INTERNATIONAL TENNIS FEDERATION

INDEPENDENT ANTI-DOPING TRIBUNAL

DECISION IN THE CASE OF M. RICHARD GASQUET

Tim Kerr QC, Chairman
Professor Richard H. McLaren
Dr. Mario Zorzoli

Introduction

1. This is the decision of the independent Anti-Doping Tribunal ("the Tribunal") appointed by Dr Stuart Miller, the Anti-Doping Manager of the International Tennis Federation ("the ITF") under Article K.1.1 of the ITF Tennis Anti-Doping Programme 2009 ("the Programme") to determine a charge brought against M. Richard Gasquet ("the player"). An oral hearing in respect of the charge took place in London on 29 and 30 June 2009.

2. The player was represented by Mr Adam Lewis QC, instructed by Mr Simon Davis, Mr Payam Beheshti and Mr Alexander Kennedy, all of Clifford Chance LLP, solicitors in London. The ITF was represented by Mr Jonathan Taylor, assisted by Mr Jamie Herbert, Mr Tim Endersby and (though she was not present at the hearing) Ms Anna-Marie Blakeley, all of Bird & Bird LLP, solicitors in London. Dr Miller, the ITF's Anti-Doping Manager, also attended on behalf of the ITF. The Tribunal is grateful to the representatives of both parties for the assistance they gave us with oral and written presentations of high quality.

3. The player was charged with a doping offence following an adverse analytical finding in respect of a urine sample, no. 3018938, provided on 28 March 2009 at the Sony Ericsson Event, in Miami, Florida. Both the A and B samples returned adverse analytical findings for a metabolite of cocaine in a very small quantity. During the A sample analysis, a very small amount of cocaine in unmetabolised form was also found. Cocaine and its metabolites are prohibited in competition but not out of competition. Following a DNA test, the player accepted that the sample tested was his. He also accepts the reliability of the laboratory test results.

4. The player denied that he had ever deliberately taken cocaine. He submitted that there was no doping offence because the sample was taken out of competition, not in competition. In the alternative, he submitted that if the sample was deemed to have been taken in competition, the provisions having that effect were unlawful and could not be relied on by the ITF or applied by the Tribunal.

5. As to sanctions, the player argued that if there was a doping offence, the player could establish "No Fault or Negligence" or alternatively "No Significant Fault or Negligence". Further, he argued that there should be no period of ineligibility because the circumstances of the offence - accidental contamination in a social setting after the player had decided to withdraw from the competition through injury -were such that any ban would be grossly disproportionate to the offence and therefore unlawful.

6. The ITF disagreed with the player's propositions and argued that he had committed a doping offence, that he could not establish his defences and that a period of ineligibility of two years was mandatory. The ITF asserted that the ban should start from 1 May 2009 when the player voluntarily stopped competing. The player argued that any ban should start from 28 March 2009 when his sample was collected. The parties also disagreed about whether the

player's results, ranking points, and prize money obtained during April 2009 should be forfeited.

7. By Article A.9 of the Programme, the proceedings before the Tribunal are governed by English law, subject to Article A.7, which requires the Tribunal to interpret the Programme in a manner that is consistent with the World Anti-Doping Code ("the Code"). According to Article A.7 of the Programme, the Code:

> "shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of any Signatory or government. The comments annotating various provisions of the Code may be used to assist in the understanding and interpretation of this Programme."

The Facts: Before the Charge

8. The player was born on 18 June 1986 and is therefore now aged 23. He is a French national resident in Switzerland. He already has a series of illustrious achievements behind him. He has been ranked number one in France and was ranked in the top twenty-five in the world four years running, from 2004 to 2008. In 2007, he was ranked in the top 10, reaching the Wimbledon semi-final in which he was defeated by Mr Roger Federer.

9. The Tribunal found the player to be a truthful and honest witness, and a man of integrity. We accept the following evidence from the player and other witnesses attesting as to his character. He is highly motivated and hard working, and also quite reserved and shy. He does not often socialise in large groups of people, preferring the company of people he knows and small groups. He rarely consumes alcohol. We accept that he is not a user of illegal recreational drugs, nor of performance enhancing drugs. He occasionally goes out to bars and nightclubs, but never does so when competing.

10. The player is well aware of the anti-doping rules applicable to his sport. He is in the habit of taking the necessary precautions to ensure that he does not

breach the rules applicable to him, such as drinking only from bottles he has himself opened, and being careful about his diet and any medication. He has frequently been tested, always with negative result, apart from the occasion which has led to this case. His attitude is that he is indifferent to whether testing is being done at any competition. He is happy to be tested any time, being confident that he should always test negative because he would not allow any prohibited substance to enter his system.

11. From December 2008, the player was experiencing pain in his right shoulder. He coped with the injury and continued playing despite the pain, though he had to withdraw from one tournament in Marseille in February 2009. He arrived in Miami on 22 March 2009, intending to take part in the Sony Ericsson Event. He was a seeded player and therefore an automatic entrant to the competition. He had a bye in the first round and was not scheduled to play until Saturday 28 March 2009.

12. From Monday 23 March to Thursday 26 March 2009, the player did some training but was hampered by his shoulder injury. He did not go out much during that time and went to bed early. The first match of the Event took place on Wednesday 25 March 2009. By Friday 27 March the concern about his shoulder injury was such that he was advised by the tournament doctor soon after 3pm to obtain a magnetic resonance imaging ("MRI") scan of his right shoulder.

13. He obtained the MRI scan and returned to the tournament doctor with the results at about 6.40pm. The doctor noted significant inflammation and advised against playing in the tournament. The player, his coach and physiotherapist left the doctor's office at about 7pm, discussed the matter for about 15 minutes and agreed that the player should not play. The player informed the Tribunal that he had decided "90%" to withdraw when he left the tournament site to return to the hotel with his coach, but the final decision was made at the hotel.

14. The player had become aware from his coach that his first match was not scheduled until quite late the next day. They decided not to go through the formalities of withdrawal that evening, instead deferring it until the next day. They had to return to the Event site anyway to return a hired car and collect an expenses cheque. Therefore, they decided to go through the formalities of withdrawal at that time, which include the filling in of a form and, under the rules, a requirement to submit to doping control if requested to do so.

15. We find that the player could have gone through the formality of withdrawal on the evening of 27 March 2009 if he had chosen to do so. He could have completed the required form and obtained the signature of the tournament doctor and physiotherapist. Their presence on the site at that time was required under the relevant ATP rules which applied to the competition. However, we have no evidence as to whether there was, or was not, a doping control testing facility in operation at the site after 7.15pm during the evening of 27 March.

16. The player was disappointed that he would not be playing. After arriving at the hotel and making the decision not to compete, he called his mother in France and agreed that she would change his flight back to France so that he would leave at 6pm on Saturday 28 March 2009. Having decided to withdraw from the tournament, he felt there was no reason to stay at the hotel that evening. He decided to go out and see a well known French DJ, M. S_____, whom he had briefly met earlier that day, and who, as he knew, would be performing that evening in Miami as part of the Winter Music Conference; an event which, though the player did not know it, is notoriously associated with use of illegal recreational drugs including cocaine.

