr. Mike Morgan, Attorney-at-Law, London, United Kindgom

Appellant

and

INTERNATIONAL TENNIS FEDERATION, London, United Kingdom

Represented by Mr Jonathan Taylor and Ms Lauren Pagé, Attorneys-at-Law, Bird & Bird LLP, London, United Kingdom

Respondent

1. BACKGROUND

1.1 The Parties

1. Maria Sharapova (the "Player" or the "Appellant") is a top-level professional tennis player of Russian nationality born on 19 April 1987. The Player has been a resident in the United States of America since 1994, and has competed regularly on the WTA Tour[1] since 2001. She is one of only ten women to hold the Career Grand Slam, having won four Grand Slam events in a single discipline. She also won the silver medal in women's singles at the 2012 Summer Olympic Games in London.

2. The International Tennis Federation ("ITF" or the "Respondent") is the International Olympic Committee-recognized international sports federation for the sport of tennis, and has its headquarters in London, United Kingdom. One of the objects and purposes of the ITF is to promote the integrity of tennis and to protect the health and rights of tennis players. To these ends, the ITF, a signatory to the World Anti-Doping Code (the "WADC") established by the World Anti-Doping Agency ("WADA"), adopted the Tennis Anti-Doping Programme (the "TADP") to implement the provisions of the WADC.

1.2 The Dispute between the Parties

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

4. On 26 January 2016, at the Australian Open Tournament (the "Tournament") in Melbourne, Australia, the Player underwent a doping control test in accordance with the TADP, version 2016.

5. On 2 February 2016, the Player underwent an out-of-competition anti-doping test in Moscow, Russia.

6. On 2 March 2016, the Player was informed by the ITF that the A sample collected from her at the Tournament had tested positive for the presence of Meldonium at the concentration of 120 μg/ml. Meldonium is a prohibited, non-specified substance included at S4 (*Hormone and Metabolic Modulators*) in the list of prohibited substances (the "Prohibited List") since 1 January 2016 promulgated by WADA.[2] The Player was also informed that such adverse analytical finding (the "AAF") constituted an anti-

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[1] The Women's Tennis Association ("WTA") is the principal organizing body of women's professional tennis. It governs the WTA Tour, which is the worldwide professional tennis tour for women.

[2] The sample collected on 2 February 2016 also tested positive for Meldonium, at the concentration of 890 ng/ml (i.e., 0.89 μg/ml). The Respondent agreed in its submissions also before CAS that this adverse analytical finding appears to be caused by "*the remnants of Mildronate tablets that [the Player] took during the 2016 Australian Open*". Therefore, no issue arises with respect to such second adverse analytical finding, which, as a consequence, will no longer be mentioned in this award.

doping rule violation under Article 2.1 of the TADP (the "ADRV"), that she had the right to have her B sample analysed, as well as of the possible consequences of the ADRV. At the same time, the Player was advised, in accordance with Article 8.3.1(a) of the TADP, that she was "*Provisionally Suspended until this matter is resolved, with effect from 12 March 2016*".

7. In a letter dated 4 March 2016, the Player, through counsel, admitted the ADRV as follows:

"*having just received the notification of the Adverse Analytical Finding, Ms. Sharapova waives her right to have her 'B' sample opened and analyzed, and admits the presence of Meldonium in her sample, pursuant to Article 8.2.1 of the … TADP. Ms. Sharapova also wishes to advise the ITF at this time, without prejudice to providing further details at a later date, that she used Mildronate at the recommendation of a trusted doctor, for several medical conditions including asthenia, decreased immunity, ECG Short PR-Interval, magnesium deficiency and diabetes indicators with a family history of diabetes, starting a decade before Meldonium was ever placed on either the WADA Prohibited List or the WADA Monitoring Program. As a result of your March 2nd letter she now knows that Mildronate is also known as Meldonium.*

Ms. Sharapova submits that her use of Mildronate was not "intentional" within the meaning of TADP Article 10.2.1(a), in that (i) there was no intention to cheat; (ii) she was unaware that her use of Mildronate constituted an Anti-Doping Rule Violation; and (iii) she was unaware that there was a significant risk that her conduct might constitute or result in an Anti-Doping Rule Violation. Therefore, it is submitted that the maximum possible sanction in this case should be two years.

Furthermore, Ms. Sharapova reserves the right to argue for the elimination or reduction of the sanction pursuant to TADP Articles 10.4 and 10.5.2; and on that basis, requests an in-person hearing before the Tribunal to make submissions as to the consequences that should be imposed. That being said, we would be open to discussing the matter with you informally, to explore whether the parties can agree on an appropriate sanction".

8. On 7 March 2016, the Player held a press conference in California, during which she publicly announced that she had inadvertently committed an anti-doping rule violation by ingesting Mildronate.

9. As a result, the case of the Player was referred to an independent tribunal constituted under Article 8.1.1 of the TADP.

10. On 6 June 2016, the Independent Tribunal appointed by the ITF to hear the Player's case (the "Tribunal") issued a decision (the "Decision"), holding that:

"*(1) An anti-doping rule violation contrary to article 2.1 of the TADP was committed by Maria Sharapova as a result of the presence of Meldonium in the samples collected from her at the Australian Open on 26 January 2016 and out of competition in Moscow on 2 February 2016;*

(2) Under article 9.1 the player is automatically disqualified in respect of her results in the 2016 Australian Open Championship, forfeits 430 WTA ranking points and prize money of AUS$281,633 obtained in that competitions;

(3) Under article 10.2 the period of ineligibility to be imposed is 2 years;

(4) Under article 10.10.3(b) the period of ineligibility shall commence on 26 January 2016".

11. In essence, the Tribunal found in the Decision that:

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

2. THE ARBITRAL PROCEEDINGS

2.1 The CAS Proceedings

12. On 9 June 2016, pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code"), the Player filed a statement of appeal with the Court of Arbitration for Sport (the "CAS") challenging the Decision. The statement of appeal contained, *inter alia*, the appointment of Mr Jeffrey G. Benz as an arbitrator and the request for an expedited hearing.

13. In a letter of 14 June 2016, the Respondent agreed to expedite this procedure.

14. On 14 June 2016, the CAS Court Office noted the procedural timetable agreed by the parties. At the same time, the parties were advised that since two of the prospective arbitrators suggested for appointment by the Respondent were not available to sit on the appeal, the CAS Court Office would proceed with the Respondent's nomination of Professor Philippe Sands as arbitrator in accordance with para. 1.8.2 of the statement of appeal.

15. On 20 June 2016, the Appellant informed the CAS Court Office that the parties had agreed to resume the appeal on a non-expedited basis. The Appellant indicated, in fact, that she had identified potential additional witnesses and evidence that she wished to evaluate and potentially introduce at the CAS hearing, and which would preclude her ability to comply with the parties' agreement to expedite the appeal as agreed upon. She therefore requested the CAS Court Office to vacate the existing expedited schedule and adopt a new non-expedited schedule.

16. On 21 June 2016, the CAS Court Office noted the modified procedural timetable. At the same time, the parties were advised that Professor Philippe Sands was unavailable to sit in this procedure and that, as a result, it would proceed with the Respondent's nomination of Mr David W. Rivkin, one of the proposed arbitrators who had been unavailable on the original procedural timetable, as an arbitrator in accordance with para. 1.8.2 of the statement of appeal; the President of the CAS Appeals Arbitration Division would then appoint a President of the Panel in due course.

17. On 30 June 2016, the CAS Court Office informed the parties, for the avoidance of doubt, that Professor Sands had formally offered his resignation from this procedure.

18. On 12 July 2016, pursuant to Articles R33 and R54 of the Code, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, informed the parties that the Panel appointed to hear the dispute between the parties was constituted as follows: Professor Luigi Fumagalli, President; Mr Jeffrey G. Benz and Mr David W. Rivkin, Arbitrators.

19. In a letter of 12 July 2016, the Appellant informed the CAS Court Office that the parties had agreed to amend the briefing schedule.

20. On the same date, 12 July 2016, the CAS Court Office confirmed the parties' agreement to amend the existing timetable in favour of a modified schedule.

