**Arbitration CAS 2006/A/1025 Mariano Puerta v. International Tennis Federation (ITF), award of 12 July 2006**

Panel: Mr John Faylor (USA), President; Mr Denis Oswald (Switzerland); Mr Peter Leaver (United Kingdom)

*Tennis*
*Doping (etilefrine)*
*Applicable law*
*Relevance of the concentration of prohibited substance*
*Duty of utmost caution placed on the athlete as well as his/her entourage*
*Sanction for two offences committed with "No Significant Fault or Negligence"*
*Filling of a lacuna in the World Anti-Doping Code (WADC)*
*Flexibility of the WADC to satisfy the principle of proportionality*

1. **The rules of a Swiss private law entity such as WADA should comply with Swiss law. Therefore, if the ITF Programme provides that it is to be governed by and construed in accordance with English law, but that provision in the ITF Programme is expressly stated to be subject to the requirement to interpret the Programme *"in a manner that is consistent with the applicable provisions of the Code [WADC]"*, those provisions must be interpreted as requiring to construe the WADC in a manner which is consistent with Swiss law, as the law with which the WADC must comply. Construing the WADC in that way means that the WADC is not subject to the vagaries of myriad systems of law throughout the world, but is capable of a uniform and consistent construction wherever it is applied. Any other construction would negate, or, at the very least, seriously weaken, the purpose and objective of the WADA and its signatories.**

2. **Any concentration of etilefrine found as the prohibited substance in an athlete's urine will be reported as an adverse analytical finding and be subject to sanctions. The concentration of the prohibited substance may be evidence, however, as to how the substance entered the athlete's body and may also provide an indication as to whether or not it was intended to enhance performance. Therefore, it also has relevance to the issue of fault and negligence, as a high concentration could indicate the presence of intent or a substantial degree of negligence.**

3. **Athletes must be aware at all time that they must drink from clean glasses, especially in the last minutes before a major competition. It is also essential for an athlete's entourage to be as aware as an athlete of the necessity of taking the utmost caution as to what an athlete eats and drinks.**

4. **For the purpose of imposing a sanction for a second offence, the WADC does not distinguish between more significant and less significant breaches. In a case in which**

**the two offences have been found to have been committed with "No Significant Fault or Negligence", an eight year sanction is not just and proportionate, especially if, due to the particular circumstances of the case, this sanction is indistinguishable from a lifetime ban. Therefore, in such a case, a panel must be allowed to impose a lesser period of ineligibility.**

5. **In all but the very rare case, the WADC imposes a regime that provides a just and proportionate sanction, and one in which, by giving the athlete the opportunity to prove either "No Fault or Negligence" or "No Significant Fault or Negligence", the particular circumstances of an individual case can be properly taken into account. However, in the very rare case in which the WADC does not provide a just and proportionate sanction, there is a gap or lacuna which is to be filled by a panel, not exercising a discretion, but applying the overarching principle of justice and proportionality on which all systems of law, and the WADC itself, are based.**

6. **The WADC contains some flexibility to enable a panel to satisfy the general legal principle of proportionality. However, the scope of flexibility is clearly defined and is deliberately limited so as to avoid situations where a wide range of factors and circumstances, including those completely at odds with the very purpose of a uniformly and consistently applied anti-doping framework are taken into account. The period of ineligibility may be reduced or eliminated only i) in the case of exceptional circumstances, and ii) in the case of Specified Substances.**

The Appellant, Mr Mariano Puerta ("Mr Puerta"), an Argentinian citizen, was born on 19 September 1978. He has been a professional tennis player since about 1995 and a member of the ATP Tour since June 1997.

The Respondent, the International Tennis Federation (the "ITF"), is the international federation governing sports related to tennis worldwide. The ITF maintains its seat in London, England. On 1 January 2004, the ITF implemented the World Anti-Doping Code (the "WADC") of the World Anti-Doping Agency ("WADA") in its Anti-Doping Programme. The rules applicable to this case, *i.e.* the ITF Tennis Anti-Doping Programme 2005 ("the Programme") are essentially identical to the WADC.

In May 2005, Mr Puerta was ranked as tenth in the ATP world rankings. On 5 June 2005, Mr Puerta competed in the final of the French Open played at Roland Garros and lost against his opponent, Rafael Nadal, in four sets.

On the same evening, he underwent a doping control and provided a urine sample. The sample was analysed at the WADA accredited laboratory in Paris and was found to contain etilefrine in an undetermined concentration. On the doping control form completed at the time of the control, Mr Puerta declared the taking of various supplements and caffeine, but no medications, and did not declare etilefrine.

The full laboratory report was received by International Doping Tests and Management ("IDTM") in Sweden on 5 July 2005 whereupon a Review Board was convened in accordance with the Programme. On 27 July 2005, the Board concluded unanimously that a doping offence had been committed.

On 28 July 2005, following Mr Puerta's participation in various competitions during the first half of August, IDTM wrote to Mr Puerta informing him of the positive test result and of his right to have the B sample analysed. Mr Puerta exercised that right. The B sample analysis took place on 15 September 2005 and confirmed the presence of etilefrine. On 21 September 2005, Mr Puerta was formally charged with the doping offence.

On 6 and 7 December 2005, a hearing took place before the Independent Anti-Doping Tribunal of the Respondent (the "ITF Tribunal"), and was attended by both parties and their representatives. The decision issued by the ITF Tribunal confirmed the doping offence, ordered that Mr Puerta's individual results in both the single and doubles competitions be disqualified in respect of the 2005 French Open and subsequent competitions, and ruled that all prize money, totalling approximately USD 887,000 (including half the prize money awarded to the doubles pair in doubles competition at the French Open) and ranking points obtained by Mr Puerta by reason of his participation in these competitions be forfeited.

Additionally, on the grounds that Mr Puerta had been sanctioned in 2003 by the ATP Tour Anti-Doping Tribunal for an earlier doping offence involving the inadvertent use of clenbuterol for an asthma attack in February 2003 (see ATP v. Puerta, Decision of 29 December 2003), the ITF Tribunal declared Mr Puerta ineligible for a period of eight (8) years commencing on 5 June 2005. Under the rules of the ATP, which had been applicable in 2003, clenbuterol was a class 1 prohibited substance which carried a mandatory two year period of ineligibility. Mr Puerta was found at that time to have committed a doping offence by failing to obtain a medical exemption for the prescribed asthma medication. It was held that Mr Puerta's actions were not deliberate and did not enhance performance, but were nevertheless committed with negligence. As the clenbuterol case was considered as inadvertent doping, the ATP Tour Anti-Doping Tribunal decided not to impose the mandatory two year ban provided for by the rules, but in the light of the principle of proportionality, it imposed on Mr Puerta a nine month period of ineligibility ending on 1 July 2004.

**The Case as presented to the ITF Tribunal**

Before the ITF Tribunal, Mr Puerta did not challenge the validity of the sample collection process, the chain of custody, the finding of the prohibited substance etilefrine in the A and B samples, the charge that these samples were his own, or that etilefrine was listed as a prohibited stimulant under S6 of the Prohibited List valid as of 1 January 2005 (Appendix Two of the WADC), nor did he claim to have obtained a TUE for this substance. He had, however, applied for and obtained a TUE in August 2003 for the use of salbutamol for a recurring asthma condition.

Mr Puerta asserted that he did not knowingly ingest the etilefrine and that its presence in his urine could only be explained by the innocent and accidental ingestion of his wife's medicine bearing the name "Effortil". She had been using this medication under a doctor's prescription to ease hypertension and menstrual pain since he had first met her in November 2000. Effortil can be

purchased over the counter in Argentina and in several European countries. It is, according to the undisputed statement of Mrs Puerta, colourless, odourless and tasteless. It contains, as its active ingredient, etilefrine; this fact is disclosed on the bottle of the medication. Mr Puerta had been aware for several years of his wife's use of Effortil, including her use of it at times of heightened stress, and was also acutely aware that it contained a Prohibited Substance and that he and his wife had to undertake, and did indeed undertake, strict precautions to ensure that he did not accidentally or inadvertently come into contact with it.

On 5 June 2005, the day of the finals, Mr Puerta and his wife journeyed at about 11:30am from their hotel to the Roland Garros Stadium, where he warmed up on the court at about noon in preparation for the final match which was to take place at 3:00 PM. After eating lunch in the Men's Room of the Stadium, Mr Puerta entered the cafeteria of the Stadium prior to the start of the final match, where his wife, her mother, her brother, Diego Estevanez, and her brother's fiancée had taken lunch. They sat together at a small table on which were coffee cups and glasses for water, all of the same appearance. Mr Puerta drank coffee and mineral water.

Shortly before the start of the final, he said goodbye to his wife and her family at the table, thinking he would not see them again until after the match, and went to the changing room to prepare for the match. There he learned that the match would be slightly delayed. He thereupon returned to the cafeteria. In fact, the final started on time at 3:00pm.

During the period of his absence from the cafeteria, Mrs Puerta told the ITF Tribunal that she had changed her position at the table to the chair in which her husband had previously been sitting. She then proceeded to drop 20 drops of Effortil into a glass which she believed to be her own and not Mr Puerta's. She then filled the glass with water and drank the mixture, draining, or almost draining, the glass. She then departed from the room together with her mother and her brother's fiancée to visit the WC, leaving her brother behind at the table alone.