17. The player's coach, M. Guillaume Peyre, called M. Thierry Champion, another coach in the same team who was a friend of M. S_____ and his wife. M. Champion confirmed that the player and his coach could attend the performance and proposed dinner beforehand at a restaurant called Vita, owned by another friend of M. Champion. They arrived at Vita and met M. Champion

and another friend of his there. They dined together, joined by the owner of the restaurant. While waiting at the bar for their table, the player noticed a group of four young women dining at a nearby table. He recognised one of them, M_____, a _____.

18. At about 10.30pm one of the women invited the group of men to join them for a drink after dinner. The men did so, joining them at their table. The player talked mostly to one of the women called P_____. We do not know her family name and therefore refer to her simply as P_____. The player learned that P_____ lived in Paris and that she, M_____ and another of the women, known as N_____, were on holiday together in Miami. The player and his companions discovered that these three women were also planning to see M. S_____ perform that night, at a club called Set. The fourth woman, called D_____, was due to leave to work at a different venue.

19. The group of four men, including the player, and the three women, including M_____ and P_____, set off for Set on foot at about midnight. They entered Set at about 12.40am on 28 March 2009, after awaiting the arrival of M. S_____. He then started his performance. The player and the others in his group were soon invited to M. S_____'s table by ___ _____. They stood around the table talking and listening to the music. On the table top, there were open jugs of mixer drinks, including apple juice, a bottle of vodka and bottles of water.

20. The player drank a vodka and apple juice prepared for him by M. Champion. Later, at about 2am, he helped himself to more apple juice, without vodka. The player talked particularly to P_____, though he was not with her all the time, and also talked to others. The Tribunal accepts the player's evidence that he and P_____ kissed mouth to mouth about seven times while they were at Set, each kiss lasting about five to ten seconds. We accept his evidence that he was not with P_____ constantly while at the club. At one stage the two of them went upstairs and sat on a sofa where they kissed. After that they came

downstairs again, stopping to kiss on the stairs. The player then drank only water from a sealed bottle and a vodka and apple juice he had ordered from the bar.

21. At about 4.15am, the player and the others with whom he had arrived decided to leave. They left at about 4.35am, after awaiting the end of M. S_____'s performance, thanking him and saying goodbye. The player was tired. His impression was that P_____ did not seem tired. She expressed a wish to go to another venue called Goldrush, where the fourth woman from the restaurant, D_____, was working. The group of seven travelled in two taxis. The player went in a taxi with P_____. Goldrush turned out to be a strip club. The player and his three male companions did not like it and wanted to leave about 10 minutes after arriving. He did not have any physical contact with D_____ or anyone else at Goldrush.

22. They waited for P_____ to return from the toilet where she had spent longer than expected. When she returned, she had replenished her make-up and rearranged her hair. The group then left at about 5am and said their goodbyes outside. The player kissed P_____ on the mouth for two or three seconds before boarding a taxi back to his hotel with his coach. On arrival at his hotel he went to his room and slept.

23. Later that day the player awoke, showered, dressed, packed and checked out of his hotel. He went to the site of the Sony Ericsson Event. While he was there, he signed a withdrawal form in the early afternoon of 28 March 2009. He cited his shoulder injury as the reason for withdrawal. The form was countersigned by the tournament doctor and physiotherapist, as the relevant ATP rules require. There is no dispute that the shoulder injury was the true reason for withdrawing from the Event. It is not suggested that the player withdrew to avoid being tested.

24. Indeed, he was required to provide a urine sample immediately after withdrawing. He did so at 2.20pm on 28 March 2009 and signed the doping control form at 2.30pm. He then went with his coach directly to the airport and boarded his flight to Paris. After arriving back in France, he received treatment for his injured shoulder which began to improve, to the point where he felt able to travel to Barcelona on 18 April 2009 in order to compete again.

25. Unaware that the urine sample provided in Miami would test positive, the player played in a competition in Barcelona on 20 April 2009, gaining 20 ranking points and 10,000 euros in prize money. His A sample, meanwhile, had been tested at the WADA accredited laboratory in Montréal and found to contain benzoylecgonine, a cocaine metabolite, and a very small amount of unmetabolised cocaine.

26. On 21 April 2009, the adverse analytical finding was reported to International Doping Tests and Management AB ("IDTM"), of Lindigö, Sweden. IDTM arranges the carrying out of doping tests on behalf of the ITF. Still unaware of the positive test result, the player played in Rome on 27 April 2009, gaining 90 ranking points and 27,500 euros in prize money.

The Facts: from the Charge Onwards

27. By letter dated 30 April 2009, the player was charged with a doping offence under Article C.1 of the Programme, namely, the presence of benzoylecgonine in his urine sample provided at the Sony Ericsson Event in Miami on 28 March 2009. The player then stopped competing and has not competed since. He sought advice, initially, from M. Lamperin and Dr Bernard Montalvan, a doctor who works for the Féderation Française de Tennis.

28. On 6 May 2009, the player underwent a test on a sample of his hair at the laboratory of Dr Pascal Kintz at Illkirch, France. No cocaine was detected in the player's hair. The expert witnesses agreed, following a witness conference

at the hearing, that the test administered by Dr Kintz would reveal the presence of cocaine if it had been ingested during a period of about four months prior to the test and if the quantity of cocaine ingested was 10 mg (approximately) or more.

29. Two days later on 8 May 2009, the B sample was opened and analysed at the Montréal laboratory. The sample bottle was opened in the presence of the player's representative, Dr Bruce Goldberger. It was also found to contain benzoylecgonine. The finding was reported to IDTM on 10 May 2009.

30. On 9 May 2009, the player and M. Nicolas Lamperin, his manager, contacted P_____ by telephone. She told them how sorry she was that he had tested positive. She said that she and M_____ had been offered cocaine at Set that night, i.e. the night of 27-28 March. She said that M_____ had taken cocaine at some point while in Miami. She agreed to meet the two of them later that evening after finishing work, but subsequently called saying she was tired and postponed the meeting until the next day.

31. The player and M. Lamperin met her at about 7pm in the evening of 10 May 2009 at her workplace, a restaurant in Paris. She again said that cocaine had been in use at Set that night and that she had been offered some, but denied taking any. She proposed dinner with M_____ that evening, saying that she was due to meet her for dinner anyway.

32. The player and M. Lamperin wanted to be sure that M_____ was happy with this plan, in view of the sensitivity of the matter and her position. They asked P_____ to check with M_____ first. Later at about 8.30pm the player called P_____ who informed him that the proposed dinner would not take place.

33. The next day, 11 May 2009, M. Lamperin sent P_____ a text message asking if she had spoken to M_____. He received no response. After

that, there was no further contact between the player and P_____, nor between M. Lamperin and P_____.

34. The player decided not to apply to the chairman to lift his provisional suspension. A letter from the ITF's lawyers to the player's lawyers dated 11 May 2009 confirmed this. The player set out his initial response to the charge in a letter from Clifford Chance dated 11 May 2009.

35. In that letter, he stated that that sample was not his; that the hair test had not indicated the presence of cocaine; that there were various difficulties with the sampling procedure; that if the sample was his, he did not knowingly take cocaine; that the test was administered out of competition while the drug is only prohibited in competition; and that if on the true construction of the rules, the test was administered in competition, the rules having that effect were unlawful and disproportionate and could not be relied upon to support the charge.