21. In accordance with such schedule:

    i. on 10 August 2016, the Appellant lodged her appeal brief, together with a bundle of 67 documents and a bundle of authorities. The Appellant also indicated the names of the witnesses and experts (in a total number of 20 persons) available to confirm at the hearing the facts and the circumstances outlined in the appeal brief and in their respective statements and/or reports;

    ii. on 31 August 2016, the Respondent filed its answer to the appeal, together with a bundle of 67 documents, which included 6 witness statements, and a bundle of authorities.

22. In a letter of 29 August 2016, the CAS Court Office noted the list of witnesses proposed by the Appellant in her appeal brief and expressed the Panel's concern as to the possibility to hear all those witnesses, as well as those indicated by the Respondent, at the hearing in the time allocated. It therefore invited the Parties' counsel to liaise and identify those witnesses that they deemed necessary and that they wished to actually have heard in person. The parties were also invited to propose a hearing schedule.

23. On 30 August 2016, the CAS Court Office issued on behalf of the President of the Panel an order of procedure (the "Order of Procedure"), which was accepted and signed by the parties.

24. On 3 September 2016, the Respondent submitted a proposed indicative hearing schedule agreed by the parties, which contained the following stipulation:

    "*1. In order to stream line the appeal, the parties have agreed not to call every witness or expert named in their respective briefs. Witnesses' written statements/reports to be taken as read.*

    […]

    3. The parties agree that the evidence of any witnesses:

        a. who were cross-examined below, but who will not be cross-examined before the CAS, remains challenged on the basis of the cross-examination below (see hearing transcript filed at MS DB 25), i.e. to streamline the process, the cross-examination of those witnesses will not be repeated. The parties

reserve the right to make submissions as to the effect and weight of that challenged evidence.

b. who are not subject to any cross-examination (whether below or before CAS) is accepted, but the parties reserve the right to make submissions as to the effect and weight of that evidence

[…]".

25. On 5 September 2016, the CAS Court Office forwarded to the parties the hearing schedule approved by the Panel.

26. On 7 and 8 September 2016, a hearing was held in New York as per the parties' agreement. The Panel was assisted by Mr Brent J. Nowicki, Counsel to CAS. The following persons attended the hearing for the parties:

i. for the Appellant: the Player in person, assisted by Mr John J. Haggerty, Mr Mike Morgan and Mr Howard L. Jacobs, counsel;

ii. for the Respondent: Dr Stuart Miller, Senior Executive Director, Integrity and Development of ITF, Mr Jonathan Taylor and Ms Lauren Pagé, counsel.

27. At the opening of the hearing, both parties confirmed that they had no objections to the appointment of the Panel. The Panel, after opening statements by counsel, heard declarations from Mr Yuriy Sharapov, Mr Max Eisenbud, Dr Stuart Miller, Dr Olivier Rabin and the Player herself. Each of the witnesses who had submitted a written statement in the proceedings before the Tribunal or before this Panel confirmed the content of such statements. The witness statements for those witnesses not testifying were admitted to the file.

28. The contents of the respective statements can be summarised as follows:[3]

i. Mr Yuriy Sharapov, the father of the Player, explained the reasons for the prescription by Dr Skalny, and for the use by the Player, of Magnerot, Mildronate and Riboxin (the "Skalny Products"), as well as the system put in place in order to ensure compliance with anti-doping requirements. Mr Sharapov described himself to be at "*the core*" of the system. Dr Skalny recommended the use of these products to protect the Player's health, including heart issues, prior to demanding physical activity. In that regard, Mr Sharapov indicated *inter alia* that he requested Dr Skalny (a doctor he had chosen to treat his daughter's medical problems) to obtain written certifications from the WADA-accredited Moscow laboratory as to the absence of prohibited substances in the Skalny Products, and moreover, that he was part of the decision in 2013 to entrust Mr Eisenbud with the task of checking the Prohibited List to confirm the same on an annual basis.

[3] The summary which follows intends to give an indication of only a few points touched at the hearing. The Panel, in fact, considered the entirety of the declarations rendered at the hearing and/or contained in the relevant witness statements, filed for the purposes of this arbitration or in the proceedings before the Tribunal. At the same time, the Panel took into account the transcript of the testimony of all witnesses before the Tribunal.

Indeed, Mr Sharapov believed Mr Eisenbud to be the right person for this responsibility. At the same time, however, Mr Sharapov confirmed (a) that he did not tell Mr Eisenbud how to conduct such checks, and (b) that Dr Skalny had recommended the continued use of the Skalny Products;

ii. Mr Max Eisenbud, the agent of the Player and Senior Vice President of IMG, a leading sports agency, described the structure of IMG and discussed his involvement (as well as IMG's involvement) in global assistance to the Player, which included anti-doping related matters, the management of "whereabouts" information, and applications for a Therapeutic Use Exemption ("TUE") for the Player. With respect to the products the Player ingested, Mr Eisenbud explained the procedure he followed to ensure compliance with anti-doping regulations. As he explained, he worked with contacts at the WTA, but only when the Player began taking new substances. Such procedure did not apply to the substances prescribed by Dr Skalny years before, as they had already been certified as compliant through a WADA anti-doping laboratory. Mr Eisenbud confirmed that he was aware that the Player was using the Skalny Products even after she had ceased to be under the care of Dr Skalny because they were important to her health. In that regard, Mr Eisenbud noted the names of the Skalny Products as mentioned in a certification issued by the WADA-accredited Moscow laboratory, and therefore understood that those names had to be checked to verify whether they were included in the Prohibited List. In any case, he was not aware that Mildronate was only a brand name, and not a substance. No specific request was made by the Player to clarify this point with Mr Eisenbud. At the same time, Mr Eisenbud confirmed that he has no medical or scientific expertise and that he has undergone no anti-doping training. The Player was aware of this fact. Mr Eisenbud further explained the circumstances which caused his failure to check the modifications introduced in the 2016 Prohibited List and the bad moment he was going through, for personal reasons, at the end of 2015, when he received the messages intended to inform the players of the changes to the Prohibited List, which circumstances otherwise caused him to not check or address the notice of those changes. Finally, Mr Eisenbud underlined the devastating effects the AAF has had on himself and the Player;

iii. Dr Stuart Miller, Senior Executive Director, Integrity and Development of ITF, explained the steps taken by the ITF to inform the players of the modifications to the Prohibited List, through the ITF website, a "hot line", emails and a "wallet card". Dr Miller confirmed that in his opinion those steps were "reasonable", even though he conceded that the notion of what is "reasonable" to publicize modifications regarding a substance could depend on the level of information the ITF might have with respect to the use of that substance by a tennis player, as was done in the past with respect to a substance called "DMBA". In any case, the ITF did not have such information with respect to Meldonium, and in addition, in his opinion the number of top players coming from Eastern European countries is not so large as to justify a different approach. Dr Miller then described the procedure the ITF followed for the distribution of the "wallet card", taking place through the WTA, on the basis of verbal agreements: WTA would distribute such "wallet card" to the players visiting its offices at tournaments. No procedure is however contemplated to follow up with the WTA's distribution and to verify whether the "wallet card" was actually received by the players or their authorized

representatives. With regard to the email of 22 December 2015 concerning the "*Main Changes to the Tennis Anti-Doping Program me for 2016*", Dr Miller indicated that it was sent to a distribution list drawn from the web-based anti-doping database established by WADA ("ADAMS"), which included the Player's representative (at IMG). Such message, however, did not directly highlight any changes with respect to Meldonium;

iv. Dr Olivier Rabin, Science Director of WADA, explained the procedure followed for the inclusion of Meldonium in the Monitoring Programme for 2015 and in the 2016 Prohibited List, and the level of information available to WADA at the relevant times with respect to the use of Meldonium in sport. At the same time, Dr Rabin confirmed that substances are normally included in the Prohibited List on the basis of their "International Nonproprietary Names (INN)" (or "generic names") when assigned to pharmaceuticals by the World Health Organization (WHO), and not of their "brand names". In the case of Meldonium, the International Nonproprietary Name (Meldonium) was associated to a brand name (Mildronate) in the Summary of Major Modifications published with the 2016 Prohibited List, in light of its prevalence of use and because it was thought that this information was useful;

v. The Player confirmed the key role of her father within her organization and summarized the activities performed by Mr Eisenbud in her favour. She asserted that it was therefore natural for her to entrust Mr Eisenbud with all anti-doping issues, including the checking of the substances she was assuming, when she left the care of Dr Skalny. In fact, even though she knew that Mr Eisenbud had no specific anti-doping training, IMG was already taking care of the submission of her whereabouts information as well as her TUE applications. At the same time, the Player indicated *inter alia* that:

