



**Arbitration CAS 2017/A/5112 Arsan Arashov v. International Tennis Federation (ITF), award of 21 November 2017**

Panel: Mr Romano Subiotto QC (United Kingdom), President; Prof. Petros Mavroidis (Greece); Mr Alexander McLin (Switzerland)

*Tennis*

*Doping (meldonium)*

*Strict liability under art. 2.1 TADP*

*Invalidation of an AAF based on a departure from the doping control procedure*

*Mechanism of proof by an athlete of his/her absence of intent to commit an ADRV*

*Reduction of a sanction based on proportionality*

- 1. The rule set forth in art. 2.1 of the Tennis Anti-Doping Programme (TADP) is a strict liability offence. The question of how the Prohibited Substance entered one athlete's sample is not relevant to the commission of an anti-doping rule violation (ADRV) and the question of one athlete's lack of intent, fault, negligence or knowledge is irrelevant to a charge that an ADRV has been committed. Under such strict liability regime, an ADRV is established where there is an Adverse Analytical Finding (AAF) in respect of one athlete's A sample and the analysis of said player's B sample confirms the presence of the Prohibited Substance found in the A sample.**
- 2. An athlete seeking to have an AAF invalidated on the basis of a departure from the International Standards for Laboratories, other International Standard, or other anti-doping rule or policy set out in the World Anti-Doping Code (WADA Code) or the TADP must establish that there was a departure from a mandatory requirement and that it could reasonably have caused the AAF. Deviations from applicable standards do not *per se* invalidate an AAF. One athlete must satisfy both requirements in order to have the burden of proof shifted to the counter-party.**
- 3. An athlete seeking to discharge the presumption of intent does not necessarily have to show exactly how the Prohibited Substance entered his sample. However, if unsuccessful, it will be very difficult for the athlete to discharge the presumption of intent, as the factual basis on which an adjudicating body can base such a conclusion will be absent. This has been recognised by CAS considering the question of No (Significant) Fault or Negligence under previous versions of the WADA Code where proof of the source of the Prohibited Substance was not a strict requirement. There may be circumstances in which an adjudicating body can be satisfied that the ADRV was unintentional, despite the source of the Prohibited Substance not being established, where it finds, for example, the testimony of the athlete credible, that such evidence is corroborated by experts and other relevant individuals, and where the scenario submitted by the athlete appears to be the most plausible.**

4. **That proportionality may require a reduction of a sentence below the stipulated minimum is recognised under Swiss law and is a widely generally accepted principle of sports law. The cases which necessitate the exercise of this flexibility are rare. Only in the event that the outcome would violate the principle of proportionality such that it would constitute a breach of public policy should a tribunal depart from the clear wording of a text.**

## **I. PARTIES**

1. The Appellant, Arsan Arashov (the “Player”), is a Kazakhstani professional tennis player born on 10 March 2000. The Player has competed on the International Tennis Federation Juniors Circuit since 2013 and on the International Tennis Federation Pro Circuit since 2014.
2. The Respondent, the International Tennis Federation (“ITF”), is the international governing body for the sport of tennis. Further to its obligations as a signatory to the World Anti-Doping Code (the “Code”) and its responsibilities as custodian of the sport of tennis, the ITF has issued the Tennis Anti-Doping Programme (“TADP”), which sets out anti-doping rules compliant with the Code applicable to players competing in “Covered Events,” as defined in TADP Article 1.10. The ITF and the Player, are referred to collectively as the “Parties”.

## **II. BACKGROUND**

### **A. Factual background**

3. Below is a summary of the relevant facts and allegations based on the Parties’ written submissions, pleadings, and evidence adduced, as well as submissions (oral and written) submitted at the hearing. Additional facts and allegations found in the Parties’ written submissions, pleadings, and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.
4. In July 2016, the Player competed in the ITF F21 Futures Tournament in Gandia, Spain (the “Event”). The ITF commissioned for blood and urine samples to be taken at the Event for testing under the TADP. Mr Derek Rooney was the Doping Control Officer (“DCO”) at the Event. The DCO had with him an assistant DCO and blood collection officer, Mr Pedro Candecas Paños, and a team of chaperones, which included Mrs Erica Hughes, the DCO’s niece.
5. Each participant was required to provide a blood sample following registration at the Event. Accordingly, on 8 July 2016, following his registration at the Event, the Player was notified by

Mrs Hughes that he was required to provide a blood sample. The blood sample provided by the Player was tested at a World Anti-Doping Agency (“WADA”)-accredited laboratory in Cologne, Germany for a series of prohibited substances, including growth hormone isoforms, hemoglobin-based oxygen carriers (“HBOCs”), and erythropoiesis-stimulating agents (“ESAs”). The blood sample was not found to contain any of these substances.

6. On the following day, 9 July 2016, each losing player was required to provide a urine sample for testing. As the Player lost his match, upon exiting the tennis court he was notified by Mrs Hughes that he was required to provide a urine sample. Mrs Hughes accompanied the Player to the Doping Control Station (“DCS”). The Player was not ready to provide a urine sample immediately and so he sat for some time and consumed water that was available in a fridge in the waiting area of the DCS. When the Player was ready to provide a urine sample, Mr Rooney asked the Player to choose a collection vessel and lid from a selection that had been put out on a table and the Player did so. Mr Paños observed the Player passing urine into the collection vessel, while Mr Rooney observed Mr Paños observing the Player. The Player then selected a pair of Berlinger bottles and divided his urine that was in the collection vessel between these bottles to create A and B samples. Each bottle was then placed in a plastic bag and sealed by the Player.
7. The A sample was analysed by a WADA-accredited laboratory in Montreal, Canada for metabolic modulators and was found to contain Meldonium (at an estimated concentration of 63µg/mL). The 2016 WADA List of Prohibited Substances identifies Meldonium as a Prohibited Substance belonging to Class S4.5. Substances belonging to Class S4.5 are not considered Specified Substances. The Player did not have a Therapeutic Use Exemption (“TUE”) allowing him to use Meldonium.
8. On 20 September 2016, the ITF sent a Notice of Charge to the Player in accordance with TADP Article 8.1.1. The Notice set out that the Player was charged with an anti-doping rule violation (“ADRV”) under TADP Article 2.1 on the basis that his urine sample collected on 9 July 2016 contained Meldonium, a Prohibited Substance, for which he did not have a TUE.
9. By email dated 26 September 2016, the Player confirmed receipt of the letter with the results of the analysis. The Player wrote: *“Some time ago I started having problems with my health. I visited a doctor who gave me the names of some medicine which I used to take in without knowing that it could have any of prohibited things in it. Do I have a chance to prove that I have been taking in that medicine without knowing and I want to play farther”*. The Player asked for advice on *“what to do next”*.
10. On 29 September 2016, the Player sent a subsequent email to the ITF. He explained: *“Some time ago I had problems with health, I felt weakness and had to go to the doctor. The doctor gave the receipt with the names of medicine. I think melodium was in it but I didn’t know”*. The Player again requested further information on what he could do.
11. On that same day, 29 September 2016, the B sample of the Player’s urine was analysed by the Montreal laboratory. It was found to contain Meldonium (at an estimated concentration of

55µg/mL). In accordance with TADP Article 8.3.1, the Player was provisionally suspended as from 30 September 2016.

12. By email dated 5 October 2016, the ITF sent the Player the results of the analysis of the B sample and explained that these results confirmed the findings of the A sample. The ITF informed the Player that the case would “*proceed in accordance with the Notice of Charge letter*”.
13. On 6 October 2016, the Player emailed the ITF confirming his receipt of the email dated 5 October. He wrote that he “*did not take meldonium deliberately*”, explained that he wished to continue to participate in tournaments, and once again asked for guidance.
14. On 22 October 2016, the Player emailed the ITF stating that he did “*not agree*” with the charge and would explain the reasons for this disagreement in a subsequent letter.
15. By email dated 27 October 2016, the ITF wrote to the Kazakhstan National Anti-Doping Organization (“NADO”), outlining that it was having difficulty communicating with the Player and requested its assistance in explaining the Notice of Charge to him. The ITF explained: “*from the few emails he has sent to us, we do not believe he understands what he is required to do, and we believe he has not spoken to a parent, or coach or taken any legal advice*”.
16. On 2 November 2016, a representative of the Kazakhstan NADO emailed the ITF stating: “*I met with athlete and his father. I explained all their further activities regarding possible ADRV. Athlete and his parents are preparing explanations and collecting medical references and relevant documents issued in connection with this case. Also, they work together with advocate. I suppose, in a few days they send you all papers on this case*”.