36. On 20 May 2009, a telephone conference attended by the parties and the chairman took place. Procedural directions were given. Pursuant to them, the ITF submitted its opening brief on 22 May 2009, alleging that a doping offence had been committed; that the sample was the player's; that the test was administered in competition; and that the normal consequences including a two year period of ineligibility should follow unless the player could establish a basis for reducing or eliminating the period of ineligibility under Article M.5 of the Programme.

37. The parties then cooperated for the purpose of subjecting the sample to a DNA test, which was carried out at a laboratory in Oxfordshire, England. The results became available on 29 May 2009. The DNA test convinced the player that the sample was his. He then lodged a written complaint dated 4 June 2009 with the French prosecuting authority, alleging against "X" that a harmful substance had been administered to him, contrary to the French penal code.

38. On 7 June 2009. the French newspaper, Aujourd'hui, published an interview with P_____ which was said to have taken place the previous afternoon. According to the article, P_____ denied taking cocaine that night and also denied that either she or the people with her had been offered any. She did not deny taking cocaine on previous occasions in her life. She also asserted that she had kissed the player only briefly and not mouth to mouth, and that she was willing to give evidence and undergo a hair test herself. She said that the matter had caused her difficulty because she was living with a man.

39. On 8 June 2009, a French radio journalist at a radio station called RMC cited an anonymous witness alleged to have been present at Set on the night of 27-28 March as saying that P_____ had taken cocaine that night, contrary to the denial of having done so attributed to her in the article in Aujourd'hui. The journalist's source was unnamed and the evidence has no probative value, but it came to the attention of the player's advisers and helps to explain – along with the article in Aujourd'hui – why the player did not attempt to call P_____ (or M_____) as a witness.

40. On 11 June 2009, the player submitted his answering brief to the Tribunal. It was very long and detailed, and contained numerous detailed arguments supported by witness statements, experts' reports and a large number of case law authorities and extracts from publications. The defence, developed at length in his answering brief, was as already summarised at paragraphs 4 and 5 above. In the light of the DNA test, he accepted that the sample tested was his. In other respects, his defence was in line with his initial response to the charge letter.

41. The ITF submitted its reply brief to the Tribunal on 25 June 2009. In it, the ITF sought to explain the history of the rules separating in competition and out of 11 competition testing, and the subsequent introduction of rules distinguishing between substances banned at all times and substances banned only in competition. The ITF insisted that on the correct construction of the relevant

rules, the player's positive test was deemed to be in competition even though administered after the player had withdrawn from the event without playing. The ITF went on to assert that the rules making provision to this effect were lawful and valid.

42. On the question of how cocaine got into the player's system, the ITF disputed the player's thesis that this occurred, more likely than not, as a result of the player kissing P_____. The ITF asserted that this was mere conjecture and that if ingestion was not deliberate for recreational purposes, other methods of accidental contamination were as likely as the kissing hypothesis. The ITF went on to submit that the player could not establish "No Fault or Negligence", or "No Significant Fault or Negligence".

43. The ITF further asserted that the player could not achieve elimination or reduction of the mandatory sanctions provided for in the Programme by reliance on the principle of proportionality, and warned that if he could, the "flood gates" would be opened and the purposes of the Code, in particular the harmonisation of sanctions, would be undermined. Finally, the ITF made separate points about the start date for any ban, and the question of disqualification of the player's results in competitions subsequent to the one which produced the positive sample.

44. Not content with the procedural directions given by the chairman on 20 May 2009, the player put in further written submissions and evidence on 28 June 2009, the day before the hearing started. At the hearing, the ITF eventually withdrew its objection to some of this additional material, and we allowed it to be relied upon. In it, the player sought to rebut the points made in the ITF's reply brief.

45. The hearing took place before us on 29 and 30 June 2009, at Bird & Bird's offices in London. The Tribunal spent the 1 July 2009 deliberating on the case.

46. For the player, we had written statements or reports from the following witnesses: the player himself; M. Lamperin, his manager; the player's coach M. Guillaume Peyre; his physiotherapist, M. Christophe Gaillard; M. Eric Deblicker of the Féderation Française de Tennis ("FFT"); Dr Bernard Montalvan who also works with the FFT; the player's solicitor, Mr Simon Davis; Dr Pascal Kintz, Dr Bruce Goldberger and Dr Edward Cone, all of whom are distinguished experts in toxicology and pharmacology; Mr John La Perla, a private investigator; His Honour Judge Jeff Blackett, a Senior Circuit Judge in England, who is also the Honorary Disciplinary Officer of the Rugby Football and Judge Advocate General of Her Majesty's Forces; and M. Guy Forget and Mr Vijay Amritraj, both distinguished former professional tennis players. Of the above witnesses, we heard oral evidence from the player, M. Lamperin, Dr Kintz, Dr Cone and (by telephone) M.Forget.

47. For the ITF, we had written statements or reports from the following witnesses: Mr Jamie Herbert, one of the ITF's lawyers; Dr Stuart Miller, Head of the ITF's Science and Technical Department; Mr Thomas Schrader, a Tour Manager employed by ATP Tour, Inc ("the ATP"); Mr Mark Young, the ATP's CEO, Americas and its General Counsel; and Professor Alexander Forrest, an expert in toxicology and Professor of Forensic Chemistry at the University of Sheffield, England. Of those witnesses, we heard oral evidence from Dr Miller and Professor Forrest, and (by telephone) from Mr Schrader and Mr Young.

48. The ITF also attempted to call P_____ to give oral evidence by telephone from Paris, in the presence of her lawyer; but P_____ was willing only to make a prepared declaration. She stated that she was unwilling to answer questions from either party's lawyer or from the Tribunal, or to give any further evidence beyond her prepared statement which contained three short points. The Tribunal considered that she had not properly presented herself as a witness and therefore found her oral evidence to be of no value, and disregarded it.

The Tribunal's Conclusions, with Reasons

49. The following matters were agreed: that the player is bound by the Programme (Article B.1); that the Sony Ericcson Event in Miami was a "Covered Event" (Article B.2); that the sample tested was the player's sample; that the player's sample tested positive for a metabolite of cocaine, and that a trace amount of unmetabolised cocaine was found in the A sample. The player does not now criticise the sample collection process, and does not challenge the testing process. He accepts that the laboratory in Montréal is duly accredited by WADA.

50. It is agreed that cocaine (including its metabolites) is a prohibited substance in competition, but not out of competition (Appendix Two, S.6, Stimulants, category a, Non-Specified Stimulants); and that cocaine is not a "Specified Substance" (Appendix Two, 2nd para, page A2.1). It is agreed that the presence of a cocaine metabolite in a player's urine is a doping offence in-competition – but not out of competition - and that the player has no Therapeutic Use Exemption for cocaine.