- she had specifically asked Dr Skalny to prescribe her only products complying with anti-doping regulations, but she had not given him instructions to check the products with the Moscow laboratory;
- she had understood that the matches of special importance for which she had to increase the dose of Mildronate were those played in demanding conditions;
- she had not directed Mr Eisenbud to take certain actions so as to verify the conformity with anti-doping regulations of the products she was taking. However, after the AAF she learned that Mr Eisenbud printed the Prohibited List to check it against the products she was ingesting;
- she did not further check the substances she was ingesting, through the ITF website, the "hot line" established by ITF, checking the package and/or leaflet of the product, or otherwise, since she had a system in place for such purpose. In any case, she had received no specific instruction from ITF or WTA to take these measures;
- she is aware of the distinction between "generic" and "brand" names of the products, but she was convinced that Mildronate was the name of the ingredient and not of the "brand";
- the ingestion of the Skalny Products (including Mildronate) had become for her *routine*. It was completely natural for her to take them, without further cross-checking or investigation because they had been approved by the

Moscow laboratory and Dr Skalny had recommended that she should continue to use those three products;

- she did not hide her ingestion of Mildronate by not declaring it on her doping control forms, since Meldonium was not forbidden until 2016. She had simply misunderstood the meaning and scope of the declaration to be rendered.

29. The parties, by their counsel, made submissions in support of their respective cases. In such context, *inter alia*, the Appellant's counsel confirmed that "*we are not arguing that the ITF should have known about Maria Sharapova's 2015 monitoring samples; and will not be arguing that the ITF should have warned Maria Sharapova about the results of her 2015 monitoring test results. As a consequence, we will stipulate that paragraphs 9.4 though 9.8 of the Witness Statement of Richard Ings can be stricken*".

30. At the conclusion of the hearing, the parties expressly stated that their right to be heard and to be treated equally in the proceedings had been fully respected.

2.2 The Position of the Parties

31. The following outline of the parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Appellant and the Respondent. The Panel has nonetheless carefully considered all the submissions made by the parties, whether or not there is specific reference to them in the following summary.

a. The Position of the Appellant

32. The statement of appeal contained the following "*Main Requests*":

> *"4.2.1 Ms Sharapova requests that CAS rule as follows:*
>
> *4.2.1.1 That her appeal of the ITF's decision to sanction her under Article 2.1 of the Programme is admissible.*
>
> *4.2.1.2 That the decision of the ITF be set aside.*
>
> *4.2.1.3 That Ms. Sharapova's sanction be eliminated, or, in the alternative, reduced.*
>
> *4.2.1.4 That the ITF shall bear all costs of the proceeding including a contribution toward Ms. Sharapova's legal costs. …*"

33. In her appeal brief, the Player confirmed her request that the Panel:

> "*(a) annul the Decision;*
>
> *(b) acknowledge that she did not take Mildronate intending to enhance her performance;*
>
> *(c) limit any period of ineligibility to be imposed on her to time served as of the date of the decision (approximately eight months); and*
>
> *(d) order the ITF to:*
>
> *(i) reimburse Ms. Sharapova her legal costs and other expenses pertaining to*

these Appeal proceedings before CAS;

(ii) bear the costs of arbitration".

34. As a basis of her claim, the Player submits that the Tribunal failed to follow the applicable rules and regulations in rendering its decision; made improper assumptions in rendering its decision; failed to accurately assess the evidence submitted in rendering its decision; and rendered a sanction that was inconsistent with recent sanctions.

35. In her appeal, the Player addressed the factual background of the dispute, identified the relevant legal framework, and developed the legal agreement specific to support her requests for relief.

36. As to the factual background, the Appellant first described herself, Mildronate and Meldonium, and her use of Mildronate. Next, she addressed the issues surrounding the introduction of Meldonium to the Prohibited List and of the notification to athletes about the prohibited status of Meldonium. More specifically:

i. the Player, after summarizing her personal and sporting history, underlined that she has never violated any anti-doping rules, that she has maintained a flawless disciplinary record, and that she would never knowingly or deliberately use prohibited substances, as confirmed by a number of witnesses as to her character;

ii. Meldonium, primarily manufactured in Latvia and sold in many eastern European countries under the brand name "Mildronate", is typically and widely used as a "*cardio-protector*" and, in light of its therapeutic action, "*it is entirely logical that a person would be more likely to use meldonium where the heart is likely to be exposed to greater stress – i.e. during exercise – than at other times*". It is also used as an "*anti-diabetic*". Meldonium, as Mildronate or under another brand, is widely used in Russia and its consumption is so prevalent that since 2010 it has been included in the Russian "*List of Vital and Essential Drugs*", which "*recognizes the importance of public access to Meldonium*". In addition, there is no basis on which it could be concluded that Meldonium is in any way performance enhancing, since "*preventing the death of heart cells and lowering blood glucose are matters of health*";

iii. the Player used Mildronate "*for an entirely legitimate purpose and not for any performance-enhancing reason, nor any other sinister purpose*", as her medical history shows. In fact, in light of her significant medical problems (which included "*pain and discomfort in the precordial region*", "*complaints regarding exercise-induced fatigue and psycho-emotional overstrain*", "*susceptibility to cold-related and inflammatory diseases*", "*dizziness and symptoms of vegetative-vascular dystonia*", "*borderline abnormal electrocardiogram and laboratory results*", "*mineral metabolism disorder*" and "*insufficient supply of nutrients through food intake*") and her "*risk factors*", the Russian doctor who treated her from 2005 to 2013, Dr Anatoly Skalny, provided her in January 2006 with a "*Rehabilitative Correction Plan*", which included "*short courses of Mildronate (usually 7-14 days) in combination with Magnerot, Riboxin and other products*". It was, therefore, entirely logical that Dr Skalny would prescribe a product (Mildronate) intended, also on match days, to protect her heart and to lower glucose levels. The Player trusted Dr Skalny and followed his advice in order to

protect her health, especially in light of her family medical history;

iv. Meldonium was introduced by WADA on 1 January 2015 in the Monitoring Program for 2015 and then, on the basis of the data generated by the Monitoring Program, added to the Prohibited List for 2016, which was published on WADA's website on 29 September 2015. In the Appellant's opinion, the decision of WADA to introduce Meldonium to the Prohibited List was based on a flawed scientific study and two papers recycling the data generated by that flawed study, on marketing claims of manufacturers and retailers of Meldonium and on the prevalence of use of Meldonium in certain European countries, but without understanding much about pharmacokinetics or the functions and effect of Meldonium;

v. little effort was made by WADA or the ITF to notify athletes and chiefly those from eastern European countries, such as the Player, of the introduction of Meldonium in the 2016 Prohibited List. In the same way, the WTA did not issue any specific notice related to Mildronate/Meldonium. Such attitude of WADA, ITF and WTA contrasts notably with the actions taken by other federations in other sports, which did much more in terms of information to athletes regarding the publication of Meldonium's prohibited status. Specific reference is made in such respect to the efforts of other sporting federations, specifically to the communication efforts of the International Weightlifting Federation (IWF), Russian Skating Union (RSU), Russian Anti-Doping Agency (RUSADA) with regard to Russian skaters, Belarus Athletic Federation (BAF), and International Floorball Federation (IFF). In the Appellant's opinion, WADA was aware that an enormous number of athletes were using Meldonium/Mildronate, as this was the basis for the inclusion of Meldonium in the 2016 Prohibited List. It was therefore incumbent on WADA and the ITF to make sure that athletes and sport governing bodies were aware and understood the change: "*the fact that it did not do so is a total dereliction of duty and an affront to athletes' rights*".