## **B. Proceedings before the Independent Anti-Doping Tribunal**

17. On 4 November 2016, the Player’s counsel sent an e-mail to the ITF formally denying the charge on the basis that the collection of the Player’s sample did not follow the relevant procedures set out in the International Standard for Testing and Investigations (“ISTP”).
18. On 5 November 2016, the Chairman of the Independent Anti-Doping Tribunal appointed by the ITF under TADP Article 8.1.1 (the “Tribunal”) emailed the parties noting that the Player had not requested a hearing by the deadline of September 29, 2016, and asked the parties for guidance on how to proceed.
19. In an undated letter, received by the ITF on 18 November 2016, the Player claimed that he had met this deadline by contacting the ITF on 26 and 29 September and 5 October 2016 and disagreeing with the charge on each of those occasions. The Player requested a preliminary hearing under TADP Article 8.4.
20. On 18 November 2016, the ITF sent an email confirming that, given the particular circumstances of the case, including the language barrier and the Player’s age, it would agree to hold the hearing before the Tribunal, notwithstanding the missed deadline.

21. The hearing was held on 10 February 2017. The Player and his counsel attended by videoconference. The Tribunal heard evidence from four witnesses. Mr Rooney, Mrs Hughes, and Professor Christiane Ayotte testified on behalf of the ITF. The Player gave evidence in his own defence. The Player also submitted a short statement from his father. However, Mr Arashov senior was not tendered for cross examination at the hearing.
22. The Parties agreed that:
  - (a) The Player was asked, at the Event on 9 July 2016, to provide a urine sample, and that he did in consequence provide such a sample; and
  - (b) The sample was found on analysis to contain a Prohibited Substance, namely Meldonium.
23. The ITF submitted that, as TADP Article 2.1 is a strict liability offense, the agreed-upon facts established the offence charged. The Player submitted that the Tribunal should dismiss the charge because, *inter alia*, he had not ingested Meldonium, the presence of the substance could be attributed to contamination of the containers where his sample was collected or the contamination of water bottles from which he drank at the DCS, and further submitted that the doping control procedure and testing of his samples was not carried out in accordance with ISTI standards.
24. The Tribunal handed down its decision on 10 April 2016. The Tribunal considered, in turn:
  - (a) *“Whether Mr Arashov did or did not ingest Meldonium (and in that context the case advanced by Mr Arashov as to contamination of the containers into which Mr Arashov’s A and B samples were placed)”*.
  - (b) *“Whether, if he did ingest Meldonium, he did so knowingly or unwittingly (and in that context the case advanced by Mr Arashov as to contamination of bottles containing water drunk by Mr Arashov on 8 and 9 July 2016)”* (para. 11).
25. The Tribunal noted that it *“found Mr Arashov to be a most composed individual, mature beyond his years. He gave his evidence confidently and clearly”*. But added that this observation was *“not to say that we have been able to accept all of his evidence as accurate”*. On this basis, the Tribunal held that it was *“unable to accept at face value Mr Arashov’s assertions: (a) that the only medications that he was prescribed were Asparcam, Stamlo and Valerian, as set out in the written prescription which Mr Arashov adduced in evidence, and (b) that he was absolutely sure that he was not taking any other medications in the run up to the Event”*. The Tribunal found *“that the relevant background points firmly in favour of the conclusion that, notwithstanding his firm denials, Mr Arashov did in fact ingest Meldonium prior to his urine sample being given on 9 July 2016”*.
26. As to whether the Player had ingested Meldonium knowingly and deliberately, the Tribunal rejected the Player’s argument that the source of the Meldonium in his sample might have been contaminated drinking water contained within one (or more) of the bottles of water taken by him from the fridge in the DCS on 8 July 2016 prior to giving his blood sample or on 8 July

2016 prior to giving his urine sample. The Tribunal also rejected the other alleged rule departures relied on by the Player. In such circumstances, the Tribunal was of the view that *“it is incumbent on us to assess the most likely circumstances of ingestion by Mr Arashov, having regard to the objectively ascertainable background facts, and apply the provisions on that basis”*. Doing so, the Tribunal concluded *“that the most probable explanation is that, on advice, he was given and took Meldonium in the period prior to 9 July 2016 (probably in consequence of his medical condition)”*.

27. As to whether the Player took Meldonium intentionally, as defined in TADP Article 10.2.3, the Tribunal reasoned: *“Since Mr Arashov volunteered that he was aware at the time that Meldonium was a banned substance, this question boils down to whether he knew that he was ingesting Meldonium”*. In this regard the Tribunal held:

*“We have not found it easy to resolve this question. We have however been struck by the seeming disparity between the impression created by Mr Arashov’s email of 29 September 2016 (...) and by the impression created by him when he appeared before us. The email came across as genuine and as having been written (without the benefit of independent advice) by an inexperienced and naïve/innocent youngster, who might have allowed himself to be guided badly by others. In contrast, the person who appeared before us seemed (as previously stated) confident and mature beyond his years. It may be that this experience so early in his career has had a sobering and maturing effect on Mr Arashov. However, be that as it may, it is important to bear in mind that we must assess Mr Arashov and his likely behaviour as at the date when the relevant events occurred, in July 2016 (some 7 months before he gave evidence). Doing so, we have concluded that, while we cannot and do not accept Mr Arashov’s steadfast denials of having taken any substance during the relevant period other than the medications in the prescription that we have seen, we can nonetheless accept that he might not have known that what he was advised to take in addition (perhaps by one of his coaches or by a medical practitioner) contained a Prohibited Substance such as Meldonium”*.

28. The Tribunal, noting that *“the exception to be found in the definitions relevant to Articles 10.4 and 10.5 of the Programme [that a Minor does not need to establish how the Prohibited Substance entered his/her own system] is not to be found in relation to Article 10.2.1”*, concluded that the Player had not presented sufficient evidence to establish that the ADRV was not intentional for the purposes of TADP Article 10.2.1 (para. 28). The Tribunal therefore did not apply TADP Articles 10.4 or 10.5.
29. The Tribunal nonetheless found that it would be disproportionate to apply a four-year ban on the Player. It reasoned: *“In our view, it would be disproportionate to impose a four year ban on Mr Arashov, who is right at the start of his career and someone who was clearly naïve and immature at the moment when he was advised and persuaded to take inappropriate medication last June/July”*.
30. The Tribunal imposed a period of ineligibility of two years, ordered that the Player’s results be disqualified in respect of the ITF F21 Futures tournament held in Gandia, Spain from 9 to 17 July 2016, and ordered that the Player be permitted to retain ranking points obtained by him in all subsequent competitions in which he took part.

### III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

31. On 28 April 2017, the Player filed his statement of appeal from the ITF's Decision before the CAS in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "CAS Code"). In his statement of appeal, the Player nominated Prof. Petros Mavroidis as arbitrator.
32. On 11 May 2017, the Player filed his appeal brief in accordance with Article R51 of the CAS Code.
33. On 26 May 2017, the CAS informed the parties that, in accordance with Article R51 of the CAS Code, the Player failed to file his appeal submission in a timely manner. On 26 May 2017, the ITF confirmed that it did not object to the Player's late filing of his Appeal Brief and waived its right to have the appeal dismissed on this ground.
34. On 1 June 2017, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, informed the Parties that the Panel was constituted as follows:

President: Mr Romano Subiotto QC, Solicitor-Advocate, Brussels, Belgium and London, United Kingdom;

Arbitrators: Prof. Petros Mavroidis, Professor, Commugny, Switzerland;  
Mr Alexander McLin, Attorney-at-law, Geneva, Switzerland.

35. On 29 June 2017, the ITF filed its answer in accordance with Article R55 of the CAS Code.
36. A hearing was held on 29 August 2017 at the CAS Court Office. The Panel was assisted by Mr Brent Nowicki, Managing Counsel to the CAS, and Mrs Clare Kelly, *ad hoc* Clerk and joined by the following:

For the Appellant: Mr Edward Greenberg and Mrs Yuliya Vershinina (counsels) and Mr Mikhail Vassielnko (translator);

For the Respondent: Mrs Abbey Jayne-Tugwood (ITF) and Mr Jonathan Taylor QC and Mrs Marjolaine Viret (counsels).

37. The Panel heard evidence from the following persons by conference call:
  - Mr Derek Rooney, Doping Control Officer at the Event, witness called by the Appellant;
  - Dr Hans Geyer, WADA-accredited Institute of Biochemistry, Cologne, Germany, responsible for the testing of the Player's blood sample, witness called by Appellant; and

- Professor Christiane Ayotte, Director of the WADA-accredited Doping Control Laboratory, Montreal, and President of the World Association of Anti-Doping Scientists responsible for the testing of the Player's urine samples, witness called by Appellant.
38. At the outset of the hearing, the parties stated that they had no objection to the constitution of the Panel. At the conclusion of the hearing, both parties expressly stated that they did not have any objection with the procedure that had been adopted by the Panel. They confirmed that their right to be heard had been respected.
39. The Panel confirms that it has carefully considered and taken into account in its award all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present arbitral award.