Upon returning to the cafeteria from the changing room, Mr Puerta found only Mr Estevanez, the ladies having departed for the WC. Mr Puerta told the ITF Tribunal that he had poured water from the bottle which he carried with him – a bottle he had not left unattended and unsealed – into the glass from which he believed that he had been drinking earlier, and drank it. He claims that the glass appeared to be empty, but that he later came to believe that it held the residue which his wife had previously left behind when she poured her Effortil into the glass.

**The Decision of the ITF Tribunal**

In its decision of 21 December 2005, the ITF Tribunal was not persuaded by Mr Puerta's narrative of the "switch of glasses" defence, but did not "rule it out". The Tribunal held that "on the balance of probabilities", Mr Puerta was contaminated by his wife's Effortil:

> *"and that this occurred during the period of about one to two days before the final at a time and place unknown, and with a dose that is unknown, and in circumstances that are unknown save that we find the source was Mrs. Puerta's medication".*

Without rejecting outright the "switch of glasses" theory posited by Mr Puerta, but without citing facts, circumstances or indicia in support of an alternative theory, the Tribunal took the position that the contamination:

> *"must have occurred through the negligent or deliberate act of an unknown person. We think that is more likely to be the case than the theory of contamination via use of the player's glass by Mrs. Puerta for her medication".*

Importantly, however, the ITF Tribunal accepted Mr Puerta's evidence that he did not deliberately dope himself:

> *"We accept on the balance of probabilities that the player's contamination with Effortil was inadvertent. We do not think he would be so unwise as to risk his career, even though he was playing the biggest match of his life on 3 June 2005".*

Moreover, the ITF Tribunal held that the ingestion of his wife's Effortil "was too small to have any effect on his performance":

> *"It later transpired that the approximate concentration was in the region of 192 ng/ml, which is about 50 times less than the reporting threshold of 10 micrograms per millilitre for ephedrine".*

The ITF Tribunal rejected Mr Puerta's submission that he acted without negligence or fault. In the view of the Tribunal, Mr Puerta failed to exercise "utmost caution" by picking up and using a glass located on a small table among other glasses of identical appearance:

> *"He could not be sure which glass he had been using. He had just been absent from the cafeteria and when he returned his glass was unattended except for the presence of his brother-in-law, of whom he made no enquiry. The circumstances were increasingly chaotic with numerous people circulating, so that the player could not know what might or might not have been already in the glass, or placed in the glass, during his absence. He ought to have drunk directly from his bottle of water to avoid any risk of contamination".*

The ITF Tribunal accepted, however, Mr Puerta's alternative submission of "No Significant Fault or Negligence". Citing the CAS Award in Knauss v. FIS (CAS/2005/A/847), the Tribunal reiterated that Mr Puerta did not deliberately dope himself and the presence of the etilefrine in his sample was inadvertent. The ITF Tribunal took into account that Mr Puerta was faced with a more difficult task than other players in protecting himself from contamination. He was aware that his wife was taking a medication containing a prohibited substance, the risk of which was heightened by the fact that she took the substance in the form of water-colored drops, not tablets. Mr Puerta had not failed to inform himself about anti-doping rules. On the contrary, he checked the list of Prohibited Substances and knew that etilefrine was on the list. He ascertained that etilefrine was the active ingredient in his wife's medication and made a conscious effort to guard against contamination. This fact, in the analysis of the ITF Tribunal, distinguishes the present case from one in which the contaminated supplements are taken without a proper checking of the ingredients.

In addition, the ITF Tribunal took into account Mr Puerta's submission that the concentration of etilefrine in Mr Puerta's A and B samples was so low as to be incapable of enhancing performance.

> *"We understand that the consequences of an error are not the same thing as the gravity of the fault that caused it to be committed, but it is relevant that the nature of the player's fault was not such as to lead to a high and performance enhancing dose of etilefrine being administered or inadvertently ingested".*

The Tribunal took the position in regard to Mr Puerta's submission that the ineligibility, forfeiture and disqualification sanctions imposed for a second offence were not *"savage and intemperate"*, as described by Mr Puerta, and that the case law of the CAS is unequivocal in the *"automatic disqualification"* of results of a competition where a doping offence is committed in the course of that competition. The ITF Tribunal accepted the ITF's submission that it would be *"wrong in principle"* for it to take into account the amount of money at stake, since that would mean that a high earning athlete would be more favourably treated under the rules than a low earning athlete. The ITF Tribunal concluded:

> *"We have rejected the defence of No Fault or Negligence, and as we have rejected the player's argument that proportionality precludes disqualification of results, it follows that the player's result in the doubles as well as the singles competition must be disqualified, and any medals, prize money and ranking points must be forfeited".*

Mr Puerta further submitted that, on the proper construction of Article M.2 of the Programme, in order for an eight year period of ineligibility to be imposed, a *"first offence"* must have been committed under the post-WADC version of the Programme and not under the ATP 2003 Rules. As the prior offence occurred and was sanctioned under different, pre-WADC rules, in his submission, he stated that it would not qualify as an offence within Article M.1 of the Programme and there was not, therefore, a second offence under Article M.2. Moreover, Mr Puerta submitted that under the ATP 2003 Rules, any subsequent second offence involving the ingestion of etilefrine carried only a one year ban. The natural meaning of the provision, he submitted, is that an *"offence"* means an offence under the Programme, i.e., the ITF Anti-Doping Programme itself. Therefore, the present case, involving etilefrine, had to be considered as a first offence. Any other construction would retrospectively change the consequences of an offence committed under earlier, different, rules and is therefore not admissible.

The ITF Tribunal rejected this submission as being without merit. Referring to the submissions made by the ITF, the ITF Tribunal held as follows:

> *"It would be contrary to the spirit of the rules and would seriously undermine the fight against doping in sport if the "slate were to be wiped clean" on entry into force of the [WADA] Code and the Programme. It would be an undeserved windfall if this player and others were to be treated as first offenders.*
>
> *There is no retrospective effect where the consequences of the first offence are not altered; only the consequences of the second offence were altered, and that occurred before, not after, the second offence was committed. Players such as this one were on notice from 1 January 2004 when the Programme and the [WADA] Code entered into force what the consequences of a second offence would be.*
>
> *There is nothing unfair about provisions which, prospectively not retrospectively, make the régime stricter than before. Consequently it is irrelevant that a second offence involving etilefrine carried only a one year ban under the old ATP rules".*

On the basis of the above findings, the ITF Tribunal held that if Article M.2 and Article M.5.2 of the Programme were to apply to the present offence and if they were to be applied as written, the combined effect of those provisions would be that Mr Puerta must be subject to a period of

ineligibility of no less than eight years. Mr Puerta's challenge to this ban as being *"unlawful, disproportionate and unjust"* in light of past CAS rulings, both pre-WADC and post-WADC, in addition to being voidable in English law under the doctrine of restraint of trade, was rejected on the following grounds:

> *"First, we accept that as a matter of principle the [WADA] Code cannot guarantee a proportionate result in every thinkable individual case. We accept the player's submission that there could be a case where the principle of proportionality requires a tribunal such as this to reduce or disapply sanctions provided for by the [WADA] Code. It is plainly established by pre-Code case law that a proportionate result on the facts must be reached in each case. It would be contrary to the rule of law if the [WADA] Code were able to substitute itself for the principle of proportionality.*
>
> *Secondly, however, it does not follow that applying the principle of proportionality to a case governed by the [WADA] Code will produce the same result as would be reached if the principle were applied to the same offence, committed in the same factual circumstances, but governed by pre-Code rules. It is incontestable that the [WADA] Code makes a proportionality argument more difficult to sustain. The CAS in [S.] and other prior cases cited to us, has made this clear. It is not sufficient that the Tribunal has an "uncomfortable feeling" (paragraph 10.26 of [S.]) about the severity of the sanction provided for under the [WADA] Code.*
>
> *In the present case, we have to ask ourselves whether the prospect of imposing a period of ineligibility of eight years (or more) on the player, when coupled with the financial and other sanctions he stands to suffer, lead us to conclude that by doing so we would be acting as an instrument of oppression and injustice to the player of such severity that we should be persuaded not to impose it".*

Notwithstanding these expressions of its views, the ITF Tribunal concluded that the fact that a sanction as harsh as an eight year ban could apply to a case where the negligence was not "significant" indicated that the WADC was intended to be severe. Deterrent punishments are by definition harsh, in the view of the Tribunal, but are not thereby, and without more, in violation of the principle of proportionality. The ITF Tribunal continued:

> *"In the end, after much anxious thought, we have concluded that we should not disapply the written provisions of the Programme applicable to this case. We do have an uncomfortable feeling about the severity of the sanction, even a very uncomfortable one. But that is not enough. Our reasons for so concluding are these.*
>
> *We consider that the real thrust of the player's complaint is, on analysis, directed at the rule itself and not just its application in his case. … He argues that this is a truly unique and extreme case on its facts.*
>
> *We do not agree that this is a truly extreme and unique case on its facts. In our view, if the application of the rules is to be condemned as disproportionate in the present case, it must also be disproportionate in many other cases and would in effect be virtually inoperable.*
>
> *In many such second offence cases, the mitigating circumstances will include factors such as those invoked by the player here: a low concentration in the urine, a lack of intent to enhance performance, an honest mistake, a low degree of fault, and so forth. Indeed, some of these were the vary factors which the CAS considered in [S.]. The real question is whether it is open to international sporting federations to adopt rules which provide for an eight year suspension for two doping offences committed by mistake, i.e., whether eight years for two mistakes is disproportionate.*
>
> *In the circumstances of the arduous fight against doping in sport, we are not persuaded that it is. The hard choice in sport is whether to have truly deterrent uniform sanctions for doping, or whether to have open-ended discretion in each case. The signatories to the [WADA] Code have chosen the former, not the latter. In our view it was*

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

In conclusion, the ITF Tribunal imposed an eight year period of ineligibility on Mr Puerta pursuant to Articles M.2 and M.5.2 of the Programme, stating that it did so *"with a heavy heart"*.