37. As to the legal framework, the Appellant points to the provisions of the TADP governing the setting of consequences for the anti-doping rule violation for which she is responsible, and chiefly to Article 10.5 of the TADP, allowing a reduction for "*No Significant Fault or Negligence*" ("NSF"). In fact, the Appellant:

i. accepts that she bears some degree of fault and therefore does not plead a defence of "*No Fault or Negligence*" ("NF");

ii. accepts that her results at the 2016 Australian Open be disqualified, and therefore does not challenge the Decision in this respect;

iii. notes that the lack of intentionality (for the purposes of Article 10.2.2 of the TADP) was acknowledged by the Tribunal, and therefore that the baseline sanction should be 2 years of ineligibility;

iv. underlines that, if she can establish NSF, this Panel has discretion to reduce the period of ineligibility to one half (*i.e.*, to 1 year), and

v. in the circumstances of the case, the Panel should exercise its further discretion to reduce the ineligibility to a shorter period, consistent with the principle of proportionality.

38. In addition to the TADP, the Appellant submits that her case should be decided pursuant to:

    i. Swiss law, to be applied notwithstanding Article 1.7 TADP referring to English law, in order to ensure the uniform application of doping rules based on the WADC; and

    ii. general principles of law, and chiefly the principle of proportionality.

39. In support of her request for relief, the Appellant described the extent and effectiveness of the system she had in place to ensure anti-doping compliance on a day-to-day basis. Namely, Dr Skalny worked closely with the WADA-accredited laboratory in Moscow to obtain certifications that the substances he was prescribing to the Player did not contain any prohibited substance; IMG, one of the world's largest sports agencies, and her agent, Mr Eisenbud, worked closely with the WTA and made personal checks to ensure compliance with the TADP and to verify the (non)inclusion in the Prohibited List of the products used by the Player. It was only at the end of 2015 that an issue arose with respect to the 2016 Prohibited List, which the Appellant attributed to some personal problems affecting Mr Eisenbud. In any case, Mr Eisenbud is a world-class sports agent and it was reasonable for the Player to rely on him.

40. In that regard, the Appellant underlined that: "*athletes are permitted to delegate elements of their anti-doping obligations. If a mistake later arises, the fault to be assessed is not that made by the delegate but the fault made by the athlete in his/her choice*". Reference is made, in support of such conclusion, to the CAS award of 8 June 2015, *Al Nahyan v. Fédération Equestre Internationale*, CAS 2014/A/3591 ("*Al Nahyan*"). In light of this, the question is not whether Mr Eisenbud's failings have to be attributed to the Player. They do not give the measure by which the Player has to be judged. The issue is about the choice of IMG and Mr Eisenbud to perform anti-doping compliance services. And the Player cannot be faulted for having relied on the services of one of the largest and best resourced sports managements firms and of Mr Eisenbud, who had advised her since she was 11 years old, had performed thorough anti-doping checks and assistance for her over several years with diligence and urgency, and understood better than anybody the catastrophic consequences of a positive test.

41. At the same time, the Appellant underlines that it was entirely reasonable for her and Mr Eisenbud to believe that Mildronate was the name of the substance (not the brand name). They cannot be reproached for such belief.

42. On the other hand, the Player's error "*did not occur in a vacuum*". First, it arose to a significant extent due to WADA's "*troubling and indefensible mistakes*", since WADA knew that Meldonium was widely known under the name of Mildronate, but still did not mention Mildronate on the 2016 Prohibited List, and was aware of the large number of athletes using Mildronate, but failed to issue specific warnings. In the same way, the ITF did virtually nothing to notify athletes of the change in the status of Meldonium.

43. On such basis, as indicated, the Appellant claims that she meets the criteria for NSF as there is no dispute as to how Meldonium entered her system, and "*her degree of fault was small in the circumstances*", taking into consideration:

    i. the Player's understanding and experience of Mildronate, a popular product in

eastern Europe, used for ten years to protect her heart;

ii. that the Player is, and has been for years, very careful about what she ingests;

iii. that the Player, before ever using Mildronate, received unqualified written confirmations by the WADA-accredited laboratory in Moscow that it was safe *vis-à-vis* anti-doping regulations;

iv. that the Player entrusted IMG, one of the world's leading sports agencies, with checking the Prohibited List to ensure that the Skalny Products remained safe for her to use, and had seen Mr Eisenbud diligently take care of elements of her anti-doping compliance dating back to 2010. She cannot be blamed for trusting one of the largest and best resourced sports agencies in the world and her agent with the task;

v. that both the Player and Mr Eisenbud mistakenly, but honestly, believed Mildronate to be the name of a substance and did not realize that it was a brand name. Notably, Mildronate did not appear on the Prohibited List. International federations, scientists and even the creator of Meldonium treated Mildronate as the name of the substance. It is not, therefore, unreasonable that the Player and Mr Eisenbud believed the same;

vi. that WADA acted negligently in adding Meldonium to the Prohibited List;

vii. that the ITF and the WTA manifestly did not do anywhere near as much as other international and national federations to notify athletes that Mildronate/Meldonium would become prohibited. The Player would undoubtedly not be in the position she is in if the ITF had fulfilled its responsibility under Article 3.1.3 of the TADP to "*take reasonable steps to publicise any amendments made by WADA to the Prohibited List*";

viii. against that context, the Player was only careless to a very small degree: the anti-doping compliance system she had in place did not pick up the change in status of Mildronate only due to a combination of circumstances;

ix. a number of precedents offer support for a finding of a minimal level of fault. Specific reference is made to:

- *ITF v/ Hood*, decision rendered on 8 February 2008 by the ITF Independent Tribunal ("*Hood*");
- *WADA v/ USADA, USBSF and Lund*, award of 10 February 2006, CAS OG 06/001 ("*Lund*");
- *ITF v/ Cilic*, award of 11 April 2014, CAS 2013/A/3327 ("*Cilic*");
- *FINA v/ Kreuzmann*, award of 18 January 2006, CAS 2005/A/921 ("*Kreuzmann*").

44. Even though a finding of NSF allows a maximum reduction of the ineligibility period to 1 year, the Panel should further consider whether the sanction is proportionate. The Panel, as a result of such exercise, should find that any period exceeding 8 months would be disproportionate, taking into account the meaning of proportionality, the conditions for the verification of its respect, the context in which this case has arisen and the Player's misconduct.

45. Some final observations were made with respect to the Decision, which, in the

Appellant's opinion, was driven by a number of misunderstandings and relied on irrelevant factors. Therefore, the findings of the Tribunal provide no useful reference point for the Panel.

b. The Position of the Respondent

46. In its answer to the appeal, the Respondent requested the Panel:

"*… to reject the Appellant's plea of No [Significant] Fault or Negligence, and her plea for a reduction on proportionality grounds, and instead to reject the appeal and leave the decision of the Independent Tribunal undisturbed.*

… to order the Appellant to pay a contribution towards the ITF's legal fees and other expenses in this matter".

47. In other words, according to the Respondent, the appeal should be dismissed and the Decision confirmed. In the opinion of ITF, in fact, "*this case has exposed the failure of the Appellant to take responsibility for discharging her anti-doping responsibilities herself (in particular, checking whether her medication contained any prohibited substances). Instead [she] delegated the job to her (hopelessly unqualified) manager, without giving him any proper instructions or procedures, or doing anything to supervise or control his work or to check that what he had done was sufficient to ensure she would not fall foul of the anti-doping rules. In such circumstances, it was hardly surprising that this arrangement failed completely, causing her to test positive in January 2016 for a drug, meldonium, that she had been taking for a long time but that had just been put onto the Prohibited List. In such circumstances, the rules and the constant CAS jurisprudence are clear: against the starting-point that she must use 'utmost caution' to ensure that no prohibited substance enters her system, the Appellant's failure to delegate her responsibilities to a properly qualified person, to provide proper instructions, to lay down proper procedures, and to supervise that person's compliance with those procedures, make her significantly negligent, and therefore the Independent Tribunal was right not to give her any reduction from the two-year ban proscribed in the Code and the TADP*".