51. The first issue the Tribunal must decide is whether, on the correct interpretation of the rules, the player's urine sample was provided in competition, as the ITF contends, or out of competition, as the player contends. So far as material, the relevant Articles of the Programme provide as follows:

> **F. In-Competition Testing**
>
> F.1 Players shall be subject to Testing on behalf of the ITF at Covered Events. The selection of the Events at which Testing is to take place shall be made by the ITF, and shall remain confidential except to those Persons with a reasonable need to know of such selection in order to facilitate such Testing.
>
> F.2 A Player may be notified that he/she has been selected for Testing in 14 conjunction with an Event in which he/she is participating at any time from 00.01 local time on the day of the first match of the main draw (or of the qualifying draw, if he/she is participating in the qualifying draw) of the Competition in question

until immediately following the completion of the Player's last match in the Event (or, where he/she is participating in the Event as a nominated member of the team, until immediately following the completion of his/her team's last match in the Event). Such periods (and only such periods) shall be deemed "In-Competition" periods for purposes of this Programme and the Code (for purposes of the Code, the "Event Period" shall start at the same time as the "In Competition" period and shall end at midnight on the day of the last match played in the Event).

....

F.4 Any Player who retires, is a no-show, is defaulted from a match or withdraws from the main draw or qualifying draw after the first match of such draw has commenced must submit to Testing at the time of the retirement/no show/default/withdrawal if requested to do so. If the Competition in question is a doubles Competition, then his/her doubles partner must also submit to Testing at the same time if requested to do so. If the Player in question is not on-site at the time of the request, the ITF may require that the Player appear for Testing at a specified time and location, in which case the Player may be required to contribute to the cost of the test in an amount not exceeding US$5,000. Such Testing will be deemed to be In-Competition Testing for purposes of this Programme.

....

G. Out-of-Competition Testing

G.1 Ambit of Out-of-Competition Testing:

G.1.1 All Players must submit upon request to Testing under this Programme at any time and place.

G.1.2 Any period outside of an In-Competition period shall be deemed an "Out-of-Competition" period for purposes of this Programme and the Code. Any Testing of a Player outside of an In-Competition period shall therefore be considered Out-of-Competition Testing. Save in exceptional circumstances, such Testing shall be No Advance Notice Testing.

G.1.3 Where a Sample is collected during Out-of-Competition Testing, there shall only be a Doping Offence under Article C.1 if a substance that is prohibited in Out-of-Competition Testing – i.e. it is listed in the section of the Prohibited List entitled "Substances and Methods Prohibited At All Times (In- and Out-of-Competition)" – is present in the Sample.

....

52. The player submitted that in order to interpret the rules fairly and lawfully, a player should be regarded as being "in competition", and any test treated as an in competition test, only if he has actually played during the tournament in question. Conversely, he submitted that he should be treated as "out of competition" if he is tested on withdrawal from the tournament without having played a match or part of a match. The player developed his submissions at great length in writing and orally, relying on wide ranging domestic and international jurisprudence. He contended that any other interpretation would penalise the innocent player who withdraws through injury without playing.

53. During oral submissions, the player explained that his interpretation should be adopted even in a case where a player decides to withdraw before playing specifically in order to avoid in competition testing because he knows he has taken a substance banned in competition. The player did not accept that his interpretation would lead to drug cheats escaping detection: he submitted that a player would find out whether testing was being undertaken at the event in question before taking any substance banned in competition only.

54. In order to give effect to his interpretation, the player submitted that the last sentence of Article F.4 (which was added to the Programme in 2008) should be read as if preceded by the words: "If the player has played any match or an part of any match at the Event ....". He submitted that it would be unfair to treat a player as having participated in a competition, if that player did not play and had no intention of doing so.

55. The ITF submitted that the words of Articles F.2 and F.4 are clear and mean what they say, i.e. that the "in competition" period in relation to a tournament begins at the same time for all players in the main draw, namely at 00.01 local time on the day of the first match of the main draw; and that the last sentence of Article F.4 was clear and made no distinction between the testing of a player who had withdrawn without playing, and one who had withdrawn after playing.

In both cases, the words clearly state that the test would be "deemed to be In-Competition testing ...".

56. The ITF submitted that no other construction was linguistically possible, and that there was nothing unfair or unlawful about the interpretation for which it contended. The ITF argued that any other interpretation would constitute an attack on the strict liability principle which underpins the Code, and would be unworkable because it would allow a player who had knowingly taken a substance such as cocaine, or another stimulant, to escape being tested in competition by withdrawing from the competition on discovering that testing was taking place.

57. The ITF pointed out that the rules of many competitions governed by the Code, including the Olympic Games, included provision for a period during which all those registered as competitors are treated as being "in competition", and all tests administered during that period treated as in competition tests, irrespective of whether the person tested has actually competed or not. The ITF contended that it was necessary to have in place a clear rule separating in competition periods, and testing, from out of competition periods, and testing. The ITF submitted that the strict liability principle meant that it was fair to enact a rule which did so without reference to whether the player had actually competed or not.

58. There was a dispute between the parties about the extent to which consideration had been given by the ITF, and the ATP, to the issues raised by what are now Articles F.2 and F.4 of the Programme. We heard evidence on the point and were shown earlier versions of ITF and ATP rules. We do not find it necessary to analyse that material here. For reasons which follow, it is clear to the Tribunal that the ITF's construction is the appropriate one and the player's is not workable. The player's construction is at odds with the plain words of the provisions, particularly the last sentence of Article F.4 which cannot be qualified in the manner suggested by the player.

59. The main features of Article F.2 are as follows. It has three principal characteristics. The first is that it encompasses all players who are "participating" in a "Covered Event". The player says that the word "participating" must be read as meaning "playing", but that is an impossible contention because testing may occur at any time from 00:01 local time on the day the first match in the main draw is due to take place, which necessarily means that testing can occur before a ball is hit in the tournament.

60. The second principal characteristic is that the start of the "in competition" period is the same for all those who are scheduled to take part in the competition, i.e. those who are in the main draw (or, if applicable, the qualifying draw). The third feature of Article F.2 is that the in competition period ends at different times for different players. The in competition periods ends "immediately following the completion of the Player's last match in the Event ...". Thus, while the in competition period starts at the same moment for all players concerned, the duration of the in competition period is personal to each individual player.

61. The player submits that this latter point means Article F.2 has an underlying premise that a player has actually played in the competition concerned. The Tribunal considers the player is correct in this observation, as far as it goes. The Tribunal notes that the definition of the in competition period in Article F.2 does not completely work in the case of a player, such as this one, who withdraws without hitting a ball. There is no point at which it can be said his last match has ended, because he did not play in any match.

62. Article F.4 deals with (inter alia) withdrawal from a tournament. It provides in the first sentence (inter alia) that a player who withdraws after the start of the first match of the main draw (or qualifying draw, where applicable) must submit to testing. Article F.4 does not include any express requirement that the player must have played a match or part of a match before withdrawing. There

18 is no construction possibility of linking the underlying premise of Article F.2 to the provisions of F.4, given the last sentence of the latter.

63. The last sentence of Article F.4 clearly states that "Such Testing", i.e. a test administered on (inter alia) a player who withdraws from the relevant draw after the start of the first match in that draw, "will be deemed to be In-Competition Testing for purposes of this Programme". Therefore, F.2 defines the in competition period but for withdrawing players the sample and the analysis thereof is to be deemed by F.4 to be an in competition test. Where the player has not himself played before withdrawing, it may well not be accurate to describe the player as being "in competition" at the moment he is tested. As already noted, the definition in Article F.2 of the "in competition" period for each player assumes that the player is going to play.