## LAW

### Jurisdiction of the CAS

1. The competence of the CAS to act as an appeal body is based on art. R47 of the Code of Sports-related Arbitration in the version in force as of January 2004 (the "CAS Code") which provides that:

   *"A party may appeal from the decision of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body"* and *"on article O. of the Programme"*.

2. Moreover, the jurisdiction of the CAS is explicitly recognised by the parties in the Order of Procedure that they signed, and which was accepted at the hearing on 24 May 2006.

3. Under art. R57 of the Code and art. O.5.1 of the Programme, the Panel has full power to review the facts and the law. The Panel did not restrict its review of the facts to only the formal aspects of the appealed decision, but considered the subject matter of the dispute *de novo*, evaluating all of the facts. However, the Panel was bound by the agreement reached between parties further described in 7. below.

### Admissibility of the Appeal and Procedure

4. Mr Puerta received the decision of the ITF Tribunal on 21 December 2005. His statement of appeal was filed on 24 January 2006 within the time limit fixed by the parties on the basis of a specific agreement. The appeal is therefore admissible.

5. On 17 February, Mr Puerta filed his appeal brief. On 30 March 2006, the ITF filed its answer.

6. The hearing was held in Lausanne on 24 May 2006.

7. Shortly before the hearing, the parties reached an agreement that the hearing would take the form of legal submissions only and that neither party would call any individuals to provide

witness or expert evidence, the factual evidence having been exhaustively established through a detailed procedure before the ITF Tribunal and contained in the set of documents presented by the parties to the Panel.

8. Mr Puerta made an oral statement at the end of the hearing.

**Applicable law**

9. Art. R58 of the Code provides:

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

10. Such provision was expressly mentioned in the Order of Procedure signed by the parties.

11. The *"applicable regulation"* in this case is the ITF Tennis Anti-Doping Programme 2005 which provides in Article S.3 that

*"Subject to Article S.1, this Programme is governed by and shall be construed in accordance with English law".*

12. In this regard, the Olympic Charter provides, *inter alia*, that every International Sports Federation must adopt and implement the WADC, or at least the compulsory elements of the WADC. The WADC and the Anti-Doping Rules of the International Sports Federations are intended to be applied consistently and uniformly throughout the world (see Introduction and Purpose of the WADC).

13. The ITF has adopted and implemented the WADC in its Programme. Article S.1 of the Programme, to which Article S.3 is subject, provides as follows:

*"The Programme shall be interpreted in a manner that is consistent with applicable provisions of the Code (…)".*

14. As most of the International Sports Federations have now resolved in their respective rules to refer sports related disputes to the Court of Arbitration for Sport, this appellate body is striving to achieve, despite differing governing laws of the Federations, a consistent and uniform application of the WADC throughout the world and for all sports disciplines. All of the case law developed by the CAS is based primarily on the rules issued by those federations. A large number of these federations are domiciled in Switzerland, thus enabling in the absence of a specific choice of law in their respective statutes the application of Swiss law.

15. The WADA is itself a Swiss private law foundation with its seat in Lausanne, Switzerland. Its headquarters are located in Montreal, Canada. The rules of a Swiss private law entity should comply with Swiss law. If they do not do so, there is a risk that the Swiss Courts will declare them to be non-compliant. It was in order to ensure that the WADC did comply with Swiss law that WADA commissioned the legal opinions to which the Panel has referred. The principal

concern of WADA was to ensure that the WADC complied with Swiss law in respect of proportionality.

16. The Panel accepts that the ITF Programme provides that it is to be governed by and construed in accordance with English law, but that provision in the ITF Programme is expressly stated to be subject to the requirement to interpret the Programme *"in a manner that is consistent with the applicable provisions of the Code [WADC]"*. The Panel interprets those provisions (Paragraphs S.1 and S.3 of the ITF Programme) as requiring it to construe the WADC in a manner which is consistent with Swiss law, as the law with which the WADC must comply. Construing the WADC in that way means that the WADC is not subject to the vagaries of myriad systems of law throughout the world, but is capable of a uniform and consistent construction wherever it is applied. Any other construction would negate, or, at the very least, seriously weaken, the purpose and objective of the WADA and its signatories.

*A. The Doping Offence on 5 June 2005*

17. Doping is defined at Article C.1 of the Programme as:

*"The presence of a Prohibited Substance or its Metabolites or Markers in a Player's Specimen, unless the Player establishes that the presence is pursuant to a therapeutic use exemption granted in accordance with Article E".*

18. In the present case, Mr Puerta acknowledged the presence of etilefrine in his urine samples on 5 June 2005, just after he participated in the final of the French Open. Etilefrine, being a Stimulant, is classified as a Prohibited Substance under S6 of Appendix Two of the Programme. Mr Puerta confirmed that he obtained no Therapeutic Use Exemption for this substance prior to the competition.

19. He furthermore admitted to being *"technically in breach of the strict liability TADP Article C.1"*.

20. The doping offence is therefore established and the sanctions set out under Article M of the Programme will apply.

*B. Elimination of the Ineligibility Sanction Based on "No Fault or Negligence" for the Offence*

21. Article M.2 of the Programme provides that except where the substance at issue is one of the Specified Substances identified in Article M.3 the period of ineligibility imposed for a violation of Article C.1 shall be:

- First offence: Two year's Ineligibility.
- Second offence: Lifetime Ineligibility.

22. The issue of whether Mr Puerta committed the offence with "No Fault or Negligence" is, however, critical in determining whether the ineligibility sanction will be treated as being referable to a "second offence" under Article M.1 of the Programme. Article 4.5.1 (last sentence) of the Programme provides that if the offence in committed with "No Fault or Negligence"

*"the period of Ineligibility otherwise applicable is eliminated, the Doping Offence shall not be considered a Doping Offence for the limited purpose of determining the period of Ineligibility for multiple Doping Offences under Articles M.2, M.3 and M.6".*

23. "No Fault or Negligence" is defined as:

*"The Player establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method"* (Appendix one; Definitions).

24. This provision must, however, be read in conjunction with Article C.1.1:

*"It is each Player's personal duty to ensure that no Prohibited Substance enters his or her body. A Player is responsible for any Prohibited Substance or its Metabolites or Markers found to be present in his or her Specimen. Accordingly, it is not necessary that intent, fault, negligence, or knowing Use on the Player's part be demonstrated in order to establish a Doping offence under Article C.1; nor is the Player's lack of intent, fault, negligence or knowledge a defence to a charge that a Doping Offence has been committed under Article C.1".*

25. In order to avoid the ineligibility sanction under Article M.5.1., Mr Puerta must establish 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 drunk or been administered etilefrine. He must first establish how the Prohibited Substance entered his body.

*C. How the Prohibited Substance entered Mr Puerta's Body*

26. The ITF Tribunal found, on the balance of probabilities, that Mr Puerta was contaminated by his wife's Effortil and that this occurred during the period of about one to two days prior to the final at a time and place unknown, and with a dose that is unknown, and in circumstances that are unknown save that the source was Mrs Puerta's medicine.

27. This finding appeared to the ITF Tribunal as more likely to be the case than the theory of contamination through the use of Mr Puerta's glass by Mrs Puerta for her medication. The Tribunal noted that Mr Puerta did not prove all the factual circumstances in which etilefrine entered his system, but he proved the source of etilefrine:

*"he has done just enough to discharge the onus on him of showing on the balance of probabilities how the Prohibited Substance entered his system. In the present case it is the source of the Prohibited Substance that is the most important feature".*

28. Mr Puerta challenged this aspect of the decision as being *"unevidenced, misconceived, illogical, illegitimate, and not properly put"*. He claims that the etilefrine entered his system as a result of his inadvertent and unknowing ingestion of the liquid residue of his wife's Effortil when he re-used his glass in the cafeteria just before the start of the final match. Additionally, he asserts that neither the ITF nor the ITF Tribunal was able to propose an *"evidenced alternative explanation"* for the inadvertent ingestion of the substance.

29. The Panel takes that view that the ITF Tribunal failed sufficiently to identify the evidential basis for its conclusion that the contamination *"must have occurred through the negligent or deliberate act of an unknown person"*. Neither the ITF nor the ITF Tribunal was able to identify the indicia, must less the evidence, to support the theory of a *"mystery person"*. Indeed, the conclusion of the ITF Tribunal runs counter to the evidence provided by Mr Puerta in Professor Forrest's extensive report based on analytical calculations of the etilefrine concentration detected in Mr Puerta's urine samples at the time they were taken.

*"On the basis of these calculations, the presence of 192 nanograms of Etilifrine (sic) per mililitre in the Player's urine samples is consistent with him having ingested the equivalent about 1 (one) drop of effortil some five hours before he donated the samples"*.