#### IV. SUBMISSIONS OF THE PARTIES

##### A. The Player's submissions

40. In its Appeal Brief, the Player requested relief as follows:
- “40. Taking into account the fact that Mr Arsan Arashov, Player did not take the substance Meldonium, and also the fact that during the trial, the source of the Meldonium occurrence in Mr Arsan Arashov, Player's urine sample was not established, we kindly request that the Judgment of the Independent Anti-Doping Tribunal issued on 10 April 2017 be invalidated.*
  - 41. We kindly request that a new decision be made applicable with respect to Arsan Arashov, Player accused by the ITF in violation of Article 2.1, The ITF Anti-Doping Program 2016, and to the standard of Article 10.4 of the Anti-Doping Code 2015, due to the lack of guilt and negligence”.*
41. The Appellant's submissions, in essence, may be summarized as follows:
- (a) The Player did not knowingly ingest Meldonium. He *“can only assume”* that Meldonium was present in the water that he consumed in the waiting area of the DCS or in the sample collection vessel. While one cannot dispute the result of the laboratory tests, the Adverse Analytical Finding (“AAF”) does not in itself constitute an ADRV - *“the presence of a prohibited substance cannot mean [ADRV] until the Player's fault has been established”*.
  - (b) There were numerous breaches of the ISTI which could have caused the AAF. Even if these do not invalidate the AAF, they should be taken into account by the Panel in considering the questions of intent and Fault or Negligence:
    - (i) There was a failure to obtain consent from the Player's adult representative prior to the commencement of the doping control process. ISTI Article 5.3.8 *“obliges the DCO to inform a third party (an adult representative of a Minor)”* of the immediate performance of the doping control on each specific instance of doping control, prior to notifying the Minor athlete. The statement of parental consent which is



made when the Player registers or renews his annual “International Player Identification Number” (“IPIN”) form to gain access to ITF tournaments “*only indicates that the parent does not object to sampling for doping control in the period when it may be necessary. This cannot satisfy the requirement that the DCO inform the adult representative immediately before each doping control of the Minor*”.

- (ii) There was a failure to inform the Minor in the presence of an adult that he had been selected for testing. Further, ISTI Articles C4.4 and C4.8 require that the notification is made in the presence of an adult representative accompanying the Player, not any adult.
- (iii) The Player was not informed of his right to have an adult representative present nor was assistance provided to the Player in locating an adult representative. The DCO simply inquired as to the availability of an adult representative, failing to clearly explain to the Player that he had a right to have an adult representative present. The Player was told that it would take too much time for his father to travel from Valencia, Spain to be present with the Player during the doping control procedure.
- (iv) The Player did not refuse to have an adult representative present and, in any event, such alleged refusal was not properly recorded. ISTI Articles C.4.4 and C.4.6 stipulate that should a Minor refuse the presence of an adult representative during the sample taking procedure, this shall be clearly documented by the DCO. The doping control form demonstrates that the doping control procedure was conducted without the participation of an adult representative of the Player, but not that the Player had refused such participation. The “x” that was placed in the “*not applicable*” box next to “*athlete’s representative*” on the doping control form “*belongs to the category of adult Players who are not eligible to having a representative. Thus, this mark cannot in any way be attributed to the refusal of a Minor Player from the presence of his adult representative*”.
- (v) There was no Third Person present during sample collection. ISTI Article C.4.4 requires that where a Minor Player refuses the presence of an adult representative, “*the Organization responsible for the sampling, the DCO, or the Chaperone, as the case may be, shall decide on the mandatory presence of other third Persons during notification and (or) sampling of the Athlete*”. The third party of a Minor “*should be his escort (parent, coach, team doctor, and other persons representing the Athlete’s interests) and not the Assistant (Chaperone)*”. Mr Paños, the Assistant (Chaperone), who was present along with Mr Rooney during the collection of the sample, “*could not and should not be a third person*”.
- (vi) There were no “*certificates of purity*” provided for the water available at the DCS. This was not compliant with the “*International GMP standards*”. The ITF, having provided water in the DCS, “*must bear responsibility for the purity of the water*”. Even though the DCO checked all bottles delivered to the DCS for integrity, it cannot

be concluded that all bottles remained intact throughout the course of the day. As the water bottles are placed in a freely accessible refrigerator, it *“allows an ill-wisher to freely manipulate the bottles of water”*. Had the organisers of the tournament, the ITF, and the DCO employed *“reasonable foresight”*, a dispenser for the bottles of water would have been installed in the DCS. This would *“certainly limit the access for ill-wishers to return [contaminated] bottles of water to the refrigerator”*. Furthermore, in violation of ISTI Article 5.4.2(a), control over the Players in the DCS was inadequate. As Mr Paños was taken with observing the passing of urine sample, Mr Rooney alone was left to ensure *“proper control”* over the Players in the waiting area. This inadequate supervision *“avails the ill-wisher to freely access the bottles of water and commit sabotage”*. Any presence of Meldonium in the water, at the concentration found in the Player’s urine sample, would not have been visible to the naked eye, nor would it have changed the taste or smell of the water.

- (vii) There was a failure to provide a certificate of sterility or other guarantee of purity was provided for the Berlinger sample collection kits, contravening the ISO 9001, ISO 13485, and GMP international standards. Moreover, *“it follows [from IST Article 6.2.4] that the cleanliness of the equipment must at least be confirmed by a certificate or other document guaranteeing cleanliness”*. The visual inspection for cleanliness cannot guarantee the sterility of the equipment because *“the polyethylene packaging of the sampler (...) does not have a sufficiently transparent appearance, and therefore it is not possible to see anything clearly enough through it”*. Regardless, as Meldonium is a crystalline substance, *“it is not possible to visually determine the purity of the sampler without special equipment”*. The absence of any history of falsification or contamination of equipment in no way confirms the cleanliness of the equipment or the beverages in the absence of their certificates, but simply that a Tribunal has not previously considered cases involving such a violation.
- (c) There were further breaches of the ISTI and breaches of the International Standards for Laboratories (“ISL”) which, though not capable of resulting in the AAF, have made it harder for the source of entry of Meldonium into the Player’s sample to be established:
  - (i) There was a violation of Paragraph 6.4 of the ISL and ISO/IEC 17025 International Standard according to which the Player’s blood sample should have been tested for all types of Prohibited Substances and concomitant Metabolites and Markers, not simply for the isoforms GH, HBOCS, and ESAs (including recombinant epics and analogues).
  - (ii) The samples from the tournament were not stored in accordance with the applicable guidelines and it is unclear why the samples were stored at the DCO’s home after collection and prior to delivery, given that there was a fridge available at the DCS.
- (d) The Player’s young age can explain why he raised no concern about the sampling procedure at the time that the sampling was taking place. His young age meant that,

despite having been informed in detail about the procedure for selecting sets of containers and inspecting these, he did not comprehend the importance of the visual inspection of the containers for cleanliness and thus signed the doping control form. Had an adult representative been present, a proper inspection of the cleanliness of the materials would have been carried out. In sum, the Player contends that *“with the participation of Mr Arsan Arashov’s adult representative everything could have been different”*.

- (e) The signing of the doping control form by the Player without specifying any comments *“does not mean that he agreed with the contents of the doping control form and (or) the absence of any deviations by the DCO from the prescribed rules”*. The Player does not have a good command of the English language. He explained to Mr Rooney that he did not fully understand the meaning of the statements on the doping control form. Moreover, the Player *“did not even try to pay attention to the contents of the doping control form and the urine sampling procedure because he was sure that he could not possibly have any adverse result of the test, since he had never taken any prohibited drugs”*.
- (f) Mr Arashov’s position has been consistent in relation to the possibility that he had taken Meldonium. In his letter of 29 September 2016 to the ITF, Mr Arashov expressed that he was at a loss as he had not taken Meldonium and noted that he *“did not know the composition of those drugs that had been prescribed to him by his doctor”*. However, upon checking the prescription from the doctor, Mr Arashov confirmed that none of the drugs prescribed by his doctor contained Meldonium. Thus, in his letter of 6 October 2016 to Stuart Miller of the ITF, Mr Arashov made clear that he did not take Meldonium. The Player was not recommended to take Meldonium by any coaches, friends, relatives, or strangers. The Player was prescribed the drug Stamlo by his doctor to treat the heart issues from which he was suffering and so the consumption of Meldonium would have been unnecessary because Stamlo and Meldonium have similar pharmacological properties. The prescription received by the Player from his doctor clearly shows that no Meldonium was prescribed. As the Player has competed to a high level in martial arts, he has been repeatedly notified of the requirement to abstain from taking Prohibited Substances. The Player, being cognisant of the consequences of breaking the requirements of WADA, would not have done so.
- (g) As a Minor is not obliged to prove how the Prohibited Substance entered his system and given the violations of the ISTI, the duty of proving how the Prohibited Substance entered the Player’s system lies with the ITF. A requirement that the Player must indicate either the specific time or means by which his sample was contaminated would require the Player to *“either possess extra-sensory abilities or should be a Medium”*.
- (h) The Tribunal did not establish *“FOR CERTAIN”* whether the Player did or did not ingest Meldonium; it did not establish whether Meldonium entered the Player’s body *“consciously or against his will”*; it did not establish whether Meldonium entered the Player’s urine sample in an extraneous way. The Tribunal therefore failed to establish the Player’s Fault in committing an ADRV. The period of ineligibility should therefore be eliminated in line with TADP Article 10.4.