64. However, the issue is about the status of the test, not the in or out of competition status of the player. The question is whether the test is to be treated as an in competition test. The last sentence of Article F.4 makes clear that the test is "deemed to be In-Competition Testing for purposes of this Programme." This is so whether or not the player's personal in-competition period has ended, and is so even if it is correct to say that, because he did not play, it never started.

65. The "purposes of this Programme", in the concluding words of Article F.4, include the purpose of giving effect to the distinction between substances banned only in competition, and substances banned at all times. The player invites us to read into the last sentence of Article F.4 the qualification that the test is only deemed to be an in competition test if the player has actually played. We are unable to accept that invitation; it would involve rewriting the rules, not construing them.

66. It follows that we accept the ITF's construction of the rules and reject that advanced by the player. We also reject the proposition that the ITF's

construction cannot lawfully be adopted because it would infringe the player's rights under EU (and English) competition law; English and international human rights law; and common law restraint of trade; or would infringe the principle of proportionality developed in the jurisprudence of the CAS based on general principles of law.

67. Again, the player developed his arguments at length in his written submissions. He submitted that the unfairness to the player, if the rules bore the meaning ascribed to them by the ITF, was such that it would be unlawful, under the rubric of the English and international legal doctrines mentioned in the previous paragraph, for the ITF to impose such rules on a player, and therefore unlawful for the Tribunal to apply them to this player. He placed reliance on numerous authorities including, most notably, *Meca Medina v. Commission* Case C-519/04P [2006] ECR 6991, asserting (in his answering brief, para 133) that the decision of the European Court of Justice in that case "marks a fundamental departure in the applicability of Competition Law to sports anti-doping rules".

68. The ITF countered these arguments with authorities in which the courts have recognised the high degree of autonomy accorded to sports governing bodies when formulating the rules under which sporting competition should take place. The ITF insisted that the burden was on the player to show that the ITF's rules were invalid and should be struck down; that the burden was a heavy one; that it would be a serious thing for a domestic tribunal appointed by a sports governing body to disapply the very rules it was appointed to apply; and that it was not unfair to the player to subject him to an anti-doping regime which treated as in competition a test carried out on his withdrawal from a competition without playing in it, or which extended the period regarded as "in competition" beyond the period during which a player had played.

69. In answer to the player's contention that Meca Medina is authority for the application of EU competition law to anti-doping rules in sport, the ITF submitted that the private rules of conduct that the ITF imposes on its players

do not engage EU competition rules, and relied in this regard on *UK Athletics v. Ohuruogu*, decision of the Disciplinary Committee (Charles Flint QC, Chair) dated 15 September 2006, at para 34:

> "There must be at least a question whether the principles expressed [by the ECJ in Meca Medina, applying the EC competition rules to FINA's anti-doping rules] are capable of being applied to anti-doping provisions imposed under the World Anti-Doping Code. The Code represents an international consensus, supported by, inter alia, the member states of the EU, setting out an agreed mechanism for the operation of an anti-doping regime. There can be no doubt that the anti-doping rules have a legitimate aim and are intended to be limited to what is necessary to ensure the proper conduct of competitive sport."

70. We do not need to decide whether Meca Medina is authority for the application of EU competition law rules to anti-doping provisions enacted in accordance with the Code. If it is, we are satisfied that the provisions of Article F.2 and Article F.4 do not infringe those rules, or any other doctrines and principles relied upon by the player, including the principle of proportionality evolved in the jurisprudence of the CAS.

71. We are far from persuaded that the ITF acted illegally by enacting those provisions. They form part of the anti-doping rules that are required in sports whose governing bodies have undertaken to implement the Code within their sport. Under the Code, it is left to signatories to determine the period during which a competition subsists, and to determine the scope of testing treated as in competition. We cannot see any intrinsic unfairness or illegality in adopting a rule which treats as "in competition" a test administered to a player who is scheduled to take part in the competition concerned but withdraws without playing in it.

72. Accordingly, the ITF has discharged the onus on it of proving to our comfortable satisfaction (see Article K.6.1) the commission of a doping offence by the player under Article C.1; namely, the presence of a metabolite of cocaine in the urine sample he provided on 28 March 2009 at the Sony Ericsson Event in Miami, Florida. It is agreed that the player has not previously committed a

doping offence. Under Article M.2, the period of ineligibility imposed for a first doping offence under Article C.1 is two years, unless (so far as material here) the conditions for eliminating or reducing the period specified in Article M.5 are met.

73. The player relies on Article M.5.1 (No Fault or Negligence) and, alternatively, on Article M.5.2 (No Significant Fault or Negligence). In order to rely on either of these two provisions, the player must first establish on the balance of probability (see Article K.6.2) how the prohibited substance entered his system. As is well established in the case law of the CAS, it is not sufficient for a player to show the route by which the substance entered his system. He must establish the factual circumstances in which it entered his system, and must do so by positive evidence, not mere speculation coupled with a protestation of innocence.

74. The player asserted that cocaine entered his system, on the balance of probability, by mouth to mouth transmission from P_____ on 28 March 2009 when they kissed several times at Set (and once outside Goldrush) during that night. He submitted that this explanation was, on the totality of the evidence, more likely than not to be the correct one. He pointed out that the kissing was not speculation: the fact that it occurred was undisputed by the ITF. He submitted that he had done enough to discharge the onus placed on him by Article M.5.1 and M.5.2.

75. The ITF submitted that, having regard to all the evidence, the theory that ingestion occurred by transmission from P_____ during kissing was speculative; and that if ingestion was not deliberate, other explanations were just as likely to be correct; for example, contamination by shaking hands with someone who had taken cocaine, drinking a liquid with cocaine in it, handling currency used to sniff cocaine, or touching the mouth with a hand contaminated by cocaine from a table to P_____ The ITF therefore submitted that the player could not rely on either Article M.5.1 or M.5.2 of the Programme.

76. For reasons which now follow, we accept that the player has discharged the onus on him of establishing, on the balance of probability, how cocaine entered his system. We find that the most likely explanation is that advanced by the player, namely that cocaine was transferred to the player from mouth to mouth kissing with P_____. We find that this explanation is more likely than not to be the correct one.

77. The Tribunal rejects any suggestion that the player deliberately took cocaine. His denial of having done so was convincing and, in our judgment, completely truthful. In addition, the expert witnesses agreed at the hearing that the minute quantity of cocaine metabolite detected in his urine made it unlikely that this was a case of recreational use. By the end of the hearing before us, the expert witnesses were agreed that the quantity was of the order of 1-10 mg, and more likely than not towards the lower end of that range, i.e. 5 mg or less.

78. That is a very small quantity indeed. We were shown a vial containing 1mg of a white powder similar in appearance to cocaine. It was about the size of a single grain of refined salt. The experts also agreed that the hair analyses performed by Dr Kintz exclude the possibility that the player is a regular social user of cocaine. Professor Forrest, the expert witness called by the ITF, accepted during his evidence that recreational use was unlikely in view of the tiny quantity of cocaine metabolite found in the player's urine sample.

79. We do not accept the ITF's submission that the player is merely speculating when he asserts that the substance entered his system by means of P_____'s kisses. It is undisputed by the ITF that the player did indeed kiss P_____ several times, mouth to mouth, that night. It was not suggested to the player in cross-examination that he had not kissed her in the manner and to the extent described in his witness statement. What was suggested to him was that other explanations were also possible and just as likely.