48. In support of such position, the Respondent underlines some relevant factual and legal points and against that background, answers the Appellant's submissions on the merits of the case.

49. As to the facts of the case, the Respondent:

i. explained the characteristics of Meldonium, a "*metabolic modulator*" that helps the body to use oxygen in the blood to produce energy more efficiently, marketed, mainly under the name of Mildronate, as a cardio-protective drug that alleviates the symptoms of ischemic heart disease. However, the Respondent underlined that several scientists (including the inventor of the drug) have claimed that it enhances athletes' endurance during training and competition. Therefore, it is also specifically marketed to athletes as a drug that increases exercise capacity and so improves athletic performance;

ii. summarized the steps taken by ITF (as well as by WADA and WTA) to publicize the inclusion of Meldonium in the 2015 Monitoring Program and, thereafter, in

the 2016 Prohibited List, and asserts that the ITF "*did more than enough*" in that respect;

iii. referred to the circumstances in which the Player was prescribed to take, and actually took, Mildronate. In that respect, ITF does not dispute that the Appellant used Mildronate on the recommendation of Dr Skalny. However, it questioned the explanation offered that her use of Mildronate was necessary to reduce or prevent the destruction of heart tissue in times of stress, such as periods of increased physical activity, and as a protective measure against the onset of diabetes or of heart problems. In fact, the contemporaneous medical files do not mention any concern about destruction of heart tissue, whether during matches or otherwise. Rather, they indicate that the Appellant was told to use Mildronate, and was using Mildronate, to boost her energy levels during matches and/or to speed recovery after matches. In the Respondent's opinion, the fact that the Appellant was using Mildronate to boost her energy during matches and/or to speed her recovery after matches, *i.e.*, for sports performance-enhancing reasons, increased still further the already strict burden on her to check the Prohibited List carefully each year to ensure that WADA had not decided to add the active ingredient of Mildronate (Meldonium) to the Prohibited List. At the same time, the ITF underlined that the Player did not discuss with any doctor her decision to carry on taking the Skalny Products after 2013;

iv. emphasized that the Player never disclosed on the doping control forms her consumption of Mildronate;

v. pointed to the fact that the Player was aware of her anti-doping obligations and of her responsibility to ensure that no product she was taking contained a prohibited substance, but chose to delegate the task of checking the ingredients of her medications each year against the Prohibited List – from 2006 to 2012 – to Dr Skalny, and, from 2013 on, to her agent, Mr Eisenbud, who, by his own admission, was singularly unqualified for the task. In addition, the Player did not give Mr Eisenbud any instructions on how to carry out the task, nor did she establish any procedures for him to follow, nor exercise any supervision or control over his work.

50. With respect to the grounds of appeal, to be decided on the basis of the TADP and, subsidiarily, of English law, the ITF submitted that there was "*no reason to disturb*" the Tribunal's finding that the Appellant was significantly at fault, and that she is therefore not entitled to any mitigation of the two-year period of ineligibility applicable under Article 10.2.2 of the TADP. In any case, the ITF contends that if (contrary to the foregoing) the Panel decides to accept the Appellant's plea of NSF, a reduction to 12 months is not automatic. Instead, the measure of the consequent reduction of the sanction depends upon a careful assessment of her relative fault, *i.e.*, the degree to which she failed in her anti-doping duties. It must therefore take account of her significant failings in this case. In addition, in the Respondent's opinion, there is no basis, in law or in fact, to reduce the Appellant's sanction below the 12-month minimum mandated by the WADC and the TADP.

51. The ITF underlines that to sustain her plea of NSF, the Appellant must show how the prohibited substance came to be in her system. The ITF accepts she has satisfied this condition (*i.e.* it came from the Mildronate tablets she took on the morning of her drug

test and to some extent, from the Mildronate tablets she took on her four previous match days in the 2016 Australian Open). In addition, the Appellant must show that the fault she bears for taking a product with a prohibited substance in it is "not significant". Unless she satisfies both pre-conditions, there is no discretion to reduce the two-year sanction.

52. In this respect, the Respondent contends that the extent of the Appellant's fault for the presence of a prohibited substance in her system is assessed against the strict personal duty that Article 2.2.1 of the WADC and of the TADP impose on a player "*to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used*": that duty is only discharged by the use of "*utmost caution*", *i.e.* the athlete must make "*every conceivable effort to avoid taking a prohibited substance and leave no reasonable stone unturned*".

53. As a result, according to the Respondent, there are only two questions for the CAS in this context:

    i. "*to what extent did the Appellant depart from her duty to use 'utmost caution' to ensure that no Prohibited Substance entered her body?*"; and

    ii. "*does she have an acceptable excuse for that failure?*"

54. Other issues, such as her clean anti-doping record, good character, or the financial or sporting consequences of the sanction are irrelevant.

55. In the Respondent's opinion, the Appellant departed from her duty to use "*utmost caution*" and does not have an acceptable excuse for that failure.

56. To sustain this conclusion, the Respondent emphasized the following:

    i. the duty of "utmost caution" depends on the context, but is certainly more stringent where (as in the case of the Appellant) the player is taking a medical product (because medicines are drugs, and therefore the risk that they may contain a prohibited substance is great), there is a close nexus between the product-taking and the athlete's sporting activities, and the product is marketed, and directions for use are given, on the basis that it will improve sports performance. In any case, simply checking the brand name of the product against the Prohibited List is obviously insufficient. In addition, since the Prohibited List is reviewed every September and changes can be introduced at that point for the following year, if a player continues to use a product for more than one calendar year, then he/she cannot stop checking after the first year, but instead must check the Prohibited List again at the beginning of each new year to ensure that none of its ingredients has been added. A failure to do so is an undoubted failure to use the "*utmost caution*" required of a player. This principle has been confirmed also in the precedents quoted by the Appellant, such as *Lund* and *Hood*;

    ii. a player who delegates his/her anti-doping responsibilities to another is at fault if he/she chooses an unqualified person as her delegate, if he/she fails to instruct him properly or set out clear procedures he must follow in carrying out his task, and/or if he/she fails to exercise supervision and control over him in the carrying out of the task. The ITF does not object to following this approach, as stated in *Al*

Nahyan. In the Respondent's opinion, in this case, it leads to the same result, i.e. excluding a plea of NSF;

iii. in fact, by this test, the Appellant was clearly significantly at fault, because:

- unlike Sheikh Al Nahyan, from 2013 on, the Appellant did not employ highly qualified persons to carry out the checks of the Prohibited List on her behalf. She entrusted Mr Eisenbud and IMG, who have no training and no qualification in that respect;
- despite his lack of qualification for the role, the Appellant did not properly instruct Mr Eisenbud as to the steps he should take to check the new Prohibited List each year to make sure that the ingredients of her medicines were still not prohibited;
- the Appellant did not put in place any procedures to ensure that Mr Eisenbud carried out his task properly;
- the Appellant did not exercise any supervision or control over Mr Eisenbud in his execution of this important task.

Sheikh Al Nahyan was only given a six-month reduction by the CAS, even though he employed highly qualified, properly instructed staff and implemented a significant range of procedures to avoid positive tests, because he failed to supervise the staff in carrying out those procedures. The Appellant did none of these things. Her plea of NSF therefore cannot be upheld, and accordingly the two-year ban must remain in place;

iv. the Appellant's non-open use of Mildronate increases her fault;

v. the Appellant does not have any viable excuses for her marked departure from the duty of utmost caution. More specifically:

- the Appellant's longstanding use of Mildronate (since 2006) does not excuse her failure to exercise utmost caution;
- it is not an excuse that the Appellant and Mr Eisenbud mistakenly believed that Mildronate (as opposed to Meldonium) was the name of the substance, nor that WADA listed only Meldonium (and not all brand names) on the Prohibited List;
- WADA and the ITF are not at fault for the ADRV since they did enough to put the Player in the condition to understand that Meldonium was going on the 2016 Prohibited List. If, in December 2015 or in the 18 days in January 2016 before she started competing and taking Mildronate again, the Appellant or Mr Eisenbud had visited the WADA, ITF or WTA website, looked at any of the emails sent to her by the ITF or WTA, opened the pen drive that came with the 2016 wallet card, or contacted the 24-hour hotline, they would have quickly found out that the Mildronate product she had been using was prohibited for use under the 2016 TADP. The Appellant, and only the Appellant, must take responsibility for not taking advantage of any of those resources to check the Mildronate would still be safe to use in 2016;

vi. the precedents cited by the Appellant do not mandate a finding of NSF in her case, still less a 50% reduction in sanction;

vii. outside the specific grounds for mitigation of sanction set out in the TADP, there is no residual discretion to mitigate the Appellant's sanction on proportionality

grounds.