## B. The ITF's Submissions

42. In its Answer, the ITF requested that the Panel:

*“10.1.1 confirm that the Player has committed an ADRV under TADP Article 2.1 as a result of the presence of Meldonium in his urine sample collected on 9 July 2016;*

*10.1.2 confirm disqualification of the Player's results at the ITF F21 Futures tournament held in Gandia, Spain on 9-10 July 2016, with all resulting consequences, including forfeiture of any medals, titles, ranking, points and prize money, further to TADP Article 9.1;*

*10.1.3 confirm that a two-year ineligibility period is to be imposed on the Player, but on the grounds of a lack of intention applying TADP Article 10 rather than on proportionality grounds, with the start date of such ineligibility to be 30 September 2016;*

*10.1.4 dismiss the appeal against the Decision of the Independent Tribunal dated 10 April 2017 insofar as the Player claims an elimination of reduction of his ineligibility period below two years”.*

43. The ITF's submissions, in essence, can be summarized as follows:

- (a) There was no departure from any mandatory requirement of the ISTI and, should the Panel find that such departures did occur, none of the alleged departures could reasonably have caused the AAF, as would be required in order for such departure to invalidate given facts or evidence:
  - (i) Parental consent to testing as part of the ITF TADP was obtained through the statement of parental consent within the Player Welfare Statement, which is made when the player registers or renews his annual IPIN to obtain access to ITF tournaments. Even if parental consent had not been given expressly, CAS jurisprudence has confirmed that parental consent to testing can be given in an implied manner, by the parent registering or consenting to participation of the Minor in an Event.
  - (ii) The Player was notified by the chaperone in the presence of an adult that he was required to submit to testing. In any event, whether or not the Player was notified in the presence of an adult is irrelevant. ISTI Article C.4.4 provides *“Athletes who are Minors should be notified [of testing] in the presence of an adult”* and the word *“should”* confirms that this is not a mandatory requirement.
  - (iii) The Player was advised that he could have an adult accompany him if he wished, but he still declined to request for an adult's presence. The requirement of ISTI Article C.4.6 that the representative of the DCO/Chaperone must be present if a Minor declines the presence of a representative was met because Mr Rooney asked Mr Paños to be present for the collection of the sample. Mr Rooney (the representative) observed his assistant Mr Paños (the chaperone) observe the

Player while the Player passed urine. In any event, the option for the Minor to have a representative present is a safeguarding measure to, as ISTI Article C.4.4 explains, “ensure that the DCO is observing the Sample provision correctly”. There is, therefore, no plausible causative link between any departure from ISTI in this context and the AAF.

- (iv) ISTI Article 7.3.3 requires that the DCO provide the Athlete with “*the opportunity to hydrate*”. It does not require the ITF to provide any drinks or, where the ITF does provide drinks, to provide certificates of purity for those drinks. Furthermore, the levels of Meldonium in the Player’s urine samples are too high to have been the result of environmental contamination and so the only possible way Meldonium could have entered the water would have been through an act of sabotage. At the Tribunal hearing Mr Rooney explained that he “*checked the drinks to make sure that they are new and sealed*” and the Player confirmed that he did not notice anything unusual about the bottles when he chose them from the fridge.
- (v) Under the ISTI there is no requirement for a “*certificate of cleanliness*” or the like from Berlinger for the sample collection vessel and the glass bottles that together make up that kit. The ‘ISO 13485’ standards that are also referenced by the Player are not applicable to the manufacturing of sample collection equipment for urine samples. Berlinger Special AG have now provided a document certifying, in particular, that the equipment in the kit are “*clean and pure*” and do not contain any “*biological material*”, and that the sample collection vessel and lid are “*blister sealed before being dispatched*”. The suggestion that there could have been Meldonium in the sample collection kit selected by the Player is “*nothing more than pure conjecture, unsupported by any sort of facts or evidence*”. Berlinger kits are used in tens, if not hundreds of thousands of drug tests each year, without problem. Contamination of sample collection equipment through Meldonium specifically is particularly unlikely as Meldonium is not a substance that can be found in the environment, but a medication only available in certain countries. As the Player selected his own equipment, it was not possible that he was specifically targeted in an act of sabotage and, since no trace of Meldonium was found in any of the other urine samples, one can equally not suspect a generalised sabotage or contamination.
- (vi) ISL Article 6.4 does not require laboratories to screen all samples for all prohibited substances, but only for those for which a ‘Fit-for-Purpose’ method exists. No ‘Fit-for-Purpose’ method presently exists for the testing of Meldonium in blood samples.
- (vii) All samples taken from the tournament were stored in conditions that complied with requirements of the ISTI. While at the DCS and at Mr Rooney’s house, the samples remained in the tamper-evident Berlinger bottles in a secure location. The security seals on the samples were inspected on arrival at the Montreal laboratory and confirmed to be compliant. It is not possible for Meldonium to “*develop*” or “*appear*” in a urine sample through any known biological or chemical process. The

Player concedes in his Appeal Brief that the alleged flaws related to sample storage and transport could not reasonably have caused the AAF for Meldonium.

- (b) It would not be correct for the Panel to accept the Player's simple denial of intent under TADP Article 10.2.1(a) simply because he is a Minor. Instead, the Panel should only consider accepting that denial if the objective facts and circumstances of the case all clearly suggest that the Player did not ingest the substance knowingly and deliberately. The objective facts and circumstances in this case point the other way. Meldonium is not something that is found as a contaminant in supplements or otherwise in the environment. Rather, it is a medication that can only be bought, in tablet or liquid form, from a pharmacy, or online (with or without a prescription). Meldonium is specifically marketed to athletes to help them to cope with the physical demands of a rigorous training and competition schedule and its use among professional athletes in Eastern Europe for exactly this purpose was widespread, which is one of the reasons why WADA put it on the Prohibited List for 2016. Thus, Meldonium is without doubt something that the Player could have been presented with, especially given the heart condition he experienced a few weeks prior to the Event, and which he was capable of taking – both in terms of having the means and of his maturity – on his own, possibly without even consulting or telling his father or coach.
- (c) The exception granted to Minors from having to show the source of the Prohibited Substance found in the Player's system in order to establish No Fault or Negligence or No Significant Fault or Negligence does not exempt the Minor from adducing the factual basis and evidence necessary for the Panel to carry out the assessment of his Fault: the burden of establishing the basis for a reduced period of ineligibility remains on the Player. While the definition of Fault (TADP Appendix 1) states that "*the Athlete's or other Person's experience*" and "*whether the Athlete or other Person is a Minor*" may be taken into account in assessing Fault, in the present matter, the Player's personal factors do not plead in favour of a reduced Period of Ineligibility for reasons of age or lack of maturity:
- (i) The Player was 16 at the time of the sample collection, he was thus no child, but a young adult determined to pursue a career in tennis.
  - (ii) He was competing in the ITF international Pro Circuit, which are not junior competitions.
  - (iii) He declared that he was well aware that Meldonium was a Prohibited Substance, and that during his sports activities in the martial arts he had been "*repeatedly notified of the prohibition to taking prohibited substances*" and that he knew the consequences, and so did his entourage.
- (d) The Player's contamination hypotheses are "*pure speculation*" and he has not established No Fault or Negligence or No Significant Fault or Negligence. A scenario in which the Player actively ingested Meldonium - upon medical prescription or not, in full awareness

or not of what he was ingesting - is far more likely than any scenario of contamination or sabotage attributable to the doping control process.

- (e) The Player, however, is not necessarily a “cheat” in the sense that he was seeking to gain an unfair advantage over his competitors. The Tribunal was correct in its finding that the Player was “*an inexperienced and naïve/innocent youngster, who might have allowed himself to be guided badly by others*” and he therefore “*might not have known that what he was advised to take in addition [to the medications prescribed by his doctor] (perhaps by one of his coaches or by a medical practitioner) contained a Prohibited Substance such as Meldonium*”. On this basis, however, it should be concluded that the Player had shown a lack of intention within the meaning of TADP Article 10.2.3. Accordingly, the Player’s ban should be reduced from four years to two years.
- (f) The period of ineligibility should not be reduced below two years because the Player did not meet his duty of “utmost caution” under TADP Articles 10.4 or 10.5 to ensure that he did not eat anything or use any medication that might contain a Prohibited Substance. The Player’s statements at the hearing and in his Appeal Brief are to the effect that he is aware of anti-doping rules and the risks of consuming Meldonium. The only plausible scenario in which the Player could claim to have committed an ADRV without intention is if he accepted to take a medication in form of a pill or in liquid form, which was either given to him by a doctor or by someone from his entourage. In such a scenario, there would be Significant Fault or Negligence.