80. However, if one rules out deliberate ingestion for recreational purposes, as we do, all the other possibilities must necessarily involve contamination of the player, either accidental or deliberate. Deliberate contamination is unlikely. The ITF did not suggest it was likely; there was no evidence that anyone had a motive to contaminate the player. Accidental contamination from a drink, from contact with a person other than P_____ or from contact with furniture, cannot be ruled out, but in our view, are considerably less likely to be the explanation than contamination from P_____'s kisses.

81. We appreciate that P_____ has been quoted in at least one press report as denying that she gave the player more than a single non-mouth to mouth kiss ("un bisou") and as denying that she kissed him mouth to mouth ("une galoche"). We appreciate also that she has also denied taking cocaine that night. When she spoke to the Tribunal by telephone in the presence of her lawyer, she repeated these denials and claimed that she had been defamed by the press.

82. However, there was no opportunity to discuss with her the content of her statement. The credibility of what she said could not be tested. Yet it was important to test her credibility, because the content of her pre-prepared statement flatly contradicted the player's evidence that they kissed extensively, mouth to mouth, at the club that night. P_____ denied this, but she was not prepared to be questioned about it. The player's evidence was supported in the witness statement of M. Guillaume Peyre, the player's coach who was present at the club that night.

83. Unsurprisingly, the ITF did not, in the circumstances, seek to rely on P_____ as a witness of truth and did not rely on her testimony as a basis for impugning the player's credibility. The ITF called no other witness to dispute the player's account of events at the club that night. We do not criticise the ITF in any way for that. We are not suggesting that the ITF should have made detailed

enquiries in a search for evidence of illicit drug taking in a club which (despite its name) has no particular connection with the sport of tennis or any sport.

84. We find that cocaine was present at the club and was in use by some of the customers there that night. This is probable because of the reputation of the Winter Music Conference, of which the club event that night formed part. It is also highly probable because of the presence of a trace amount of unmetabolised cocaine (as well as benzoylecgonine, a cocaine metabolite) in urine provided by the player about 12 hours later. The expert witnesses agree that this means the player must have ingested cocaine in a very small quantity and that the ingestion probably occurred in the period from approximately, 2am-6am on 28 March. The player was at Set for most of that period.

85. We accept the player's evidence that he was not with P_____ at every moment while at the club on 28 March 2009. We think it is likely that P_____ had the opportunity to take cocaine while not with him. We accept the evidence of the player and M. Lamperin that P_____ told them both in Paris on 10 May 2009 that someone had offered cocaine to her and her friend M_____ that night at the club in Miami. She would have no particular reason to invent those facts and neither side sought to dispute them.

86. We also accept the evidence (albeit hearsay) that P_____ has taken cocaine in the past. She is reported to have said this to a journalist, and would have no reason to say it if it were not true. We consider that a prior user of cocaine who has the opportunity to use the drug during a social night out, is more likely to avail herself of the opportunity than one who – like the player – has never used cocaine and would not willingly do so.

87. That said, we have no direct evidence that P_____ herself took cocaine that night, and it is possible, though not particularly likely in the view of the experts who gave evidence, that she was herself accidentally contaminated with cocaine before accidentally contaminating the player with it. We do not draw any

adverse inference against her credibility because of her refusal to answer questions before the Tribunal. That refusal is understandable in view of the criminal complaint filed by the player and the presence of P_____'s lawyer when contacted during the hearing.

88. However, in our judgment, there is other evidence which supports the proposition that her kisses were more likely than not to be the source of the player's contamination. She spent what the player described as an "excessive" time in the toilet at Goldrush, shortly before 5am on 28 March 2009. She then kissed the player for a few seconds on the mouth. This, again, was witnessed by M. Peyre and was not challenged in cross-examination by the ITF.

89. Furthermore, the expert witnesses agreed that a very small quantity of cocaine most probably entered the player's system within about 12 hours of the urine sample being provided, at about 2.20pm on 28 March 2009. The view that ingestion had occurred as recently as in the 12 hours preceding the sample was shown by the presence of a trace quantity of free (unmetabolised) cocaine found in the player's A sample. If cocaine had been ingested any earlier, the quantity was so small, and the half life of the drug is so short, that it would have been undetectable in the player's urine. That 12 hour period includes the time the player spent with P_____, during which they kissed.

90. We conclude that it is more likely than not that the cocaine detected in the player's urine sample entered his system by means of P_____'s kisses during the period from about 2am to 5am on 28 March 2009. We conclude that P_____ had herself, deliberately or otherwise, ingested cocaine before contaminating the player. It follows that the player has discharged the onus on him of showing how the prohibited substance entered his system, and is therefore in principle entitled to rely on the defences of No Fault or Negligence, or No Significant Fault or Negligence, in Article M.5.1 and M.5.2 respectively.

91. In order to establish "No Fault or Negligence" for the purpose of eliminating the otherwise applicable period of ineligibility, the player must establish (according to the definition in Appendix One to the Programme) that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered with the prohibited substance. The test under Article M.5.1 is strict and the fault of the player must normally include, for this purpose, fault on the part of his entourage and advisers, as established in other cases including *Koubek v. ITF* (CAS sole arbitrator) CAS/A/828, at paras 53-61.

92. The player's conduct that evening was not completely free from fault. He placed himself in an environment where contamination with a prohibited substance was a risk. He ought to have known that the Winter Music Conference festival was an event notorious for illegal use of recreational drugs. Neither he nor any of his party appear to have thought of this. He was aware that drugs are not infrequently consumed in night clubs.

93. He was in the habit of taking precautions such as drinking only from bottles he had himself unsealed, and keeping them with him. That evening, he was lax about observing such precautions. He let his guard drop. He drank apple juice which had been stored in an open topped jug. Although we have found that a drink was probably not the source of contamination, it might have been. He kissed a woman who was unknown to him before that evening, and who for all he knew, could be a drug user.

94. So we do not accept that the player can succeed in showing No Fault or Negligence so as to bring himself within Article M.5.1 and eliminate any period of ineligibility. We turn next to consider whether he can succeed in bringing himself within Article M.5.2. In order to establish this defence, for the purpose of achieving a reduction in the otherwise applicable minimum period of ineligibility, the player must establish that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for "No

Fault or Negligence", was not "significant in relationship to the doping offence in issue".

95. The player submits that he can meet this test. The ITF submits that he cannot. The ITF points to the case law establishing that cases of No Significant Fault or Negligence will be exceptional. We accept this. The ITF points to the risks taken by the player in socialising with people he did not know in a club notorious for cocaine use. It seeks to draw a parallel with the decision of the Anti-Doping Tribunal in ITF v. Burdekin, dated 4 April 2005, where the defence abjectly failed.

96. In Burdekin the player was significantly at fault because he had drank so much alcohol that he could not police his own conduct or that of others, so that he was at risk of doping himself with cocaine or being doped with it by others. He was socialising in a bar where people he knew as users of illegal drugs were nearby. Cocaine and metabolites were detected in a urine sample he gave about 60 hours later. The Tribunal in Burdekin did not exclude deliberate use of cocaine by the player. Here, by contrast, we have discounted deliberate use of cocaine, and the player drank little alcohol and remained sober.