30. In stating its conclusion on this issue, the Panel has not ignored the comments made by Dr Olivier Rabin of the World Anti-Doping Agency in his report dated 1 December 2005. The Panel does not doubt Dr Rabin's conclusion that *"the urinary concentration of etilefrine is irrelevant under the WADA anti-doping rules"*. The Panel agrees with Dr Rabin that any concentration of etilefrine detected and confirmed by a WADA accredited laboratory will be reported as an adverse analytical finding and be subject to the sanctions set out in Article M. of the Programme. The concentration of the prohibited substance found in Mr Puerta's urine may be evidence, however, as to the manner in which the substance entered his body, and may also provide an indication as to whether or not it was intended to enhance performance. The ITF Tribunal accepted that Mrs Puerta's medication was the source of the contamination. However, in the Panel's view, the concentration of etilefrine found in Mr Puerta's urine also has relevance as to how the medication entered his body and, with that, to the issue of fault and negligence. The taking of a high concentration two or three days prior to the final could indicate the presence of intent or a substantial degree of negligence.

31. In his report, Dr Rabin states as follows:

*"In addition, the excreted dose of a substance such as etilefrine can vary in great proportion according to each individual's metabolism, the dose ingested, the delay between the substance administration and the sample collection and the diuresis. Therefore, although it is argued that the low dose in urine in this case (Specimen no: 388198) is a result of a low dose ingested, this is specualtive. For example it cannot be denied that the low dose in urine could result from a substantial dose of the drug being taken at an earlier time than claimed by the athlete. Furthermore, to say that such or such level would not have increased performance is again highly speculative as it will vary from one individual to the other and depends upon (among other things) the time at which the substance was taken and the physical performance.*

*Even if no direct study on the performance enhancing effect of etilefrine exists in athletes, the analogy with similar stimulants of the S6 section of the Prohibited List, allows us to have a good understanding of the effects of such class of drugs on performance"*.

32. With the greatest respect to Dr Rabin, the Panel takes the view that this is simply a text-book statement and is of little assistance to it. If Dr Rabin is saying, or attempting to say, that the circumstances in which the Prohibited Substance was ingested are irrelevant, the Panel disagrees with that statement, which, in any event, is directly at odds with the WADC, which does permit the circumstances to be taken into account.

33. Without providing contrary analytical data to rebut the analysis conducted by Professor Forrest, it is not persuasive, in the view of the Panel, for Dr Rabin to criticize Professor Forrest's conclusions, which are based on an analysis of the actual concentration levels, as being *"speculative"* and *"highly speculative"*. Moreover, Mrs Puerta confirmed in her witness statement that she had taken her Effortil medication at 7:30am on the date of the final, because she was *"feeling bad"*. Her menstruation had started that morning. She stated explicitly in her testimony that *"on the 3 and 4 June 2005 I had had no need for the medication"*.

34. On the basis of the above analysis, the Panel concurs with the ITF Tribunal that the source of the contamination was indeed the Effortil medication used by Mrs Puerta. The Panel takes the position, however, that on the "balance of probabilities", and in the absence of a credible alternative explanation, for which the ITF bears the burden of persuasion, the contamination took place because Mr Puerta mistakenly used the glass which his wife had used to take her medication several minutes before her husband's re-entry into the cafeteria. Accordingly, the Panel holds that Mr Puerta has proved to its satisfaction how the substance entered his body.

*D. No Fault or Negligence*

35. Having established how the prohibited substance entered his system, in order to establish No Fault or Negligence, Mr Puerta must prove 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.

36. The ITF Tribunal held that Mr Puerta failed to exercise "utmost caution" by picking up and using a glass located on a small table on which other glasses of identical appearance were standing. It added:

> *"He could not be sure which glass he had been using. He had just been absent from the cafeteria and when he returned his glass was unattended except for the presence of his brother-in-law, of whom he made no enquiry …. He ought to have drunk directly from his bottle of water to avoid any risk of contamination"*.

37. The ITF's submission is that the requirement of "utmost caution" means that Mr Puerta must establish, to the satisfaction of the Panel, that (a) he took all of the steps that could reasonably be expected of him to avoid inadvertently ingesting his wife's medication and (b) it would be unreasonable to require him to take any other steps.

38. Mr Puerta submits that when he re-used what he believed to be his glass upon returning to the cafeteria from the changing room, he had no reason to know his wife had taken her medication just minutes before, still less that she used that glass. When he returned, the glass appeared to the eye to be empty. At worst, what was in the glass was odourless, tasteless and colourless and the quantity left was close to infinitesimal and not readily discernible. He poured water from his own bottle into the glass. He was, therefore, *"the victim of an extraordinary and unpredictable sequence of events: precisely the sort of rare and exceptional case referred to in the commentary to the WADC"*.

39. Mr Puerta further submits that his wife acted reasonably, and without fault or negligence. When he had left to play, it was completely reasonable to assume that he was not coming back. Once

she drained the glass, there was only a tiny, to all intents and purposes invisible, quantity left in the glass. She then left and did not see her husband again before the match.

40. In the view of the Panel, Mr Puerta has satisfactorily established the circumstances leading to and causing the contamination. Indeed, the facts of this case can be deemed to be extraordinary. However, they cannot be described as being so extraordinary as to exempt Mr Puerta from the duty placed upon all athletes to maintain "utmost caution".

41. Mr Puerta submits that he cannot be expected to exercise "utmost caution" when he has no knowledge that he has ingested anything at all. In the view of the Panel, Mr Puerta is overstating his position. Water is ingested just like any other liquid, be it coffee or orange juice. It is not unreasonable to expect of Mr Puerta, who had been aware for several years of his wife's regular use of colorless, tasteless and odourless Effortil and the manner in which she administered it (10 to 20 drops in a glass of water), to be aware also that residues of the substance could be found in a used glass, even if the glass appears to be empty. Athletes must be aware at all times that they must drink from clean glasses, especially in the last minutes before a major competition. He should have been particularly aware as he knew that she had taken the medication at 7:30am that morning.

42. The fact that the atmosphere in the cafeteria was becoming increasingly chaotic provides no excuse. Mr Puerta is an experienced professional, who was keenly aware of the consequences of a second doping offence. Moreover, knowing that his wife was using a prohibited substance, he also claims to have exercised a higher level of vigilance at all times. In the Panel's view, it would not have been too much to expect of him to ask his brother-in-law upon returning to the table whether the glass that he was going to use was *"his glass"* or whether *"anyone had used his glass"* during his absence. However slight and excusable his negligence may have been in the minutes prior to the start of the final match, Mr Puerta cannot avoid the conclusion that he suffered a momentary lapse of attention and exhibited a momentary lack of care when he used a glass over which he had lost visual control, especially at such a critical and vulnerable time, just hours before he knew that he would have to undergo a doping test.

43. The commentary to Article 10.5.2 of the WADC states that a sanction cannot be completely eliminated on the basis of No Fault or Negligence when

*"sabotage of the Athlete's food or drink by a spouse, coach or other person with the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink)".*

44. The Panel notes that Mr Puerta's brother-in-law stayed at the table while Mr Puerta left for the changing room. He observed that his sister, Mrs Puerta, took her medicine by placing drops into an empty glass and that she left the used glass on the table. He did not react when Mr Puerta returned to the cafeteria and reached for the same glass to fill it with water from the bottle which he brought with him. Mr Puerta's brother-in-law must have noticed that it was medication of some form which his sister had dropped into the glass. Despite the fact that Mr Puerta did not enquire of his brother-in-law whether the glass had been used in his absence, it would not have been unreasonable, in the Panel's view, to expect that his brother-in-law would, on his own volition, point out to Mr Puerta that the glass had obviously been used for

medication. The Panel does not suggest that Mr Puerta's brother-in-law is to blame for Mr Puerta's misfortune, but highlights this matter because it is essential for an athletes's entourage to be as aware as an athlete of the necessity of taking the utmost caution as to what an athlete eats and drinks.

45. CAS case law on the issue of accidental and inadvertent doping is very strict; doping offences occur usually with professional athletes who are fully aware of the risks of doping (CAS 2005/A/951; CAS 2005/A/830; CAS OG 04/003, in: CAS (ed.), CAS Awards – Salt Lake City 2002 & Athens 2004, p. 89; CAS 2003/A/484). Neither the unsuspecting use of a cream to treat a skin affection nor the ingestion of a medication which the athlete knows has gone through several hands after being prescribed by a tournament doctor were sufficient to lead to the elimination of ineligibility sanction based on "No Fault or Negligence" provision.

46. On the other hand, in a FISA case of an athlete who had taken a medicine provided by her doctor at the Olympic and declared it on the Doping Control Form, the Panel considered that the athlete had relied on the doctor and had no intention to artificially improve her performance. Therefore, no period of ineligibility was imposed on the athlete, while the team doctor was suspended for four years (FISA Anti-Doping Panel, O. Olefirenko, 9 February 2005) (see as well CAS OG 00/011, in: CAS (ed.), CAS Awards – Sydney 2000, p. 111, where no suspension was imposed on the athlete).

47. In the circumstances, and despite the extraordinary manner in which the contamination with etilefrine occurred, the Panel is forced to conclude that the requirements which might justify a finding of "No Fault or Negligence" (Article M.5.1 of the Programme) have not been met in the present case. Mr Puerta failed to exercise the "utmost caution" at this critical time.

*E. No Significant Fault or Negligence*

48. The next question is whether Mr Puerta's fault or negligence can be considered to come within the definition of "No Significant Fault or Negligence" pursuant to Article M.5.2.

49. Article M.5.2 provides:

*"If a Player establishes in an individual case involving such offences that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduce period under this section may be no less than eight years. When the Doping Offence involves Article C.1, the Player must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced".*

50. As has been stated above, Mr Puerta has satisfied the Panel as to how the Prohibited Substance entered his system. It is, therefore, unnecessary to restate the Panel's conclusions on this issue again.