## V. JURISDICTION

44. Article R47 of the CAS Code provides as follows:

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

45. In this case, the jurisdiction of CAS, which is undisputed and is confirmed by the signature of the Order of Procedure by the Respondent, is derived from TADP Article 12.2.1. That Article provides as follows:

*A decision that an Anti-Doping Rule Violation has been committed, a decision imposing (or not imposing) Consequences for an Anti-Doping Rule Violation [may] be appealed by any of the following parties exclusively to CAS: (a) the Player or other Persons who is the subject of the decision being appealed.*

46. Pursuant to Article R57 of the CAS Code, the Panel has full power to review the facts and the law and to hear the case *de novo*. Furthermore, the Panel may issue a new decision which replaces the decision challenged, or may annul the decision and refer the case back to the previous instance. As a previous CAS Panel has outlined: “*this Panel is not bound by the findings of the Tribunal, however well-reasoned they are. More specifically, this Panel has full power to examine de novo the Player’s*

*actions, and the evidence before it, in order to verify whether the Player's plea of [No Significant Fault], dismissed by the Tribunal, is grounded or not. Such exercise is linked to the appellate structure of CAS proceedings"* (CAS 2016/A/4643, para. 63).

47. The Panel is, however, limited by the principle of *ne eat iudex ultra petita partium*, according to which it cannot do more than is requested of the parties.

## VI. ADMISSIBILITY

48. Article R49 of the CAS Code provides as follows:

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

49. The Respondent expressly accepts that the CAS has jurisdiction to hear this appeal in accordance with TADP Article 12.2.1 and that the statement of appeal was filed within the 21-day deadline set out in TADP Article 12.5.
50. The Panel confirms that the Player filed his statement of appeal on 28 April 2017, and therefore, this appeal is timely.
51. On May 3, 2017 the CAS wrote to the Parties acknowledging receipt of the Notice of Appeal and informed the Parties that, pursuant to Article R51 of the Code, the Appellant should file with CAS an Appeal Brief, together with all exhibits, within ten days following the expiry of the time limit for the appeal.
52. The Appellant filed its Appeal Brief via email on May 11, 2017 and the full Appeal Brief and exhibits were received at the CAS on May 19, 2017.
53. By letter dated May 24, 2017, the CAS informed the Parties that it appeared that the Player had failed to file his Appeal in a timely manner in accordance with Article R51 of the Code. It requested comment from the Appellant.
54. By letter dated May 24, 2017, the Appellant outlined that the full Appeal brief and exhibits were sent by courier on May 10, 2017 and sent by email on May 15, 2017.
55. By letter dated May 26, 2017, the CAS informed the Parties that as the Appeal Brief had been received by courier on May 19, 2017 and that, in accordance with Article R31 of the Code, the Appellant had failed to file the Appeal Brief before the deadline of May 12, 2017. The CAS further informed the Parties that, pursuant to Article R51 of the Code, the appeal would therefore be deemed withdrawn. The CAS requested comment from the Respondent.



56. On May 26, 2017, the ITF sent an email to CAS stating that it did not object to the Player's late filing of his Appeal Brief by courier.
57. By letter dated May 29, 2017, the CAS confirmed that, in light of the Respondent's letter, the appeal would be allowed to proceed.

## VII. APPLICABLE LAW

58. In accordance with the terms of the Order of Procedure dated 4 August 2017, the parties agreed to refer the present dispute to the CAS subject to the Code and that the provisions of Chapter 12 of the Swiss Private International Law Statute shall apply, to the exclusion of any other procedural law. Moreover, Article R58 of the CAS Code provides as follows:

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

59. In the present case, the applicable regulations for the purposes of Article R58 of the CAS Code are those contained in the TADP because the appeal is directed against a decision issued by an ITF independent Anti-Doping Tribunal, which was passed applying the rules and regulations of the TADP.

60. TADP Article 1.7 provides:

*The Programme shall be interpreted in a manner that is consistent with the Code. The Code shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of any Signatory or government. The comments annotating various provisions of the Code, the International Standards and the Programme shall be used to interpret the Programme.*

61. TADP Article 1.8 provides:

*Subject to Article 1.7, this Programme is governed by and shall be construed in accordance with English law. Strictly without prejudice to the arbitration provisions of Articles 8 and 12 of the Programme, disputes relating to the Programme shall be subject to the exclusive jurisdiction of the English courts.*

## VIII. MERITS

### A. Commission of ADRV

62. TADP Article 2.1 provides:

*Doping is defined as the occurrence of one or more of the following (each, an "Anti-Doping Rule Violation"):*

2.1 *The presence of a Prohibited Substance or any of its Metabolites or Markers in a Player's Sample, unless the Player establishes that such presence is consistent with a TUE granted in accordance with Article 3.5.*

2.1.1 *It is each Player's personal duty to ensure that no Prohibited Substance enters his/her body. A Player is responsible for any Prohibited Substance or any of its Metabolites or Markers found to be present in his/her Sample. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Player's part be demonstrated in order to establish an Anti-Doping Rule Violation under Article 2.1; nor is the Player's lack of intent, Fault, negligence or knowledge a defence to a charge that an Anti-Doping Rule Violation has been committed under Article 2.1.*

2.1.2 *Except in the case of those substances for which a quantitative threshold is specifically identified in the Prohibited List, and subject to the special criteria established in the Prohibited List (and/or other International Standards) to distinguish between endogenous and exogenous production of certain substances, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a Player's Sample constitutes an Anti-Doping Rule Violation under Article 2.1, unless the Player establishes that such presence is consistent with a TUE granted in accordance with Article 3.5.*

63. TADP Article 2.2 provides:

2.2 *Use or Attempted Use by a Player of a Prohibited Substance or a Prohibited Method, unless the Player establishes that such Use or Attempted Use is consistent with a TUE granted in accordance with Article 3.5.*

2.2.1 *It is each Player's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Player's part be demonstrated in order to establish an Anti-Doping Rule Violation for Use of a Prohibited Substance or a Prohibited Method under Article 2.2; nor is the Player's lack of intent, Fault, negligence or knowledge a defence to a charge that an Anti-Doping Rule Violation of Use has been committed under Article 2.2.*

64. Further, TADP Article 8.7.5 provides:

8.7.5 *Sufficient proof of an Anti-Doping Rule Violation under Article 2.1 is established (a) by an AAF in respect of a Player's A sample if (i) the Player waives analysis of the B sample and the B sample is therefore not analysed; or (ii) the Player's B sample is analysed, and that analysis confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Player's A Sample; or (b) by splitting the Player's B sample into two bottles, if the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.*

65. The Player did not have a TUE allowing him to use Meldonium. Meldonium belongs to Class S4.5 of the WADA 2016 List of Prohibited Substances. As such, its use is prohibited In-Competition and Out-of-Competition. The analysis of the Player's B sample confirmed the presence of Meldonium found in the Player's A sample. The parties do not dispute these points.
66. The ITF submits that, as an ADRV is a strict liability offence, the above facts establish the ADRV. The Player argues that he did not take Meldonium and therefore there can be no ADRV. The Appellant also concedes, however, that one "*cannot dispute the findings of the tests, because upon delivery of the Player's samples to the laboratory, no unauthorized opening of the Berlinger bottles was detected, which means that the urine sample belonged to Mr Arashov*".
67. As it is a strict liability offence, the question of how the Prohibited Substance entered the Player's sample is not relevant to the commission of an ADRV. The Player's lack of intent, Fault, negligence or knowledge is not relevant to a charge that an ADRV has been committed. Rather, this is a matter to be considered in relation to the sanction, if any, that is to be imposed. Furthermore, the relevant statute does not include a different standard (other than strict liability) for violations committed by Minors. Consequently, the argument advanced by the Player to this effect must be rejected.
68. Under the strict liability regime of Article 2.1, an ADRV is established where there is an AAF in respect of the Player's A sample and the analysis of the Player's B sample confirms the presence of the Prohibited Substance found in the A sample. As observed by a previous CAS Panel, "*Since there is no mens rea requirement for anti-doping violations, a finding that an athlete's sample contains a prohibited substance is ipso facto a finding that the athlete has committed an anti-doping violation*" (CAS 2014/A/3487).
69. Meldonium was found to be present in the Player's A sample. This was confirmed by the analysis of the Player's B sample. The ADRV is therefore established.