3. LEGAL ANALYSIS

3.1 Jurisdiction

57. CAS has jurisdiction to decide the present dispute.

58. In fact, the jurisdiction of CAS is accepted by the Respondent, is confirmed by the Order of Procedure, signed by the parties without any reservation, and is contemplated by Article I2 "*Appeals*" of the TADP, which provides as follows:

> "*12.1 Decisions Subject to Appeal:*
>
> *Decisions made under this Programme may be appealed only as set out in this Article 12 .....*
>
> *12.2. Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, Recognition of Decisions and Jurisdiction:*
>
> *12.2.1 A decision that an Anti-Doping Rule Violation has been committed, a decision imposing (or not imposing) Consequences for an Anti-Doping Rule Violation ... may ... be appealed by any of the following parties exclusively to CAS:*
>
> *(a) the Player or other Persons who is the subject of the decision being appealed; ...*".

3.2 Appeal Proceedings

59. As these proceedings involve an appeal against a decision rendered by the Tribunal, brought on the basis of rules providing for an appeal to the CAS, in a disciplinary dispute rendered by an international body, they are considered and treated as appeal arbitration proceedings in a disciplinary case, within the meaning, and for purposes of the Code.

3.3 Admissibility

60. The statement of appeal was filed within the deadline set in Article 12.5.1 of the TADP and complied with the requirements of Articles R48 and R64.1 of the Code, including the payment of the CAS Court Office fee. The admissibility of the appeal is not challenged by the Respondent. Accordingly, the appeal is admissible.

3.4 Scope of the Panel's Review

61. 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.…*"

62. In that regard, this Panel notes and accepts the *dictum* in the award of 21 May 2010, CAS 2009/A/1870, at para. 125, under which "*the measure of the sanction imposed by a*

disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (see TAS 2004/A/547, §§ 66, 124; CAS 2004/A/690, § 86; CAS 2005/A/830, § 10.26; CAS 2005/C/976 & 986, § 143; 2006/A/1175, § 90; CAS 2007/A/1217, § 12.4)". However, such jurisprudence, confirmed in several other CAS awards, far from excluding or limiting the power of a CAS Panel to review the facts and the law involved in the dispute heard (pursuant to Article R57 of the Code), only means that a CAS Panel "*would not easily 'tinker' with a well-reasoned sanction, i.e. to substitute a sanction of 17 or 19 months' suspension for one of 18*" (award of 10 November 2011, CAS 2011/A/2518, § 10.7, with reference to CAS 2010/A/2283, § 14.36).

63. As a result, this Panel is not bound by the findings of the Tribunal, however well reasoned they are. More specifically, this Panel has full power to examine *de novo* the Player's actions, and the evidence before it, in order to verify whether the Player's plea of NSF, dismissed by the Tribunal, is grounded or not. Such exercise is linked to the appellate structure of CAS proceedings.

3.5 Applicable Law

64. The question of what law is applicable in the present arbitration is to be decided by the Panel in accordance with the provisions of Chapter 12 of the Swiss Private International Law Act (the "PIL"), the arbitration bodies appointed on the basis of the Code being international arbitral tribunals having their seat in Switzerland within the meaning of Article 176 of the PIL.

65. Pursuant to Article 187.1 of the PIL,

"*The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the law with which the case is most closely connected*".

66. Article 187.1 of the PIL constitutes the entire conflict-of-law system applicable to arbitral tribunals which have their seat in Switzerland. The other specific conflict-of-laws rules contained in Swiss private international law (including the provisions referred to by the Appellant) are not applicable to the determination of the applicable substantive law in Swiss international arbitration proceedings (KAUFMANN-KOHLER & STUCKI, *International Arbitration in Switzerland*, Zurich 2004, p. 116; RIGOZZI, *L'arbitrage international en matière de sport*, Basel 2005, § 1166 et *seq*).

67. With respect to Article 187.1 of the PIL, it is to be underlined (i) that it recognizes the traditional principle of the freedom of the parties to choose the law that the arbitral tribunal has to apply to the merits of the dispute, and (ii) that the choice of law it allows can be made also indirectly, through the reference to the rules governing the procedure set in regulation of an arbitral institution, where they contain a "choice-of-law" provision (KAUFMANN-KOHLER & RIGOZZI, *Arbitrage International. Droit et pratique à la lumière de la LDIP*, 2ª ed., Berne 2010, p. 400).

68. As a result, the law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

69. Article R58 of the Code provides the following:

"*The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision*".

70. In the present case, the "*applicable regulations*" for the purposes of Article R58 of the Code are, indisputably, those contained in the TADP because the appeal is directed against decisions issued by the Tribunal, which was passed applying the TADP's rules and regulations.

71. Article 12.6.4 of the TADP, then, provides that:

"*In all appeals to CAS pursuant to this Article 12, the governing law shall be English law ….*"

72. As a result, TADP's rules and regulations shall apply primarily. English law applies subsidiarily.

73. The Panel notes that the Appellant submitted that Swiss law should be applied instead of English law since the WADC is governed by Swiss law, the WADC is intended to apply uniformly by all WADA stakeholders, including the ITF, and that the TADP intends to implement the WADC for the sport of tennis. The Panel, at the same time, notes the express choice of law contained in the TADP, and that, even though the WADC may be subject to Swiss law, the TADP remains governed by English law. In any case, the Panel was not directed to any difference that could derive from the application of Swiss law instead of English law. In the end, therefore, the question is immaterial and does not need to be further explored.

74. The provisions of the TADP and of its Appendix One ["*Definitions*"] which are relevant in this case are the following:

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for an Anti-doping Rule Violation under Article 2.1, 2.2 or 2.6: […]

10.5.2 Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1:

In an individual case where Article 10.5.1 is not applicable, if a Player … establishes that he/she bears No Significant Fault or Negligence, then ... the otherwise applicable period of Ineligibility may be reduced based on the degree of Fault of the Player …, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. [...]

Fault: Fault is any breach of duty or any lack of care appropriate to a particular

situation. Factors to be taken into consideration in assessing a Player or other Person's degree of Fault include, for example, the Player or other Person's experience, whether the Player or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Player and the level of care and investigation exercised by the Player in relation to what should have been the perceived level of risk. In assessing the Player or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Player or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that a Player would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Player only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.

No Fault or Negligence: The Player … establishing that he/she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he/she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1 the Player must also establish how the Prohibited Substance entered his/her system.

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

3.6 The Dispute

A. Introduction

75. This dispute concerns the Decision rendered by the Tribunal, which found the Player responsible for the ADRV, declared her ineligible for a period of two years, and disqualified the results she had obtained at the 2016 Australian Open Championships, with all ensuing consequences. The Player disputes in part this conclusion, and requests that the Panel find that she bears NSF for the ADRV and, on such basis, that the period of ineligibility be reduced. On the other side, the Respondent requests the Panel to confirm the Decision rendered by the Tribunal.

76. In essence, on the basis of the parties' submissions, issues relating to the commission by the Player of the ADRV and to the consequences other than the length of the period of ineligibility are not before this Panel. At the same time, the Player accepts that she bears some "minimal" degree of fault. As a result, the main questions that the Panel has to examine are the following:

    i. what is the Player's level of fault and more specifically, did the Player commit the ADRV with NSF?
    ii. if so, what is the proper sanction?