51. This defence involves measuring the degree of fault or negligence of the athlete with respect to the analytical positive result. If the fault or negligence is not significant, then the CAS, or a first

instance tribunal, has the opportunity to reduce the sanction that would otherwise arise by strict liability.

52. In the CAS 2004/A/690 case, the Panel considered that the athlete's lack of inquiry about what he was consuming was negligent and that he could not satisfy the No Significant Fault or Negligence provision to reduce his sanction. In the CAS OG 04/003 case, the source of the nikethamide was two glucose tablets ingested by the athlete that unbeknownst to her and her physical therapist at that time, contained a prohibited stimulant. The CAS Panel held that athlete was negligent in not conducting further research before ingesting the product. Not only did the packaging have the name "nikethamide" on it, but a leaflet inside the box warned athletes in the French language that the product contained an active principle that could result in a positive doping test (CAS OG 04/003, in: CAS (ed.), CAS Awards – Salt Lake City 2002 & Athens 2004, p. 89). In similar circumstances, the purchase of a medicine over the counter to heal a skin affliction, the Panel held that the in the absence of intention to gain advantage toward competitors, the athlete bore No Significant Fault or Negligence (CAS 2005/A/830).

53. The definition of "No Significant Fault or Negligence" requires the Panel to look at the totality of the circumstances. In CAS 2005/A/951, the Panel held that an athlete had a duty of "utmost caution" after visiting the Tournament doctor when obtaining and using prescribed medication. If the medication had not been handed over by the doctor himself, but had gone through several hands before being delivered to him, the athlete could, and should, have made the effort to double check the prescription against the medication he received. Nevertheless, the reason for the ingestion was clearly medical and the error in delivering a medicine which was intended for another person was not his error, but rather the one of Tournament employees. In this case, the Panel held that the athlete had established that he bore "No Significant Fault or Negligence" allowing the period of Ineligibility to be reduced.

54. In the present case, the following factors weigh in Mr Puerta's favour:
    - The substance ingested by Mr Puerta was water, not a vitamin, nutritional supplement, medication, tonic or salve. Water is indeed ingested just like any other beverage, but the water which Mr Puerta drank was the water which he brought with him and which he knew to be clean. He could not detect the colorless, oderless and tasteless presence of etilefrine when he filled the glass with his own water and drank it;
    - He had no reason to know that his wife had taken her medication just a few minutes prior to his return to the table from the changing room;
    - He left his glass unattended for only a few minutes on a table at which he had been sitting and, under normal out-of-competition circumstances, could have reasonably assumed that the glass which he took into his hands was the same glass he had previously used;
    - The quantity found of the Prohibited Substance in Mr Puerta's urine was so minute (192 nanograms of etilifrine (sic) per mililitre) that it could not have had any performance-enhancing effect.

55. Proceeding from the premise that each case must demonstrate exceptional circumstances, the Panel has concluded, after examining and evaluating the facts in their totality, that the ingestion of etilefrine occurred inadvertently. Although Mr Puerta acted negligently in not ensuring,

despite his brief absence, that his previous glass had not been used by another person, the degree of his negligence is so slight that a finding of "No Significant Fault or Negligence" is inevitable and necessary.

56. Taking into account the factors identified above and all of the facts of the case, the Panel holds that the present case is substantially different from the typical doping cases which characterize the previous jurisprudence of the CAS and, in contrast to the view expressed by the ITF Tribunal, must be considered to be truly exceptional and unique. Mr Puerta has established that he is entitled to a finding of "No Significant Fault or Negligence", which, on the basis of Article M5.2, permits the period of ineligibility to be reduced from a lifetime to no less than eight years.

*F. First or Second Offence*

57. The ITF Tribunal treated the etilefrine offence of 5 June 2005 as Mr Puerta's second offence for the purpose of imposing the sanction prescribed in Article M.5.2 of the Programme. Mr Puerta contends, however, that the Programme must be construed subject to general principles of law:

- The Programme must be construed *contra proferentem*, in the sense that if there are two possible constructions, the construction which is most favourable to the athlete must be adopted;
- The Programme must not be construed in a manner which imposes retrospective effect. To treat the current offence as a second offence would do so in the sense that under the 2003 ATP anti-doping rules, under which the previous offence was committed, a second offence involving ingestion of etilefrine would have resulted in only a one year period of ineligibility.

58. Article S.1 of the Programme provides:

*"The Programme shall be interpreted in a manner that is consistent with applicable provisions of the [WADA] Code. The comments annotating various provisions of the Code may, where applicable, assist in the understanding and interpretation of this Programme".*

59. Article 24.5 of the WADC provides:

*"The Code shall not apply retrospectively to matters pending before the date the Code is accepted by a Signatory and implemented in its rules".*

60. Pursuant to this rule, to the extent the WADC was not accepted and implemented into a Signatory's rules, the sanctioning regime of the WADC shall not apply.

61. The WADC was implemented in the ITF's Programme on 1 January 2004, whilst Mr Puerta was serving his nine month suspension which was due to end on 1 July 2004. This offence occurred on 13 February 2003 when Mr Puerta tested positive for clenbuterol. At that time, the offence was finally adjudicated under the ITF's Tennis Anti-Doping Program contained in its 2003 ATP Official Rulebook. On 29 December 2003, the ATP Tour Anti-Doping Tribunal held:

*"A first Doping Offence has occurred under Rule C.1.a. The Doping Offence involved the use of a Class I Prohibited Substance for which no medical exemption had been obtained nor could have been retroactively obtained. Under Rule M.1.a. it is ordered that the Player be suspended from participation in any and all ATP sanctioned or recognised tournament or events for a two-year period subject to the application of the principle of proportionality by which the suspension is reduced to 9 months inclusive of the voluntary suspension which commenced on 2 October 2003".*

62. As the WADC had not been implemented into the ATP Official Rulebook 2003 when the first offence occurred, Mr Puerta is correct in stating that there can be no retrospective effect of the WADC with regard to this first offence.

63. The ATP Tribunal imposed a sanction on Mr Puerta after he ingested a Class I Prohibited Substance, namely clenbuterol, under the 2003 Tennis Anti-Doping Program. Clenbuterol is listed as an S.2 Prohibited Substance under the ITF's Programme (and the WADC) under the heading *"Other Anabolic Agents"*. The applicable sanction under the Tennis Anti-Doping Program 2003 was a two year ban. The same sanction would have been applicable under the ITF's Programme in 2005 (and the WADC) if this offence had been committed after 1 January 2004 or if the adjudication of the offence were still pending on that date. In the circumstances, Mr Puerta cannot avoid accepting the fact that he committed a first offence with a Prohibited Substance under both sets of rules.

64. The purpose of the Tennis Anti-Doping Program 2003 and the ITF's 2005 Programme is the same, *i.e.,* the fight against doping. To achieve this objective, the sanctions under both sets of rules are intended to deter athletes from the use of prohibited substances and prohibited methods. Whereas under the former Program, the sanction for a repeated offence was one year, under the ITF's 2005 Programme, the sanction for a second offence is a lifetime ban or, in the event the offence can be classified as having been committed with "No Significant Fault or Negligence", the ban can be reduced to eight years. It is clear that the purpose of the increased sanction is to get tougher with recidivists.

65. The Panel accepts the reasoning of the ITF Tribunal in its ruling of 21 December 2005 that the fight against doping would be entirely thwarted if one were to ignore the existence of a first offence under the pre-WADC Tennis Anti-Doping Program in setting the sanction for a second offence under the ITF's 2005 Programme. In both cases, Mr Puerta used a Prohibited Substance. As the ITF correctly points out, it would be contrary to the spirit of the rules and would seriously undermine the fight against doping in sport if the *"slate were to be wiped clean"* on entry into force of the Programme. The fight against doping must be a long term campaign if it is to succeed. The adoption of the Programme did not provide for an amnesty for all athletes previously sanctioned who commit a second offence.

66. Contrary to the position taken by Mr Puerta, the Panel takes the view that there is no ambiguity in the provisions, Article M.2 of the Programme makes a clear distinction in between first and second offence. The word "offence" as used in Article M.2 refers to the "Doping Offences" of Article C. of the Programme:

*"Doping is defined as the occurrence of one or more of the following (each, a "Doping Offence"):*

*C.1 The presence of a Prohibited Substance (…)".*

The term "Doping Offence" under the 2003 Tennis Anti-Doping Program embodies exactly the same definition:

*"Doping is forbidden and constitutes a Doping Offence under this Program. Doping occurs when:*

*a. A Prohibited Substance is found to be present within a player's body".*

67. The definition of Article C. of the Programme is not restricted to first offences committed after 1 January 2004. It covers both doping offences committed under the Programme or a doping offence committed under previous rules.

68. This position is confirmed by the commentary made under Article 24.5 of the WADC:

*"Pre-Code anti-doping rule violations would continue to count as "First violations" or "Second violations" for purposes of determining sanctions under Article 10 for subsequent post-Code violations".*

69. Therefore, the Panel concludes that there is no ambiguity in the Programme which requires a construction *contra proferentem*. The positive finding made on 5 June 2005 must be considered as a second offence. At the time the second offence was committed on 5 June 2005, the revised rules of the ITF had already been enacted with full force and effect since 1 January 2005. The fact that the previous rules provided for a more lenient sanction in the event of a second offence is of no relevance in adjudicating the offence committed on 5 June 2005. For these reasons, Mr Puerta's objection is rejected.