## **B. Period of ineligibility**

70. The issue in the present proceedings is the cause of the AAF. The Player submits that, as he did not knowingly ingest Meldonium, he "*can only assume*" that Meldonium was present in the water that he consumed in the waiting area of the DCS or in the sample collection kit. The ITF submits that the Player's hypotheses are "*pure speculation*" and that the most likely explanation for the presence of Meldonium in the Player's sample is that he "*actively ingested*" it.
71. TADP Articles 10.2.1, 10.2.2, and 10.2.3, which apply to the Imposition of a period of ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method, state:

*10.2.1 The period of Ineligibility shall be four years where:*

- (a) *The Anti-Doping Rule Violation involves a Prohibited Substance that is not a Specified Substance, unless the Player or other Person establishes that the Anti-Doping Rule*

*Violation was not intentional.*

(b) *The Anti-Doping Rule Violation involves a Specified Substance and the Anti-Doping Organisation establishes that the Anti-Doping Rule Violation was intentional.*

10.2.2 *If Article 10.2.1 does not apply, the period of Ineligibility shall be two years, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6.*

10.2.3 *As used in Articles 10.2 and 10.3, the term “intentional” is meant to identify those Players or other Persons who cheat. The term, therefore, requires that the Player or other Person engaged in conduct that he/she knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk.*

72. TADP Articles 10.4 and 10.5, provide, in applicable part:

10.4 *Elimination of the period of ineligibility where there is No Fault or Negligence:*

*If a Player or other person establishes in an individual case that he/she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.*

10.5 *Reduction of the period of ineligibility based on No Significant Fault or Negligence:*

10.5.1 *Reduction of Sanctions for Specified Substances or Contaminated Products for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6:*

(...)

(b) *Contaminated Products.*

*In cases where the Participant can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the degree of Fault of the Participant.*

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

*In an individual case where Article 10.5.1 is not applicable, if a Participant establishes that he/she bears No Significant Fault or Negligence, then (subject to further reduction or elimination as provided in Article 10.6) the otherwise applicable period of Ineligibility may be reduced based on the degree of Fault of the Participant, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the*

*reduced period under this Article may be no less than eight years.*

73. The Comment to Article 10.5.2 of the Code provides:

*Article 10.5.2 may be applied to any anti-doping rule violation, except those Articles where intent is an element of the anti-doping rule violation (e.g., Article 2.5, 2.7, 2.8 or 2.9) or an element of a particular sanction (e.g., Article 10.2.1) or a range of Ineligibility is already provided in an Article based on the Athlete or other Person's degree of Fault.*

74. The comment to TADP Article 10.5.2, strictly speaking, applies only to a plea of No Significant Fault or Negligence. Nonetheless, where intent is an element of the ADRV, Article 10.4 cannot be applied to reduce the period of ineligibility on the basis of No Fault or Negligence. Intent, as TADP Article 10.2.3 states, “requires that the Player or other Person engaged in conduct that he/she knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk”. In line with this definition, where there is intent there is necessarily Fault or Negligence - though the inverse is not necessarily true (where there is no intent there may or may not be No Fault or Negligence; this will depend on the circumstances of the case).
75. As Meldonium is not a Specified Substance, the presumptions are that (i) the ADRV was intentional, and, consequently, that (ii) a four-year ban is to be imposed. If the Player establishes that the ADRV was not intentional, the period of ineligibility is reduced to two years, rather than four years, subject to a further reduction if the Player can establish No Fault or Negligence or No Significant Fault or Negligence. Articles 10.4 and 10.5 cited above are engaged only where the Player rebuts the presumption of intent. The Tribunal correctly explained: “*In order to decide upon the period of ineligibility to be imposed on Mr Arashov, it is necessary to determine whether the Anti-Doping Rule Violation in the present case was intentional (Articles 10.2.1(a) and 10.2.3 of the Programme), and whether the provisions of Article 10.4 of the Programme (No Fault or Negligence) or Article 10.5 (No Significant Fault or Negligence) are engaged and satisfied*”.
76. The ITF submits that the Player can rebut the presumption of intent warranting a four-year ban “*by satisfying the panel that it is more likely than not (TADP Article 8.6.2) that he did not know when he ingested Meldonium that it was banned and nor did he know that there was a significant risk that ingesting the Meldonium might constitute or result in an ADRV*”. While this is accurate, it presumes that the Player knew that he was ingesting Meldonium - a point which is contested by the Player. Intention under Article 10.2.3 also requires actual awareness of or a manifest disregard for what is being consumed.
77. It is necessary to consider intent at the time of ingestion of the Substance (CAS A2/2011). Furthermore, there is no explicit distinction in Article 10.2.1 as to the evidential burdens that are on Minor and adult Players.

**1. Intent**

78. The question for this Panel to consider therefore is whether the Player has rebutted the presumption that, at the time of the conduct, whatever this may have been, that led to the commission of an ADRV, the Player (i) knew that the conduct constituted an ADRV or (ii) that there was a significant risk it might and manifestly disregarded that risk. If the Panel is satisfied on the balance of probabilities that the Player has rebutted the presumption, the base period of ineligibility to be imposed must be two years, rather than four years.
79. In order to prove his “*lack of guilt and negligence*”, the Player proffers various alleged departures from applicable guidelines and standards by the ITF, the tournament organizers, and/or the doping control personnel (each of these is considered below).
80. TADP Articles 8.7.3 and 8.7.4, which reflect Articles 3.2.2 and 3.2.3 of the Code, address allegations concerning alleged departures from the ISL and any other International Standard, or other anti-doping rule or policy set out in the Code or TADP:
- 8.7.3 *WADA-accredited laboratories, and other laboratories approved by WADA, shall be presumed to have conducted Sample analysis and custodial procedures in compliance with the International Standard for Laboratories. The Participant may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred that could reasonably have caused the AAF. In such an event, the ITF shall have the burden to establish that such departure did not cause the AAF.*
- 8.7.4 *Departures from any other International Standard, or other anti-doping rule or policy set out in the Code or this Programme that did not cause the facts alleged or evidence cited in support of a charge (e.g., an AAF) shall not invalidate such facts or evidence. If the Participant establishes the occurrence of a departure from an International Standard or other anti-doping rule or policy set out in the Code or this Programme that could reasonably have caused the AAF or other facts alleged to constitute an Anti-Doping Rule Violation, then the ITF shall have the burden to establish that such departure did not cause such AAF or other facts.*
81. A Player seeking to have an AAF invalidated on the basis of a departure from the ISL, other International Standard, or other anti-doping rule or policy set out in the Code or the TADP must establish (i) that there was such a departure and (ii) that such departure caused the AAF. The Player must satisfy both requirements in order to have the burden of proof shifted to the ITF.
82. In relation to requirement (i), in order to invalidate the AAF, the alleged departure must be from a mandatory requirement (CAS 2006/A/1149; *See also* USADA v Landis, AAA Panel decision dated September 20, 2007; CAS 2007/A/1394). Accordingly, the rule must use obligatory language (such as “*shall*” or “*must*”) as opposed to optional language (such as “*may*” or “*should*”).
83. In relation to requirement (ii), CAS bodies have confirmed that deviations from applicable

standards do not *per se* invalidate an AAF. There is no general rule of strict compliance with International Standards (CAS 2015/A/3915; CAS 2015/A/3925; CAS 2012/A/2779; CAS 2005/A/908). Indeed, the amendment of the Code in 2009 affected a change in the scope of Rule 3.2.1. As the Panel in CAS 2015/A/3915 explained:

*Article 3.2 of the WADC [the Code] strikes the balance between strict liability and the rights of athletes. This approach is confirmed in particular when the text of the current provision is compared to the previous version of Article 3.2 of the WADC (2003 version), which provided: “The Athlete may rebut this presumption by establishing that a departure from the International Standard occurred”, without requiring a correlation between that departure and the AAF. A per se rule that non-compliance with the IST automatically invalidates the sample’s test results is rejected, because it would invalidate a positive test result even if the possibility of contamination is factually implausible and because it would contradict the express language of Article 3.2 of the WADC (and that of its implementing regulations).*

84. Article 3.2 of the Code does not require the Athlete to prove that the departure did cause the AAF, but rather that it “*could reasonably have caused*” the AAF. A number of CAS Panels have previously considered what this requires of a Player:

- (a) CAS 2014/A/3487: “*the Panel considers that Rule 33.3(b) [of the 2011 International Association of Athletics Federations Anti-Doping Regulations, reflecting Article 3.2 of the Code] requires a shift in the burden of proof whenever an athlete establishes that it would be reasonable to conclude that the IST departure could have caused the AAF. In other words, the athlete must establish facts from which a reviewing panel could rationally infer a possible causative link between the IST departure and the presence of a prohibited substance in the athlete’s sample. For these purposes, the suggested causative link must be more than merely hypothetical, but need not be likely, as long as it is plausible. (...) IAAF Rule 33.3(b) must be interpreted in such a way as to shift the burden of proof onto the anti-doping organisation whenever a departure from an IST gives rise to a material - as opposed to merely theoretical - possibility of sample contamination*”.
- (b) CAS 2014/A/3639: “*the suggested causative link must be more than merely hypothetical, but need not be likely, as long as it is sensible based on the facts presented*”.
- (c) CAS 2015/A/3925: “*Article 3.2.2 establishes an objective test to be applied in assessing the evidence in this case and determining whether “it is plausible” the Player’s urine sample was contaminated by exposure to water or sweat containing [the Prohibited Substance] from another person or in the environment when it was collected*”.