77. The Panel shall examine those main issues separately.

i. What is the Player's level of fault?

78. The Tribunal found that the Player, responsible for the ADRV, was not entitled to the benefits under Article 10.5.2 of the TADP. The Tribunal, in fact, came to the conclusion, expressed with plain language, that the Player could "*not prove that she exercised any degree of diligence, let alone utmost caution, to ensure that her ingestion of Mildronate did not constitute a contravention. To the contrary her concealment from the anti-doping authorities and her team of the fact that she was regularly using Mildronate in competition for performance enhancement was a very serious breach of her duty to comply with the rules. Her conduct was serious in terms of her moral fault and significant in its causative effect on the contravention*". In other less severe words, the Tribunal found the degree of the Player's negligence to be significant, considering the totality of the circumstances of the case. As a result, the Tribunal concluded that the otherwise applicable period of ineligibility could not be reduced.

79. Article 10.5.2 of the TADP sets two conditions for the reduction of the ineligibility period to be applied on an athlete following the finding of the violation of Article 2.1 of the TADP (presence of a prohibited substance):

    i. the athlete must establish how the prohibited substance entered his or her system;

    ii. the athlete must establish that he or she bears "No Significant Fault or Negligence".

80. The Panel notes that the first condition is satisfied. The issue is indeed not even disputed by the parties in this arbitration. The Tribunal held that the Player had established that the prohibited substance (Meldonium) entered into her system as a result of her use of Mildronate; and the ITF accepts that the Player tested positive because of the product (Mildronate) she ingested.

81. The dispute between the parties instead concerns the satisfaction of the second condition, denied by the Respondent and claimed to be fulfilled by the Appellant, who disputes the conclusions of the Tribunal.

82. The issue whether an athlete's fault or negligence is "significant" has been much discussed in the CAS jurisprudence, and chiefly so with respect to the various editions of the WADC (in the cases of *Lund*, *Cilic*, and *Kreuzmann* discussed by the parties in the present arbitration, but also in a number of other cases: *e.g.*, *inter alia* CAS 2004/A/690; CAS 2005/A/830; CAS 2005/A/847; CAS OG 04/003; CAS 2006/A/1025; 2008/A/1489&1510; CAS 2009/A/1870; CAS 2012/A/2701; CAS 2012/A/2747; CAS 2012/A/2804; CAS 2012/A/3029). These cases offer guidance to this Panel. It is, however, to be underlined that all those cases are very "fact specific" and that no doctrine of binding precedent applies to the CAS jurisprudence. Indeed, the TADP itself, while defining the conditions for the finding of NSF, stresses the importance to establish it "*in view of the totality of the circumstances*", and therefore paying crucial attention to their specificities.

83. Two points need to be underlined in this respect.

84. First, a period of ineligibility can be reduced based on NSF only in cases where the circumstances justifying a deviation from the duty of exercising the "*utmost caution*"

are truly exceptional, and not in the vast majority of cases. However, in the Panel's opinion, the "bar" should not be set too high for a finding of NSF. In other words, a claim of NSF is (by definition) consistent with the existence of some degree of fault and cannot be excluded simply because the athlete left some "*stones unturned*". As a result, a deviation from the duty of exercising the "*utmost caution*" does not imply *per se* that the athlete's negligence was "significant"; the requirements for the reduction of the sanction under Article 10.5.2 of the TADP can be met also in such circumstances. It is in fact clear to this Panel (as noted in *Cilic*, §§ 74-75) that an athlete can always read the label of the product used or make Internet searches to ascertain its ingredients, cross-check the ingredients so identified against the Prohibited List or consult with the relevant sporting or anti-doping organizations, consult appropriate experts in anti-doping matters and, eventually, not take the product. However, an athlete cannot reasonably be expected to follow all such steps in each and every circumstance. To find otherwise would render the NSF provision in the WADC meaningless.

85. Second, the parties agreed before this Panel to follow the approach indicated by *Al Nahyan* (§ 177), i.e. that athletes are permitted to delegate elements of their anti-doping obligations. If, however, an anti-doping rule violation is committed, the objective fact of the third party's misdeed is imputed to the athlete, but the sanction remains commensurate with the athlete's personal fault or negligence in his/her selection and oversight of such third party or, alternatively, for his/her own negligence in not having checked or controlled the ingestion of the prohibited substance. In other words, the fault to be assessed is not that which is made by the delegate, but the fault made by the athlete in his/her choice. As a result, as the Respondent put it, a player who delegates his/her anti-doping responsibilities to another is at fault if he/she chooses an unqualified person as her delegate, if he/she fails to instruct him properly or set out clear procedures he/she must follow in carrying out his task, and/or if he/she fails to exercise supervision and control over him/her in the carrying out of the task. The Panel also concurs with such approach.

86. In light of the foregoing, the Panel finds that that the Player's fault was not significant.

87. In that respect, the Panel remarks that the Player chose to rely on Mr Eisenbud and his organization (IMG) for the performance of all anti-doping related matters based on a long history of satisfactory compliance with anti-doping rules and regulations with respect to (1) the submission, through ADAMS, of the Player's "whereabouts" information, and for the filing of TUE applications, if and when required; and (2) for the checking of the Prohibited List and the observation of the evolution in the anti-doping regulations since 2013. This point is confirmed not only by consistent testimony of the witnesses heard, but by the very actions of the ITF, which, on 22 December 2015, emailed to a representative of the Player at IMG the explanation of the "*Main Changes to the Tennis Anti-Doping Program me for 2016*".

88. The Panel finds the choice of Mr Eisenbud to be reasonable in the circumstances of the case. In fact:

    i. even though, under the TADP, it is the Player's personal duty to ensure that no prohibited substance enters his/her body (Article 2.1.1) and it is the responsibility of each player to be familiar with the most current edition of the Prohibited List (Article 3.1.2 *in fine*), nothing prevented the Player, a high-level athlete focused

on demanding sporting activities all over the world, from delegating activities aimed at ensuring regulatory compliance and more specifically that no anti-doping rule violation is committed;

ii. Mr Eisenbud and IMG were, in 2013, when the Player left the care of Dr Skalny, already taking care of other aspects of her anti-doping compliance, which, such as TUE applications, involve some complexities;

iii. checking a substance against the Prohibited List is not an action for which specific anti-doping training is required. It is expected to be made, as a rule and under Article 3.1.2 of the TADP, by the player personally, and a player does not need to have scientific or medical expertise for such purpose. No standard in the WADC or otherwise raises such a high bar. Therefore, the delegation to Mr Eisenbud, an expert sports agent, aware of the importance of the services rendered to the Player, and whose livelihood was dependent on the athletic success of the Player, was not precluded by any lack of scientific or medical qualification, openly recognized by Mr Eisenbud himself. In other words, the Player chose a sufficiently qualified person as her delegate for the purposes of checking the Prohibited List.

89. The Player, however, did not give Mr Eisenbud instructions as to how this task had to be performed. The Player did not tell Mr Eisenbud to check (and Mr Eisenbud therefore did not check) whether Mildronate was only a "brand name" or indicated the ingredient of the product; she did not put him in touch with Dr Skalny at the time she left the care of Dr Skalny, but simply supplied Mr Eisenbud with the names of the Skalny Products; she did not instruct Mr Eisenbud to consult the WADA, ITF or WTA website, to call the ITF "hot line", to open the flash drive supplied with the "wallet card", or even to read the emails received, opening the "links" therein contained. She simply passed the entire matter over to Mr Eisenbud, completely relying on him.

90. In the same way, the Player did not establish any procedure to supervise and control the actions performed by Mr Eisenbud in the discharge of the tasks he was expected to perform: no procedure for reporting or follow-up verification was established to make sure that Mr Eisenbud had actually discharged the duty, for instance, of checking year after year the Skalny Products towards the Prohibited List.

91. Such circumstances show some degree of fault on the part of the Player, but they do not exclude altogether the possibility for the Player to invoke NSF.