*G. Sanction*

70. In the light of its conclusion that Mr Puerta acted with "No Significant Fault or Negligence" (Article M.5.2 of the Programme), the Panel must determine the actual period of ineligibility to be imposed on Mr Puerta. This determination necessarily requires the Panel to consider the issue of proportionality. As was stated in CAS 2005/A/951 and CAS 2005/A/847:

*"In the Panel's opinion the requirements to be met by the qualifying element No Significant Fault of Negligence must not be set excessively high (see also […] CAS 2004/A/624 marg. no. 81 et seq.; by contrast much stricter […], CAS 2003/A/484 marg. no. 61 et seq.). This follows from the language of the provision, the systematics of the rule and the doctrine of proportionality. Once the scope of application of Article 10.5.2 FIS Rules (the same provision as Article M.5.2 of the Programme) has been opened, the period of ineligibility can range between eight years to a lifeban. In deciding how this wide range is to be applied in a particular case, one must closely examine and evaluate the athlete's level of fault or negligence. The element of fault or negligence is therefore ultimately "doubly relevant". Firstly it is relevant in deciding whether Article 10.5.2 FIS-Rules (the same provision as Article M.5.2 of the Programme) applies at all and, secondly, whether, in the specific case, the term of the appropriate sanction should be at somewhere between eight years to a lifeban"* (CAS 2005/A/951 marg. no. 9.1).

71. It is to be noted that, for the purpose of imposing a sanction for a second offence, the WADC does not distinguish between more significant and less significant breaches. This failure to distinguish may be justified in the overwhelming majority of cases, but may lead to injustice in a very small number of cases. The point can be shortly illustrated. A first breach may attract a reduced sanction in consequence of a finding of No Significant Fault or Negligence. But under the WADC that finding of No Significant Fault or Negligence is irrelevant if there is a second breach. For the purposes of the second breach, a tribunal is required to treat the first breach in exactly the same way as if there had been no finding of No Significant Fault or Negligence in relation to the first breach. The WADC treats an offence as an offence, whatever the circumstances of the offence, and requires a tribunal to ignore those circumstances when deciding on the sanction.

72. Again, under the WADC it is irrelevant that the second offence may itself attract a reduced sanction because there has been No Significant Fault or Negligence on the part of the athlete. The athlete will be treated in exactly the same way as if the first offence had attracted the full rather than the reduced sanction. It will be a previous breach, and its facts will be ignored. This is an application of a very crude *"Two strikes and you are out"* policy.

73. None of these difficulties arise if either offence attracts the full sanction, that is, if either breach is not reduced on the basis of No Significant Fault or Negligence. Hence, if an athlete does not persuade a tribunal that he or she is not entitled to a reduced sanction either in respect of a first offence or in respect of a second offence, that athlete will inevitably face a lifetime ban (or possibly an 8 year period of ineligibility) on the second offence.

74. The issue that arises in the present case is not an issue which the draftsmen of the WADC appear to have had in mind. In relation to each of the two breaches which Mr Puerta has been found to have committed, a reduced sanction has been imposed because the breach is deemed to have been committed with "No Significant Fault or Negligence". In the first case, which, as has been stated, occurred before the WADC came into force, the Panel found that Mr Puerta had inadvertently taken a Prohibited Substance, and reduced the sanction from the mandatory period of ineligibility of 2 years to nine months. If the present case had been a first offence, the Panel would have imposed under the ITF Programme the reduced one year sanction on the basis of No Significant Fault or Negligence on Mr Puerta's part.

75. In the present case, the ITF Tribunal set the period of ineligibility at eight years. That is the reduced period for a second offence where No Significant Fault or Negligence has been found in relation to that second offence, but without taking into account the facts or circumstances of the first offence. As the two exceptions to the principle of the prohibition of the *reformatio in pejus* (application of statutory law or counter-appeal by the ITF) are not met, the Panel is, *prima facie*, bound to impose an eight years sanction. At least it cannot go above that limit (CAS 2002/A/432, in: M. REEB (ed.), Digest of CAS Award III 2001-2003, p. 419). Nevertheless, the sanction must be proportionate and, if, in the Panel's opinion, an eight year sanction is not proportionate in a case in which each offence has been found to have been committed with No Significant Fault or Negligence, the issue which inexorably arises is whether the Panel can impose a lesser period of ineligibility.

76. That is precisely the issue with which the Panel is faced in the present case.

77. The WADC contains some flexibility to enable a Panel to satisfy the general legal principle of proportionality. However, the scope of flexibility is clearly defined and is deliberately limited so as to avoid situations where a wide range of factors and circumstances, including those completely at odds with the very purpose of a uniformly and consistently applied anti-doping framework are taken into account. The period of ineligibility may be reduced or eliminated only:
    - in the case of exceptional circumstances: if the athlete can establish that he or she bears No Fault or Negligence or No Significant Fault or Negligence, but, in the latter case, to no less than one-half of the normal sanction or no less than 8 years on a second breach and
    - in the case of Specified Substances.

78. In relation to the mandatory two year ban, or two to one year ban, the validity of Article 10.5. of the WADC has been accepted by the following authorities:
    - CAS Case Law: CAS 2004/A/690. The Panel found that the athlete had not established either "No Fault or Negligence" or "No Significant Fault or Negligence". In the result, the Panel upheld [H].'s two years suspension. In this case, the Panel cited with approval the decision of the Swiss Federal Court in N. *et al.* v. FINA (W. v. FINA 5P.83/1999). This latter case involved positive doping tests by four Chinese swimmers. The appeal concerned the CAS award upholding the swimmer's suspensions. The award was rendered prior the adoption of the WADC. One of several claims raised by the swimmers on appeal was that the CAS award failed to comply with the principle of proportionality. The amount of banned substance was very low, yet the suspension handed down could possibly end the swimmers' careers. The Swiss Federal Court held that under the applicable FINA Anti-Doping Rules, the appropriate question is not whether a penalty is proportionate to an offence, but rather whether the athlete is able to produce evidence of mitigating circumstances. Furthermore, the issue of proportionality would only be a legitimate issue if a CAS award constituted an infringement of individual rights that was extremely serious and completely disproportionate to the behaviour penalised. The Court found that the two year suspensions in question were only a moderate restriction on the athletes, because the suspensions resulted from a proven doping violation under rules that had been accepted by the athletes. In the result, the court held that the two year suspensions handed down without an examination of proportionality did not constitute a violation of the general principles of Swiss law.
    - Various Legal Opinions: Prof. Kaufmann-Kohler *et al.* confirmed that the WADC mechanisms are not contrary to human rights legislation:

      *"Based upon the weight of legal authority, we conclude that a two-year suspension for a first doping offence is not disproportionate, considering the gravity of the offence committed. In our view, a more lenient sanction for a first offence is likely to seriously jeopardize the effectiveness of the fight against doping".*

      However, in the same opinion, Prof. Kaufmann-Kohler emphasized the *"paramount role of proportionality":*

      *"From court decisions in sports and doping matters, it is clear that proportionality plays the predominate role in assessing the validity of restrictive doping regulations. Proportionality is not only the paramount*

*condition for the validity of restrictions for fundamental rights it is also a general principle of law governing the imposition of sanctions of any disciplinary body, whether it be public or private".*

(Prof. G. Kaufmann-Kohler, *et al.,* Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law, available on WADA website).

- Dr Claude Rouiller:

*"The matter of proportionality as such is more delicate in connection with the informal examination being made here. Would it not be possible, in certain exceptional cases, to set the penalty at something less that the absolute one-year limit in order to take the personal situation of the offender into account, just as a criminal judge should do? This way of looking at the matter is seductive. But it fails to take into account of a number of factors. The Code's aim is to completely eradicate doping, which is acknowledged as potentially fatal for the future of large sports competitions. Even if deterrence does not justify every means, the punitive system is appropriate and necessary, that hardly leaves any room for criticizing it from the angle of proportionality as such, as ultimately embodied in Article 27 of the Swiss Civil Code. (…) In spite of its severity, the system providing for a fixed suspension applicable – subject only to the exculpatory evidence and limited attenuating mechanisms set forth in Articles 10.2, paragraph 2 and 10.5 of the Code – in the case of a first anti-doping violation is compatible with the fundamental rights and the general principles enshrined in or recognised by autonomous Swiss law; the athlete's fundamental rights with respect to a defence would of course have to be respected, which the Code requires at least implicitly".*

(Dr Rouiller, Legal Opinion 25 October 2005, p. 33 *et seq*., cited in O. Niggli, J. Sieveking, *Eléments choisis de Jurisprudence rendue en application du Code mondial antidopage*, Jusletter, 20 February 2006).

79. Notwithstanding the above statements of general approval of the WADA sanctions, the CAS Panel in CAS 2005/A/830 stated in an *obiter dictum* that

*"the mere adoption of the WADA Code by a respective Federation does not force the conclusion that there is no other possibility for greater or less reduction of a sanction than allowed by DC 10.5. The mere fact that regulations of a sport federation derive from the World Anti-Doping Code does not change the nature of these rules. They are still – like before – regulations of an association which cannot (directly or indirectly) replace fundamental and general legal principles like the doctrine of proportionality a priory for every thinkable case. (…) Nevertheless, the implementation of the principle of proportionality as given in the World Anti-Doping Code closes more than ever before the door to reducing fixed sanctions. Therefore, the principle of proportionality would apply if the award were to constitute an attack on a personal right which was serious and totally disproportionate to the behaviour penalised (see CAS 2004/A/690 v. ATP Tour Inc., CAS 2004/A/ 690). However, the Panel considers, not without hesitation, that there should be no further reduction of penalty in the present matter, considering the circumstances of Mr [S.]'s case. Nevertheless, the possibility to have a future case which would not fit in properly with one of the definitions provided by art. 10.5 of the WADA Code must be seriously envisaged".*

80. In relation to the lifetime ineligibility or reduced eight year ban, the case law is less abundant. Before the WADC was adopted, the CAS issued several awards confirming lifetime sanctions:

- Pre-WADC: CAS 2001/A/330, in: M. REEB (ed.), Digest of CAS Award III 2001-2003, p. 197): As a matter of principle, a lifetime ban can be considered both justifiable and proportionate in doping cases. That is so even if the ban is imposed for a first offence.