85. Overall, these Panels have attempted to strike “*an appropriate balance between the rights of athletes to have their samples collected and tested in accordance with mandatory testing standards, and the legitimate interest in preventing athletes from escaping punishment for doping violations on the basis of inconsequential or minor technical infractions of the IST*” (CAS 2014/A/3487).

a. *Departures alleged by the player*

86. As a preliminary point, since the Player admits that the departures could not have caused the

AAF in this case, the Panel deems it unnecessary to assess the following alleged departures:

- (a) Failure to provide certificates of sterility for the glass Berlinger bottles.
  - (b) Failure to test the Player's blood sample for all types of Prohibited Substances and concomitant Metabolites and Markers, not simply for the isoforms GH, HBOCS, and ESAs (including recombinant epics and analogues).
  - (c) Failure to store the samples from the tournament in accordance with the applicable guidelines.
- i. Alleged failure to provide certificates as to sterility of water provided in the doping control area and to ensure that the water remained intact throughout the course of the day.
87. The Player does not point to any International Standard or other anti-doping rule or policy set out in the Code or the TADP which requires certificates to be provided as to the sterility of water provided in the DCS. Quite to the contrary, ISTI Article 5.4.1(g) states clearly: *"should the Athlete choose to consume food or fluids prior to providing a Sample, he/she does so at his/her own risk"*.
88. Professor Ayotte and Dr Geyer provided evidence for the ITF to the effect that:
  - (a) Meldonium is not a substance that is found normally in the environment, and could inadvertently contaminate a product during the manufacturing or packaging process. Rather, it is a medication available in tablet or liquid form that no manufacturer or bottler of water would have on its premises.
  - (b) Both ITF laboratory experts confirm that, if Meldonium was in the bottles, it would have to be through an act of sabotage, not through an environmental contamination: the levels in the sample are simply too high.
89. The Player provided no evidence to the contrary and the Panel accepts this evidence of the ITF experts.
90. Regardless, the Player has not explained - and it is not clear to the Panel - how a failure to provide certificates as to the sterility of the water could in any way have caused the AAF.
91. If Meldonium of the quantity necessary to result in the AAF could not be present in the water bottles though environmental contamination, the only option would be for it to be present through an act of sabotage. The Player asserts that there was inadequate supervision in the DCS which could have provided somebody with the opportunity to commit an act of sabotage. Mr Rooney testified in the hearing before the Panel that there were approximately five or six players present in the waiting area of the DCS at any given time. To the Panel, such a ratio is sufficient to ensure *"proper control"* over the players in the waiting area.
92. Furthermore, the Player has not provided any evidence of who may have committed such an



act. Before the Tribunal, the Player suggested that *“the tournament organizers are interested in the victory of their Players, so it is reasonable to presume that the beverages provided by the organizer of the tournament may contain prohibited substances unscrupulously”*.

93. CAS Panels must reject such unsubstantiated theories of sabotage. As was noted in CAS 2010/A/230 (albeit in the context of the question of Fault): *“Spiking and contamination - two prevalent explanations volunteered by athletes for such presence - do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete’s basic personal duty to ensure that no prohibited substances enter his body. The Sole Arbitrator has sympathy with athletes who are - as, he accepts they can be - victims of spiking without evidence to prove its occurrence; but the possible unfairness to such athletes is outweighed by unfairness to all athletes if proffered, but maybe untruthful, explanations of spiking are too readily accepted”*. Similarly, in CAS 99/A/234 and 235, the Panel held that *“[t]he raising of an unverified hypothesis is not the same as clearly establishing the facts”*.
94. The basis for the Player’s allegation regarding the tournament organisers is unclear. Without more than the simple assertion, the Panel cannot accept it – for example, who are *“their players?”*; how would only the Player have been affected by this act of sabotage?; or, alternatively, if the Player was specifically targeted, who would have had the motive to do this? Such suppositions clearly do not meet the evidential threshold.
- ii. Alleged failure to provide certificates as to the sterility of the testing kit and to ensure the purity of the testing kit.
95. The Player’s initial contention was that the lack of certificates of quality and cleanliness from the manufacturer (*i.e.*, the Berlinger Company) gives reason to doubt the sterility of the entire testing kit. The testing kit consists of the collection vessel and lid, which come in a sealed plastic bag divided into two sections, with the vessel in one section and the lid in another, and A and B glass Berlinger bottles, which come in a plastic box and are sealed. The Player claims that the absence of certificates of sterility contravenes *“ISO 13485”* standards and *“GMP International Standards”*. Neither of these, however, apply to the manufacturing of sample collection equipment for urine samples. There is, therefore, no requirement that certificates of sterility are provided at the DCS. The Player has therefore failed to establish that there was a breach of an International Standard.
96. Regarding the cleanliness of collection equipment, ISTI Article 6.3.4 provides that:
- The Sample Collection Authority shall only use Sample Collection Equipment systems which, at a minimum:*
- a) Have a unique numbering system incorporated into all bottles, containers, tubes or other items used to seal the Sample;*
  - b) Have a sealing system that is tamper-evident;*
  - c) Ensure the identity of the Athlete is not evident from the equipment itself; and*

d) *Ensure that all equipment is clean and sealed prior to use by the Athlete.*

97. These requirements were met:

- (a) There was a unique numbering system incorporated into all bottles, containers, tubes or other items used to seal the Sample. The glass A and B Berlinger bottles were engraved with a unique sample code.
- (b) For the proceedings before the Tribunal, the ITF obtained from Berlinger Special AG a document certifying, in particular: that the sample collection vessel and the glass bottles that together make up that kit are *“clean and pure”* and do not contain any *“biological material”*, and that the sample collection vessel and lid are *“blister sealed before being dispatched”*.
- (c) The numbering systems ensures that the identity of the Athlete is not evident from the equipment itself.
- (d) The Player is given a choice of sample collection kits to choose from and is asked to inspect the kit that is selected for any problems before using it. Mr Rooney explained to the Tribunal that the Player was told to *“inspect the vessel, and the plastic seal it came in”* and was advised *“that he could request to change it if thought there was any damage to the vessel or plastic seal, or if he thought necessary for any other reason”*. The Player confirmed at the hearing before the Tribunal that, when presented with the choice of collection vessels, *“I looked at them and have not noticed anything”*.

98. In CAS 98/211, the Panel rejected the Appellant’s assertion that the custody of the samples with the transport company DHL was *“suspect and insecure”*, noting that *“DHL is a carrier of international reputation. We see no reason to assume that the sample, which arrived timeously on this occasion, was not in DHL’s custody throughout”*.

99. Nor can this Panel make an assumption that the Berlinger equipment used was contaminated. Berlinger kits are used in tens if not hundreds of thousands of drug tests each year, without problem. For example, Professor Ayotte testified at the hearing before the Tribunal that her laboratory in Montreal receives 25,000-28,000 samples a year, half of which are collected with Berlinger equipment and that, therefore, it must have analysed to date hundreds of thousands of such samples. She has not been aware of any incident involving Berlinger equipment being contaminated by a substance that could cause an AAF. In such circumstances, specific evidence would be required as to how the Berlinger equipment used for the sampling of the Player’s urine was contaminated. The Player has not provided any such evidence.

100. As with the water bottles, the Player again proffered a theory of sabotage relating to the sample collection kit to supplement his argument relating to the absence of certificates of sterility. In the hearing before the Panel, having observed the sample collection kits provided as evidence by the ITF, the Player accepted that an ill-wisher could not possibly have contaminated the Berlinger glassware with Meldonium, because the bottles were *“sealed with lids and had a rigid*

*packaging*". The Player, however, maintained that it was possible to sabotage the urine collection vessels because these are packed in soft plastic bags and so could be pierced with a needle and liquid Meldonium poured in.