97. We find that in the unusual and exceptional circumstances in which he was, on the balance of probability, contaminated with cocaine by P_____, the player succeeds in establishing the defence of No Significant Fault or Negligence. We have already explained that his conduct was not completely free from fault. But we do not consider that the fault was "significant in relationship to the doping offence in issue". The doping offence here was the inadvertent ingestion of a minute quantity of cocaine.

98. When the offence was committed, the player was aged 22. As a professional tennis player at the highest level he has few opportunities to go out for social purposes in the evenings. His shoulder injury and consequent decision to withdraw from the competition gave him a rare opportunity to do so. It was

reasonable that he would wish to do so. He had clearly decided to withdraw from the competition, but had overlooked the need to complete the formalities of withdrawal.

99. As we have already noted, he showed a lack of judgment in deciding to go to the club, Set. His lack of judgment was shared by others in his entourage that evening. But the degree of his fault, and of those accompanying him, was slight. He might well have reasoned that if he took his usual precautions he would be able to avoid contamination. He did not know how easily contamination with cocaine can occur. As he is not an expert scientist, this is understandable.

100. Having arrived at Set, he proceeded to kiss a woman he had not met before who might, for all he knew, be a cocaine user. He might have considered this possibility, had he been exercising the utmost caution. But his fault in not doing so was slight. As a healthy, single young man who is not often able to go out and enjoy himself socially in the evenings, it is not unnatural that he should have been attracted to P_____, to the point of kissing her. He is not the first young man to have done such a thing with a young woman during a social night out.

101. In addition, the amount with which he was contaminated was probably about the size of a grain of salt at the most. Contamination with a large dose might well correspond to a high degree of fault: the more cocaine is found in the player's urine, the more explaining he has to do. It is reasonable to acknowledge the converse proposition too. Like the quantity of cocaine ingested, the degree of his fault was very small.

102. We conclude that the player has, unusually, discharged the burden on him of establishing that he was not significantly at fault, within the meaning of Article M.5.2 of the Programme. We therefore have discretion to reduce the otherwise applicable period of ineligibility of two years by up to half, i.e. to a minimum

of one year. On the facts of this case we would have no hesitation in exercising our discretion to give the player the benefit of the full reduction and impose a period of ineligibility of only one year.

103. That concludes our analysis of the case with reference to the rules governing the period of ineligibility where, as we have found, a doping offence under Article C.1 is committed. However, it does not conclude our consideration of the issue as to any period of ineligibility in this case. The player submits that any period of ineligibility, even a period of only one year (on the basis that Article M.5.2 applies and the Tribunal reduces the two year period by the maximum allowed) would be disproportionate to the doping offence committed.

104. The player relies on the CAS's decision in *Puerta v. ITF* CAS 2006/A/1025 for the proposition (at para 11.7.23) that:

> "[a]ny sanction must be just and proportionate. If it is not, the sanction may be challenged. .... . in those very rare cases in which Articles 10.5.1 and 10.5.2 of the WADC [the Code] do not provide a just and proportionate sanction, i.e., when there is a gap or lacuna in the WADC, that gap or lacuna must be filled by the Panel. That gap or lacuna ... is to be filled by the Panel applying the overarching principle of justice and proportionality on which all systems of law, and the WADC itself, is based."

105. The player submits that any period of ineligibility would be a grossly disproportionate punishment for a player who did not compete in the competition concerned, had already decided not to compete when the contamination occurred, and had made that decision for the very good reason that he was injured, and not to avoid testing. He relied on the passage in *Puerta* at para 11.7.18 where the CAS rejected the notion that "it is necessary for there to be undeserving victims in the war against doping".

106. He submits that the rules set out in Articles F.2 and F.4 were not intended to catch a victim of inadvertent contamination with a substance not banned out of competition, who only finds himself tested "in competition" because of the

purely technical point that he had not formally withdrawn from the competition before the contamination occurred. Mr Lewis, for the player, said that "we stand here in this case ... on the deck of a man of war with a player about to be shot *pour encourager les autres*". He submitted that this was an unacceptable result.

107. The ITF disagrees and submits that the mandatory uniform sanctions provided for in the Programme and in the Code should be applied. Mr Taylor, for the ITF, pointed out that in cases such as *Edwards v. USADA and IAAF*, CAS OG/04/003, 17 August 2004, the CAS had recognised the legitimacy of a uniform two year ban for a first doping offence and had rejected the argument that two years was disproportionate. It is clear from that case law that it will only be in the rarest of cases that proportionality would require a lesser sanction than provided for under the rules.

108. Mr Taylor warned against the risk of eviscerating the strict liability principle which underlies the Code, and of "opening the floodgates". He submitted that there was nothing particularly unusual or exceptional about the present case. He argued that it was not an exceptional feature that the player had not actually played, since he could easily have protected himself against the risk of testing positive for a substance banned in competition only, by formally withdrawing on the evening of 27 March 2009, rather than the next day by which time he was contaminated with such a substance.

109. The ITF accepted, on the authority of *Puerta*, that a mandatory sanction provided for under the Programme could in the most extreme circumstances be disapplied, but submitted that it is only legitimate to do so where the player can show that the mandatory sanction would constitute an infringement of individual rights that was extremely serious and completely disproportionate to the behaviour penalised. The player, said the ITF, did not come close to meeting that standard.

110. In *Gatlin v. USADA*; *IAAF v. USATF and Gatlin*, CAS 2008/A/1461 and 1462, an athlete appealed against a four year ban imposed for what the CAS Panel decided constituted a second doping offence, involving the presence of testosterone in the player's system. His first offence, involving medication for Attention Deficit Disorder containing amphetamine, had been committed several years earlier, without any intent to enhance performance. A two year ban that had been imposed by an arbitral panel had been commuted by consent of the IAAF to enable the athlete to compete again.

111. The athlete argued that the circumstances of his first offence were such that it would be disproportionate and unfair to visit his second offence with the full rigour of the rules, which provided for a lifetime ban for a second offence. The IAAF argued that the athlete should be banned for life for his second offence or, if an "exceptional circumstances" defence (drafted differently from Article M.5.1 and M.5.2 here) could be made out, for eight years and not less.

112. The CAS Panel was prepared to accept, when considering the question of exceptional circumstances, that "recognizing ... the huge impact that the sanctions imposed under the IAAF Rules may have on the life of an athlete .... the IAAF Rules leave room for discretion and must not be applied mechanically and rigidly" (see page 13 of the decision). The Panel decided that the circumstances surrounding the first offence were such that exceptional circumstances were present and that when combined with the second offence the facts of the entire case encompassing both infractions amounted overall to exceptional circumstances. It decided that the period of ineligibility for the second offence should be four years.

113. Gatlin was decided under different rules from those which follow the Code but, like *Puerta*, it demonstrates the need for flexibility in deciding cases involving wholly exceptional factual circumstances, where a rigid application of the applicable regulatory regime would lead to serious injustice. In *Gatlin* and, in a different way in *Puerta*, where rules based on the Code were in play, the CAS

recognised that in such wholly exceptional cases, the need to avoid serious injustice to an individual must override the need for harmonisation in decision making and strict application of the relevant rules.