92. The Panel finds in fact that the Player had a reduced perception of the risk she was incurring while using Mildronate, and that this reduced perception of risk was justified, because:

i. Mildronate was one of the Skalny Products that the Player, at the beginning of 2016, had used for 10 years without any anti-doping issue, as confirmed by the certificates of anti-doping compliance obtained by Dr Skalny, and by the lack of any positive result returned by the numerous anti-doping tests to which the Player had also undergone after she had left Dr Skalny and through 2015;

ii. as recognized by the Tribunal (§ 24 of the Decision), the Player did not seek treatment from Dr Skalny for the purposes of obtaining any performance

enhancing product, but for medical reasons. The fact that she continued to also use the Skalny Products after she had left Dr Skalny and without a medical prescription (except those obtained years before) (though no prescription from a physician was required to obtain Mildronate over the counter) could not change, in the Panel's opinion, the perception of the Player, also in light of the recommendation of Dr Skalny (confirmed by his testimony) that she continued to take those substances;

iii. no specific warning had been issued by the relevant organizations (WADA, ITF or WTA) as to the change in the status of Meldonium (the ingredient of Mildronate). In that respect, the Panel notes that anti-doping organizations should have to take reasonable steps to provide notice to athletes of significant changes to the Prohibited List, such as the addition of a substance, including its brand names. Indeed, the ITF had done so when the substance DBMA had been added to the Prohibited List. Here, the ITF relies on its wallet card, emails, and other online resources, on which the Panel heard testimony. The Panel notes that an athlete or his/her delegate could have found reference to both Meldonium and its brand name Mildronate through a couple of links on the ITF website. However, it is concerned that the ITF's notices to athletes that referred to "Significant Changes" to the TADP referred only to procedural changes and not to the addition of new prohibited substances.

93. In addition, the Panel notes that:

a. There had been no significantly publicized case of a Meldonium positive in Olympic sports and no prior case at all in tennis;

b. The Player took a public position acknowledging that she took Meldonium and that she accepted responsibility therefor, and she did so in a very public way, calling a press conference, on her own, that brought worldwide publicity to her case and to the use of Meldonium going forward;

c. The Panel gives no weight to the fact that the ITF later rejected her application for a TUE to use Mildronate; that action in part precipitated her appeal of the charges in this case, and so it could not be used as a basis to justify a longer sanction as requested by the ITF.

94. In light of the totality of such circumstances, the Panel concludes that the Player's claim of NSF can be accepted.

ii. What is the appropriate length of the ineligibility period to be imposed on the Player?

95. The measure of the sanction to be imposed depends on the degree of fault.

96. The Panel notes that, even though the Player committed the ADRV with NSF, she bears some degree of fault, which prevents a reduction to the minimum measure of ineligibility under Article 10.5.2 of the TADP.

97. Having considered the precedents, and the framework of the review of these cases provided by the *Cilic* case (incorporated under the 2015 WADC in 2016/A/4371 *Lea v. USADA*), the Panel is of the view that:

a. The relevant measure of fault here is whether the Player was reasonable in selecting IMG to assist her in meeting her anti-doping obligations. The Panel has already determined that her decision was reasonable. Where the Player fell short, however, was in her failure to monitor or supervise in any way whether and how IMG was meeting the anti-doping obligations imposed on an athlete when IMG agreed to assist her. She failed to discuss with Mr Eisenbud what needed to be done to check the continued availability of Mildronate (as opposed to the procedure to check new substances she was prescribed), to put him in contact with Dr Skalny to understand the nature of the Skalny products, to understand whether Mildronate was the name of the product or the substance, and whether he had made the necessary confirmation each year that the product had not been added to the Prohibited List. It cannot be consistent with the relevant precedents and the WADC that an athlete can simply delegate her obligations to a third party and then not otherwise provide appropriate instructions, monitoring or supervision without bearing responsibility; such a finding would render meaningless the obligation of an athlete to avoid doping.

b. In addition, unlike *Lund*, Ms. Sharapova did not disclose on her anti-doping control forms her use of the prohibited substance, a factor that clearly weighed heavily in the mind of the CAS Panel in *Lund* for the Panel to reach its conclusion of one year.

98. For these reasons, the Player's fault is greater than the minimum degree of fault falling within NSF, but as noted less than Significant Fault. Accordingly, the Panel has determined, under the totality of the circumstances, that a sanction of fifteen (15) months is appropriate here given her degree of fault.

99. The Panel is also of the view that there is no basis for reducing her sanction further by applying principles of proportionality. The Panel's basis for this position is that the WADC, from which the ITF ADP is derived and on which it is based, has been found repeatedly to be proportional in its approach to sanctions, that the question of fault is built in to analysis of length of sanction under the ITF ADP, and that no case has been cited that could justify a further reduction of the Player's sanction here.

100. The Panel wishes to emphasize that based on the evidence, the Player did not endeavour to mask or hide her use of Mildronate and was in fact open about it to many in her entourage and based on a doctor's recommendation, that she took the substance with the good faith belief that it was appropriate and compliant with the relevant rules and her anti-doping obligations, as it was over a long period of her career, and that she was not clearly informed by the relevant anti-doping authorities of the change in the rules. After its *de novo* review here, the Panel has determined it does not agree with many of the conclusions of the Tribunal, except as otherwise specifically indicated herein.

101. Finally, the Panel wishes to point out that the case it heard, and the award it renders, was not about an athlete who cheated. It was only about the degree of fault that can be imputed to a player for her failure to make sure that the substance contained in a product she had been legally taking over a long period, and for most of the time on the basis of a doctor's prescription, remained in compliance with the TADP and WADC. No question of intent to violate the TADP or WADC was before this Panel: under no

circumstances, therefore, can the Player be considered to be an "intentional doper".

102. Accordingly, considering all of the foregoing reasons, the Panel has determined that the appropriate length of sanction here is fifteen (15) months; in other words, the Panel is reducing her sanction on the basis of NSF by nine (9) months.

3.7 Conclusion

103. Based on the foregoing, the Panel, based upon its *de novo* review of this entire matter, finds that the appeal is to be partially granted, and the period of ineligibility reduced to fifteen (15) months. The starting date of the ineligibility period remains 26 January 2016, set by the Decision and unchallenged in this arbitration.

4. COSTS

104. Article 65.1 of the Code reads as follows:

This Article applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body. In case of objection by any party concerning the application of the present provision, the CAS Court Office may request that the arbitration costs be paid in advance pursuant to Article R64.2 pending a decision by the panel on the issue.

105. Article R65.2 of the Code provides as follows:

Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of CAS are borne by CAS.

Upon submission of the statement of appeal, the Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000.-- without which CAS shall not proceed and the appeal shall be deemed withdrawn. […]

106. Article R65.3 of the Code provides:

Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.

107. The present arbitration procedure, being an appeal from an international federation, is therefore free, except for the CAS Court Office fee of CHF 1,000 paid by the Appellant, which is retained by the CAS.

108. Having taken into account the outcome of the arbitration and in the light of all the circumstances of the case, including the conduct and the financial resources of the Parties, the Panel is of the view that the parties shall bear their own expenses sustained in relation with the present appeal.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 9 June 2016 by Ms Maria Sharapova against the decision rendered by the Independent Tribunal of the International Tennis Federation on 6 June 2016 is partially upheld.

2. The decision rendered by the Independent Tribunal of the International Tennis Federation on 6 June 2016 is set aside.

3. Ms. Maria Sharapova is suspended for a period of fifteen (15) months commencing 26 January 2016.

4. Ms. Maria Sharapova's individual results obtained at the Australian Open on 26 January 2016, including any WTA ranking points and prize money, are disqualified.

5. The present arbitration procedure shall be free, except for the CAS Court Office fee of CHF 1,000 (one thousand Swiss francs), which has already been paid by Ms Maria Sharapova and is retained by the CAS.

6. The parties shall bear their own expenses sustained in connection with these arbitration proceedings.

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

Seat of arbitration: Lausanne, Switzerland
Date: 30 September 2016

THE COURT OF ARBITRATION FOR SPORT

Luigi Fumagalli
President

Jeffrey G. Benz
Arbitrator

David W. Rivkin
Arbitrator