This case concerns an athlete participating in the Olympic Games in Sydney who was tested with a concentration of nandrolone in his urine around four times greater than the IOC threshold. At that time the FISA Anti-Doping Rules provided that the first doping offence led to a lifetime ban. The Panel found no mitigating circumstances and considered the sanction not to be disproportionate to the offence. CAS 99/A/252: The Panel confirmed a life ban for an athlete (among others) who committed a first offence in 1996 and a second offence in 1999 at the Pan American Games for anabolic agents. In this latter case, the Panel found no circumstances that would tend to diminish the responsibility of the athletes.

- Post-WADC: CAS 2005/A/969: The Panel considered that the exceptional circumstances based on No Significant Fault or Negligence were not applicable as the athlete accepted from his doctor an injection of what he knew at the time was a *"risky product"*. The results of his urine samples revealed the use of recombinant EPO. As he was already involved in a first anti-doping proceeding when he accepted the injection, the Panel declared the athlete ineligible for competition for lifetime. In Azevedo v. FINA, the FINA Doping Panel (FINA Doping Panel 3/05, 21 April 2005) held that the swimmer shall be ineligible for lifetime as she refused to submit to a doping control after she already tested positive for a first offence and had been suspended for two years. The FINA Panel noted that the swimmer had the opportunity to establish that she bore "No Significant Fault or Negligence". However, she did not establish such facts, on the contrary she refused to submit to doping control on purpose.

81. Professor Kaufmann Kohler states, with regard to lifetime ineligibility:

*"As a final matter, it should be noted that legal commentators have been less inclined to criticise the imposition of a lifetime suspension for a second doping offence. There appears to be a general consensus that recidivism justifies a harsh penalty. The Ontario Court of Appeal was clearly influenced by this rationale in deciding to uphold the lifetime ban imposed on Ben Johnson for his second offence. Indeed, the imposition of a lifetime ban for a second offence is often less severe in practice than the imposition of a two-year suspension for a first offence due to the fact that top-level athletic careers are very short in many sports disciplines".*

This opinion is confirmed by CAS case law cited above. Once the offence is proved, and the athlete is not able to submit exceptional circumstances to the Panel, the sanction of lifetime ineligibility appears to be appropriate. But when exceptional circumstances are present, the prescribed sanction does not appear to be significantly *"less severe"*.

82. In the Advisory Opinion delivered by CAS in relation to the implementation of the WADC into the FIFA Disciplinary Code, the Panel held that the principle of proportionality is guaranteed under the WADC; moreover, proportional sanctions facilitate compliance with the principle of fault. Consequently, each body must consider the proportionality of imposed sanctions for doping cases (CAS 2005/C/976 & 986, paragraph no. 139). The opinion nevertheless held:

*"The right to impose a sanction is limited by the mandatory prohibition of excessive penalties, which is embodied in several provisions of Swiss law. To find out whether a sanction is excessive, a judge must review the type and scope of the proved rule violation, the individual circumstances of the case, and the overall effect of the sanction on the offender. However, only if the sanction is evidently and grossly disproportionate in comparison to the proved*

*rule violation and if it is considered as a violation of fundamental justice and fairness, would the Panel regard such a sanction as abusive and, thus, contrary to mandatory Swiss law"* (*op. cit.* paragraph no. 143).

83. In this Advisory Opinion, the authors did not have to consider whether the WADC enabled a Panel to impose a just and proportionate sanction when each offence had itself attracted the reduced sanction on the basis that it had been committed with No Significant Fault or Negligence. The issue was not within the scope of the questions which the Panel was asked to answer.

84. But this Panel cannot avoid a consideration of precisely that issue. *Prima facie*, it cannot impose a sanction that is less than the eight year period of ineligibility mandated under Article M.5.2 of the Programme. In the Panel's view, an eight year sanction in the present case is indistinguishable from a lifetime ban: it brings Mr Puerta's career to an end. And to bring an athlete's career to an end in circumstances in which, although he has breached the WADC (or its equivalent) on two occasions, it has been determined on each occasion that Exceptional Circumstances justifying a reduced sanction had been present, does not commend itself to the Panel as being a just and proportionate sanction.

85. From a Swiss law perspective, it must be remembered that the relationship between a sports organisation, such as a National Federation or a sport club, and its members is governed by private law and must conform to Articles 28 and 60 of the Swiss Civil Code and to the Swiss Code of Obligations. In the event of an infringement of the right of an individual's economic liberty or his right to personal fulfilment through sporting activities, the conditions set at Article 28 al. 2 of the Swiss Civil Code are applicable. Such infringement must be based either on the person's consent, by a private or public interest or the law. Some authors have criticised sanctions issued by tribunals dealing with cases involving athletes as being too harsh or as appearing to be not proportionate in relation to the infringement and the interests at stake (BUCHER A., Personnes physiques et protection de la personnalité, Bâle 1999, p. 124; BADDELEY M., *L'association sportive face au droit, Les limites de son autonomie*, Bâle 1994, p. 309 *et seq*.; cf. also JAQUIER J.*, La qualification juridique des règles autonomes des organisations sportives*, thèse Lausanne, Neuchâtel 2004, no. 212; Arrêt du Tribunal Fédéral Suisse, 4C.1/2005).

86. This latter opinion has particular bearing in the present case. The eight years ban set by Article M.5.2 of the Programme appears to the Panel to be unjust and disproportionate to the circumstances surrounding the positive test result and the severe consequences to the athlete's livelihood which such a ban entails. The relevant circumstances of the present case are the following:

*Mr Puerta accidentally and inadvertently, as determined also by the ITF Tribunal, ingested a drop (see the Professor Forrest analysis) of his wife's pre-menstrual medication containing a Prohibited Substance which was obtainable in Argentina and other countries over-the-counter;*

- Taking into account the extraordinary and unique circumstances leading up to the mistaken use of the contaminated water glass and the fact that it had been out of his sight for only a few minutes, demonstrated minimal negligence;
- The quantity of Prohibited Substance found in his urine specimen just after the sporting event was negligible and had no performance-enhancing effect;

- It is the second offence committed by Mr Puerta. In 2003, he was found to have committed a doping offence by failing to obtain a medical exemption for prescribed asthma medication. It was found that Mr Puerta's actions were not deliberate and did not enhance performance, but involved an insignificant degree of negligence. The sanction was reduced from two years to nine months;
- Mr Puerta was born in September 1978. In June 2005, he was 26 years old. An eight years ban would mean the end of his career as professional player and the forfeiture of all earning potential, his only livelihood.

  In view of these considerations, the Panel finds it difficult to assess how the imposition of an eight year period of ineligibility having the equivalent effect of a lifetime ban in the present case can in any way be called *"just and proportional"* in light of the benefit which the WADC aims to achieve in its legitimate aim to deter doping.

87. It is undoubtedly, and commendably, the aim of WADA and of the signatories to the WADC to ensure that the WADC established a coherent and reasonable policy for sanctioning athletes who were found to have broken anti-doping regulations, and thereby cheated both their fellow athletes and the sporting public at large. The Panel has no doubt that the WADC has achieved that aim admirably, and is an invaluable tool in the fight against doping. Indeed, in all but the very rare case, the WADC imposes a regime that, in the Panel's view, provides a just and proportionate sanction, and one in which, by giving the athlete the opportunity to prove either "No Fault or Negligence" or "No Significant Fault or Negligence", the particular circumstances of an individual case can be properly taken into account.

88. But the problem with any *"one size fits all"* solution is that there are inevitably going to be instances in which the one size does not fit all. The Panel makes no apology for repeating its view that the WADC works admirably in all but the very rare case. It is, however, in the very rare case that the imposition of the WADC sanction will produce a result that is neither just nor proportionate. It is argued by some that this is an inevitable result of the need to wage a remorseless war against doping in sport, and that in any war there will be the occasional innocent victim. There may be innocent victims in wars where bullets fly, but the Panel is not persuaded that the analogy is appropriate nor that it is necessary for there to be undeserving victims in the war against doping. It is a hard war, and to fight it requires eternal vigilance, but no matter how hard the war, it is incumbent on those who wage it to avoid, so far as is possible, exacting unjust and disproportionate retribution.

89. WADA has recognised that there are degrees of guilt by permitting the athlete to prove either "No Fault or Negligence" or "No Significant Fault or Negligence", but it is axiomatic that in the former case there has been no cheating by the athlete, and in the latter case that the degree of "fault" is less than in the case where the athlete fails, or does not attempt, to prove "No Significant Fault or Negligence".

90. The present case is the paradigm of such a case. The Panel is satisfied that Mr Puerta's ingestion of the prohibited substance was inadvertent, and that the degree of fault or negligence that he exhibited was so small as almost to amount to No Fault or Negligence. However, the Panel is also mindful of the numerous CAS cases in which CAS Panels have expressed the view that the

*"utmost caution"* that is required in order to prove "No Fault or Negligence" requires an athlete to be eternally vigilant.