114. In the present case, we start by asking ourselves whether there is a "lacuna" in the rules. There was a lacuna in *Puerta* because on the facts of the case "Articles 10.5.1 and 10.5.2 of the WADC [the Code] do not provide a just and proportionate sanction" (*Puerta*, at para 11.7.23). In the present case, we consider it unlikely in the extreme that the drafters of Article F.2 and F.4 could have had in mind a case such as the present, where a player decides to withdraw on purely medical grounds without ever playing, but has without significant fault been contaminated before his actual withdrawal, with a tiny amount of a substance banned in competition only.

115. We heard evidence about the genesis and rationale of Articles F.2 and F.4, and their predecessors in both the ATP and ITF rules. As already stated, we did not find it necessary to analyse that evidence. We accept that there was and is good reason to require players who withdraw from competitions to submit to testing, and for treating such testing as in competition. The reason is to preserve the good repute of the competition by avoiding players withdrawing because testing is going on and thereby avoiding being tested.

116. But that rationale does not extend anywhere near far enough to cover the facts of the present case, which are unusual to the point of being probably unique. There is no good reason to penalise harshly an athlete whose fault is only slight with a ban of one year when the basis for doing so is the purely technical one that he had not actually completed the formalities of withdrawal before becoming contaminated. We accept the player's submission that if we were to impose a one year period of ineligibility, applying the rules rigidly, we would be penalising a person whom the rule was not intended to catch.

117. In the present case, we have found the player to be a person who is shy and reserved, honest and truthful, and a man of integrity and good character. He is neither a cheat nor a user of drugs for recreational purposes. His inadvertent ingestion of cocaine occurred in circumstances in which the degree of his fault was very small, as small as the miniscule quantity consumed. The substance with which he was contaminated is banned only in competition. At the time of contamination and testing, the player remained "in competition" only in the most technical sense.

118. Standing back and looking at the totality of the evidence, we have reached the conclusion that a very serious injustice and infringement of the player's right to practise his profession would be done if we were to impose a one year period of ineligibility. We are required under the rules to find that a doping offence has been committed. He will therefore have a doping offence on his record for the rest of his career. He will be at risk of a life ban if he ever commits a further doping offence.

119. The player has already served a provisional suspension and missed Wimbledon and Roland Garros as a result. The ranking points system is such that it is essential to play frequently in major tournaments to maintain one's ranking position. He already has much ground to recover. If he were banned for one year until the summer of 2010, he might never be able to recover his position in the top twenty-five of the world rankings.

120. We do not accept the ITF's contention that by declining to ban the player for one year in this case, we would be undermining the integrity of the Programme, "opening the floodgates" for others or destroying the principle of strict liability which underpins the Code. We are not exercising a discretion to disapply the provisions of the Programme. We are fulfilling our obligation to apply "the overarching principle of justice and proportionality on which all systems of law, and the WADC itself, is based" (*Puerta*, at para 11.7.23).

121. We have decided, in the exceptional circumstances of this case, that there should be a period of ineligibility running from 1 May 2009 up to the time and date this decision is issued; in other words, a period of ineligibility for time served. We consider that it would be unjust and disproportionate to require the player to be banned from playing after the date of this decision in the very exceptional circumstances of this case.

122. We turn next to consider the other issues provided for in the Programme. Article L.1 provides that the player's results in the competition which produced the positive test result shall be automatically disqualified, and any titles, medals, prize money and ranking points forfeited. That provision has no application in the present case, because the player did not compete in the Sony Ericsson Event. He withdrew from it before his first match.

123. Article M.8 of the Programme provides that where a doping offence is committed, all other competitive results from the date of the sample collection through to the start of any period of ineligibility, must also be disqualified, with forfeiture of any titles, medals, prize money and ranking points, unless the Tribunal determines that "fairness requires otherwise". However, the last sentence of Article M.8 states that lack of evidence that the player's performance was enhanced during such subsequent competitions is not of itself sufficient to trigger the Tribunal's discretion to make a determination that fairness requires a player's subsequent results to remain undisturbed.

124. We accept the submission of the ITF, founded on *ITF v. Bogomolov*, Anti-Doping Tribunal decision dated 26 September 2005, at para 109 that:

> "The question is one of fairness on the facts of each case, but the starting point is indeed ... that disqualification is the norm and not the exception. Otherwise, the rule would have been drafted the other way round, so as to make non-disqualification the norm unless the Tribunal considers that fairness requires disqualification."

125. The player played during April 2009 in Rome and Barcelona, after the sample collection date, 28 March 2009, but before the positive test result became known to him on or about 1 May 2009. He earned 100 ranking points and 37,500 euros from playing in those two competitions. He did not compete after 1 May 2009, and did not apply to lift the provisional suspension provided for under the 2009 version of the Programme unless lifted on an application to the chairman of the Anti-Doping Tribunal.

126. We have come to the conclusion, in the unusual and exceptional circumstances of this case, that fairness does require the player's results in the Rome and Barcelona competitions remain undisturbed. We reach that conclusion not just because the player's performance could not possibly have been enhanced during those competitions (indeed he was tested at both of them, and there is no suggestion that the results were other than negative).

127. We take into account that the player was contaminated with a very small amount of cocaine in an isolated incident occurring in very unusual circumstances, the effect of which did not last the sunset of the day of ingestion. We take into account that the amount of cocaine in the player's body was so small that if he had been tested only a few hours later, his test result would be likely to have been negative.

128. We also take into account that it was an understandable misjudgment that the player omitted to fill in a withdrawal form during the evening of 27 March 2009, rather than on 28 March 2009. Had he withdrawn that evening instead of the next day, he would (if the testers were still on site) probably have been tested, if at all, that evening and the result would have been negative. The player is neither a recreational drug user nor a cheat. He was unlucky to test positive for inadvertent contamination by cocaine.

129. The final issue is what the start date for the player's period of ineligibility should be. As already mentioned, we decide that the period should run from 1

May 2009. It is apparent from our decision not to disturb the player's results during April 2009 that we should not impose a period of ineligibility which includes April 2009. t would be wholly inappropriate to allow results during a period of ineligibility to stand. The player submitted that any such period should start on 28 March 2009 which is the earliest date on which, in theory, the period of ineligibility should start. But we accept the ITF's submission (accepting the applicability of Article M.9.3(a)) that the period should start on 1 May 2009 when the player ceased competing.

The Tribunal's Ruling

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

(1) confirms the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 30 April 2009, namely that a prohibited substance, benzoylecgonine, a cocaine metabolite, was present in the urine sample provided by the player at the Sony Ericsson Event in Miami, Florida, on 28 March 2009;

(2) declares the player ineligible for a period of two months and 15 days commencing on 1 May 2009 and expiring at 9am (London time) on the date of release of this decision, from participating in any capacity in any event or activity authorised by the ITF or any national or regional entity which is a member of or is recognised by the ITF as the entity governing the sport of tennis in that nation or region;

(3) orders that the player's results in competitions subsequent to the Sony Ericsson Event, in Barcelona and Rome during April 2009, shall remain undisturbed and the prize money and ranking points obtained by the player in those competitions shall not be forfeited.

131. This decision may be appealed to the CAS by any of the parties referred to in Article O.2 of the Programme.

Tim Kerr QC, Chairman

Professor Richard H. McLaren

Dr. Mario Zorzoli

Dated: 15 July 2009.