91. For the reasons stated elsewhere in this Award, the Panel has concluded that Mr Puerta fell just short of establishing that he exercised the *"utmost caution"*, but that the very minor failure on his part did not justify the imposition of a sanction that would be tantamount to a lifetime period of ineligibility. Such a sanction would be neither proportionate nor just. If this had been a first offence of the ITF Programme, the Panel would have wanted to impose a period of ineligibility of no more than 6 months, but would have been required to, and would have, imposed a sanction of one year's ineligibility.

92. In the circumstances of the present case, the fact that it is the second offence does not, in the Panel's view, require the imposition of a sanction that would have the effect of bringing Mr Puerta's career to an end. The Panel's view in this regard is fortified when it considers the circumstances of the first offence by Mr Puerta (albeit of the 2003 ATP Anti-Doping Program rather than the WADC) and the Award of a very experienced CAS arbitrator, Professor Richard McLaren, in that case. Whether taken individually or cumulatively, the degree of fault or blame (or negligence) on the part of Mr Puerta has been very small. As the Panel has stated elsewhere in this Award, it is satisfied that Mr Puerta is not a cheat, and that the fact that he has been found to have been in breach of anti-doping regulations is more the result of bad luck than of any fault or negligence on his part.

90. But what is a CAS Panel to do in such a case? In the Panel's view, the answer is clear, albeit not without problems and difficulties. Any sanction must be just and proportionate. If it is not, the sanction may be challenged. The Panel has concluded, therefore, that in those very rare cases in which Articles 10.5.1 and 10.5.2 of the WADC 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, which the Panel very much hopes will be filled when the WADC is revised in the light of experience in 2007, 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.

93. Every system of law seeks to apply sanctions, whether for breach of the criminal law or for breach of contractual or other obligations, which are just and proportionate. Of course, in national law the notion of what is a just and proportionate sanction may vary from state to state, but the WADC is, in a sense, a species of international law, in that it must be applied in every country, and, therefore, must produce a just and proportionate sanction in every country. It would be a disaster for the WADC, and for the fight against doping in sport, if the WADC were to be struck down in any jurisdiction as not producing a just and proportionate sanction.

94. The Panel does not consider that to fill the gap or lacuna that it believes to exist in the WADC requires it, or any tribunal, to exercise a general discretion. Although the WADC does provide for tribunals to exercise a discretion in certain, limited, circumstances, such as whether to eliminate or reduce a sanction on the basis of No Fault or Negligence or No Significant Fault or Negligence or whether to grant a TUE (Article 13.3) or whether to treat two offences as one offence (Article 10.6), it does not bestow upon tribunals a general discretion. Indeed, the existence of such a general discretion would be inimical to the WADC, which seeks to achieve

consistency and certainty. The Panel does not believe that such a discretion exists, and would not welcome its existence.

95. The circumstances in which a tribunal might find that a gap or lacuna exists in the WADC in relation to sanctions for breach of its provisions will arise only very rarely. Possibly, those circumstances might never arise again, if WADA revises the WADC to deal with the issue which arises in the present case. But even if the WADC is not revised to deal with this issue, the Panel would suggest that it would not be found to exist if, in respect of one of the breaches, an athlete had been found to have committed a serious drug offence, for example, by the use of anabolic steroids, EPO, THG, HGH or the like, or by the use of a prohibited method. Nor would it be found to exist if, in respect of one of the breaches, there was any suggestion of a performance enhancing effect: in the present case, no such suggestion has been made in respect of either breach. Conversely, it might be found to exist in a case in which, in relation to one of the breaches, a discretion had been permitted, such as in relation to TUEs, and the second breach attracted a reduced sanction on the basis of No Significant Fault or Negligence.

96. There may be other circumstances in which a tribunal would be tempted to find a gap or lacuna in the WADC, but the Panel has found it difficult to imagine that such cases will frequently arise. Indeed, the Panel repeats its view that in all but the very rarest of cases the sanction stipulated by the WADC is just and proportionate. There are unlikely to be many cases in which, as in the present case, the combination of circumstances of the two offences convinces the Panel that the WADC does not produce a just and proportionate result.

97. The ITF, whose conduct in these proceedings has been exemplary, did not suggest that the imposition of an eight year period of ineligibility would be just and proportionate on the facts of the present case, but very sensibly expressed its concern at the Panel making a decision that might be perceived to involve the exercise of a discretion, and which might, therefore, *"open the floodgates"* to a tidal wave of decisions in which anti-doping tribunals would exercise a discretion rather than apply the WADC.

98. The Panel has attempted to make it as clear as it possibly can that its decision in the present case does not involve the exercise of a discretion, but is a filling of a gap or lacuna in the WADC in circumstances which will rarely arise. Indeed, the combination of circumstances which has led to the identification of the gap or lacuna in the WADC in the present case may never arise again, and will not arise again if the WADC is revised so as to remove it.

99. In any event, the Panel does not take such a gloomy view of the determination of the international federations and their anti-doping tribunals to wage the war against doping. Indeed, if the anti-doping tribunals of international federations start to purport to exercise a discretion not to impose the sanctions required by the WADC, WADA will no doubt take the cases to the CAS, and the international federations might well lay themselves open to an award of costs against them if the CAS Panel finds that the purported exercise of the discretion was unjustified.

100. One of the Panel's concerns in coming to the conclusion that it has that there is a gap or lacuna in the WADC Code is that its conclusion might be seen generally as a weakening of the WADC

or that WADA might believe that the WADC is being weakened. The Panel does not believe that either view would be justified.

101. The Panel has already expressed its view that (a) there is a gap or lacuna in the WADC in relation to the circumstances of the present case; (b) such circumstances may never arise again; (c) the WADC provides a just and proportionate sanction in all but the very rare case; and (d) its decision does not weaken either the WADC or WADA. Equally, the Panel does not believe that WADA, as a responsible law-maker, would want the WADC to be seen as an instrument of oppression and injustice in the very rare case in which it could, with justification, be seen to have that effect.

102. In the result, the Panel is satisfied that its decision does not represent *"the thin end of the wedge"* or in any way a weakening of the war against doping. It believes that when properly understood it represents a desire to ensure that so far as possible the sanction imposed in every case will be, and be seen to be, just and proportionate, and that there will not be a tiny number of cases in which anti-doping tribunals, athletes and international federations feel that the imposition of the WADC sanctions results in oppression or injustice. The Panel makes no apology for repeating that in its view the WADC provides a proportionate and just result in all but the very rare case.

103. In the Panel's view, the circumstances which arise in the present case differ notably from any previous CAS case. Mr Puerta did not ingest or use a medicine consciously not knowing that the product at hand could contain prohibited substances. Accidentally the medicine used by his wife happened to enter his body. In such rare circumstances, the Panel considers the eight years period of Ineligibility as disproportionate. A two year period of ineligibility appears to the Panel to be the only just and proportionate sanction.

*H. Commencement of the Sanction*

104. According to Article M.8.3 of the Programme and where required by fairness, the Anti-Doping Tribunal may start the period of ineligibility at an earlier date commencing as early as the date of sample collection.

105. The sample collection took place on 5 June 2005. Mr Puerta was formally charged with the doping offence on 21 September 2005. He carried on playing until November 2005. According to Article M.7 of the Programme, all competitive results obtained from the date a positive sample are collected shall be disqualified with all resulting consequences. Taking into account the circumstances in which the positive test occurred, i.e., the lack of intentional doping, the commencement of the sanction shall be set on 5 June 2005 when the samples were collected. The period of ineligibility shall last until 4 June 2007 included.

*I. Disqualification of Subsequent Competition Results*

105. Pursuant to Article L.1, a doping offence committed by a Player in connection with or arising out of an In-Competition test automatically leads to disqualification of the individual results obtained by the Player with all resulting consequences, including forfeiture of any medals, titles, computer ranking points and prize money obtained in that competition. As Mr Puerta committed a doping offence during the tournament in Paris, all results achieved during this event shall be disqualified. Therefore, the decision of the ITF Tribunal dated 21 December 2005 shall be confirmed in this respect.

106. The Panel orders that Mr Puerta's individual results from both the single and doubles competitions shall be disqualified in respect of the 2005 French Open and, in consequence, rules that the prize money (half the prize money awarded to the doubles pair, in the case of the doubles competition) and ranking points obtained by Mr Puerta resulting from his participation in those competition must be forfeited.

107. Pursuant to Article M.7, in addition to the automatic disqualification of the results in the competition that produced the positive sample, all other competitive result obtained from the date a positive sample was collected shall be disqualified with all of the resulting consequences. On this matter as well, the Panel considers the decision of ITF Tribunal as valid. Therefore, it orders, that Mr Puerta's individual results in all competitions subsequent to the French Open shall be disqualified and all prize money and ranking points in respect of those competitions forfeited.

**The Court of Arbitration for Sport rules that:**

1. The appeal filed by Mr Mariano Puerta is partially upheld.

2. The decision of the International Tennis Federation Independent Anti-Doping Tribunal dated 21 December 2005 is partially annulled.

3. All results achieved by Mr Mariano Puerta in both the singles and doubles competitions must be disqualified in respect of the French Open, and in consequence, the prize money (half the prize money awarded to the doubles pair, in the case of the doubles competition) and ranking points obtained by Mr Mariano Puerta must be forfeited.

4. All individual results of Mr Mariano Puerta in all competitions subsequent to the French Open must be disqualified and all prize money and ranking points in respect of those competitions must be forfeited.

5. Mr Mariano Puerta shall be declared ineligible for competition for two years starting from 5 June 2005.

6. (…).