101. Again, this allegation of sabotage must be rejected. The Player has not substantiated it with any evidence as to who would have committed such an act or why they would have the incentive to do it.
- iii. Involvement of adult representative.
102. The Player submits a number of alleged departures concerning the involvement of an adult representative during the doping control procedure. Each of these will be analysed in turn:
  - (a) Alleged failure to obtain consent.
    - (i) This was a new argument on appeal. The Player submits that consent must be obtained on each specific instance of doping control, prior to notifying the Minor and that the statement of parental consent contained within the Player Welfare Statement, which is made when the Player registers or renews his annual IPIN to obtain access to ITF tournaments, does not suffice for this purpose.
    - (ii) ISTI Article C.3 provides: *"The Testing Authority has responsibility for ensuring, when possible, that the DCO has any information necessary to conduct a Sample Collection Session with an Athlete who is a Minor. This includes confirming wherever necessary that the organizer of the Event obtains the necessary parental consent for Testing any participating Athlete who is a Minor"*.
    - (iii) IPIN Section 2 (Anti-Doping Consent) reads, in its relevant parts: *"The ITF may conduct anti-doping testing at ITF-sanctioned events under the Anti-Doping Programme, and will enforce any penalties, sanctions and/or other measures taken against me under the Anti-Doping Programme. I hereby submit to the jurisdiction and authority of the ITF to manage, administer and enforce the Anti-Doping Programme and to the jurisdiction and authority of the Anti-Doping Tribunal and the Court of Arbitration for Sport "(CAS)" to determine any charges brought under the Anti-Doping Programme"*.
    - (iv) As part of this statement, parents or legal custodians declare: *"I, as parent / legal guardian of [PLAYER NAME], have read, understood, consent and agree to the above agreements of the player (section 1), Anti-Doping Consent (section 2), and Anti-Corruption Consent (section 3), Eligibility for Wheelchair Tennis Players (section 4) (where applicable) and Minor Medical release (section 5) (where applicable)"*.
    - (v) An application for the renewal of the Player's IPIN was completed and submitted each year from 2013 to 2016, last on 25 November 2015 for the year 2016.
    - (vi) In CAS 2006/A/1032, the CAS Panel found that the Minor player became *"bound by TADP by participation in Roland Garros because by her doing so with her father's consent they both*

*demonstrated their intention to be subject to the rights and obligations stemming therefrom*". Similarly, in CAS 2010/A/2268, the Panel concluded that *"once a young athlete is introduced with the consent of his parents in a context of international competitions, he must bear all the "normal" consequences of such competitions, including doping control procedures and the disciplinary consequences thereof"*.

- (vii) The Panel is satisfied that, through the IPIN registration process, the parental consent to testing as part of the ITF Tennis Anti-Doping Programme at ITF Events was secured. There is no separate requirement that parental consent be obtained on each specific instance of doping control.
  - (viii) Regardless, the Player has not explained - and it is not clear to the Panel - how a failure to obtain consent, if that was required by some international standard, could in any way have caused the AAF.
- (b) Alleged failure to notify of testing in the presence of an adult representative accompanying the Player.
- (i) The testimony of the Player differs from that of Mr Rooney and Mrs Hughes as to whether the Player was notified in the presence of an adult. Mr Rooney and Mrs Hughes both testified that every member of the doping control staff, mindful that the Event would involve a number of Minors, were well aware of the requirements for doping control involving Minors and were thorough in applying them. Before the Tribunal, the Player testified that he was speaking with another player at the moment he was notified and that the player's coach was *"nearby"*, while he stated in his written submission to the Tribunal that there was no adult present at the moment he was notified.
  - (ii) The Player further argues that ISTI Articles C.4.4 and C.4.8 require that the notification is made in the presence of an adult representative accompanying the Player, not any adult.
  - (iii) ISTI Article C.4.4 provides: *"Athletes who are Minors should be notified in the presence of an adult, and may choose to be accompanied by a representative throughout the entire Sample Collection Session"*. This article is written in such a way as to separate the moment of notification from the Sample Collection Session - notification should occur in the presence of an adult; a representative may be present throughout the entire Sample Collection Session. The ISTI defines Sample Collection Session as *"[a]ll of the sequential activities that directly involve the Athlete from the point that initial contact is made until the Athlete leaves the DCS after having provided his/her Sample(s)"*. The moment a Minor is notified he may choose to be accompanied by a representative, but the notification itself does not require the presence of a representative. Were this not so, it would not be possible to notify a Minor that he had been selected for testing in circumstances such as those in the present case where the Minor did not wish to have a representative attend his matches.

- (iv) Regardless, notification in the presence of an adult is not a mandatory requirement. ISTI Article C4.4 provides that “*Athletes who are Minors should be notified in the presence of an adult*” (emphasis added). Thus, notification in the presence of an adult is not a mandatory requirement and therefore failure to notify in the presence of an adult is incapable of invalidating the AAF. Furthermore, the Player has not explained - and it is not clear to the Panel - how a failure to notify in the presence of an adult could in any way have caused the AAF.
- (c) Failure to explain the right to have an adult representative present during the doping control procedure.
- (i) In his testimony before the Tribunal, Mr Rooney explained that, as he understood this to be the Player’s first ever urine test, he “*took extra time to explain the procedure to him*”. In addition, as noted above, Mr Rooney and Mrs Hughes both testified that every member of the doping control staff, mindful that the Event would involve a number of Minors, were well aware of the requirements for doping control involving Minors and were thorough in applying them.
  - (ii) The Player has not pointed to any International Standard or other anti-doping rule or policy set out in the Code or the TADP that requires the right to be explained on each occasion to a Minor Athlete. The Panel is not aware of any such standard, rule, or policy that exists. Therefore, even if such right was not explained, there is no departure from any International Standard or other anti-doping rule or policy set out in the Code or the TADP.
  - (iii) In any event, if such standard, rule, or policy were to exist, it is not plausible, at least in the present case, that a failure to comply with this could cause the AAF. The Player has not even for example, stated that, had the right been explained to him, he would have wished for an adult representative to be there, never mind showing how there is any causal link between a failure to be informed of a procedural right and the AAF. The Panel in CAS 2015/A/3915 similarly found “*a possible notice sent to his coach or possible lack of information regarding the rights and responsibilities could not have caused the AAF*”. In that case, the Athlete did not suggest that it could have.
- (d) Alleged failure to properly document the Player’s purported refusal to have a representative present.
- (i) ISTI Article C.4.6 provides: “*Should an Athlete who is a Minor decline to have a representative present during the Sample Collection Session, this should be clearly documented by the DCO. This does not invalidate the test, but must be recorded. If a Minor declines the presence of a representative, the representative of the DCO/Chaperone must be present*”.
  - (ii) The ITF points to (i) an “x” that was placed in the “*not applicable*” box next to “*athlete’s representative*” on the doping control form and (ii) a strike was put through the name

and signature boxes for an athlete's representative on the doping control form as proof that the Player refused to have a representative present and that this was adequately recorded.

- (iii) The Player contended that “x” that was placed in the “*not applicable*” box next to “*athlete’s representative*” on the doping control form “*belongs to the category of adult Players who are not eligible to having a representative. Thus, this mark cannot in any way be attributed to the refusal of a Minor Player from the presence of his adult representative*”.
  - (iv) At the hearing, Mr Rooney explained that the same doping control form is used for adult and Minor Athletes. As an adult Athlete also has an entitlement to have a representative present, the doping control personnel would ask the Athlete if they would like a representative present. If they did not, an “x” would be placed in the “*not applicable*” box next to “*athlete’s representative*”. Thus, contrary to the Player’s contention, the marking of an “x” in the “*not applicable*” box on the doping control form would indicate that a Player - Minor or adult - they had declined to have an adult representative present.
  - (v) Regardless, ISTI Article C.4.6 provides that a failure to clearly document a Minor’s refusal to have a representative present “*does not invalidate the test*”.
- (e) Alleged failure to have a third person present during the Sample Collection Session:
- (i) It is not disputed that both Mr Rooney and Mr Paños were present throughout the entire sample collection procedure. Mr Rooney explained that, when the urine was being passed, Mr Rooney observed Mr Paños who observed the Player’s passing of the urine sample.
  - (ii) The Player submits that DCO cannot be considered as a third person. The Player suggests that ISTI Article C.4.4 requires that where a Minor athlete does refuse the presence of an adult representative, “*the Organization responsible for the sampling, the DCO, or the Chaperone, as the case may be, shall decide on the mandatory presence of other third Persons during notification and (or) sampling of the Athlete*” (emphasis in Appeal Brief).
  - (iii) The actual wording of ISTI Article C.4.4 is as follows:  
  

*“Athletes who are Minors should be notified in the presence of an adult, and may choose to be accompanied by a representative throughout the entire Sample Collection Session. The representative shall not witness the passing of a urine Sample unless requested to do so by the Minor. The objective is to ensure that the DCO is observing the Sample provision correctly. Even if the Minor declines a representative, the Sample Collection Authority, DCO or Chaperone, as applicable, shall consider whether another third party ought to be present during notification of and/or collection of the Sample from the Athlete”.*
  - (iv) Further, ISTI Articles C.4.5 and C.4.8 provide:

*“C.4.5 The DCO shall determine who (in addition to the Sample Collection Personnel) may be present during the collection of a Sample from an Athlete who is a Minor, namely a representative of the Minor to observe the Sample Collection Session (including observing the DCO when the Minor is passing the urine Sample, but not directly observing the passing of the urine Sample unless requested to do so by the Minor) and the DCO’s/Chaperone’s representative, to observe the DCO/Chaperone when a Minor is passing a urine Sample, but without the representative directly observing the passing of the Sample unless requested by the Minor to do so”.*

*“C.4.8 The Sample Collection Authority shall consider the appropriate course of action when no adult is present at the Testing of an Athlete who is a Minor and shall accommodate the Athlete in locating a representative in order to proceed with Testing”.*

- (v) Contrary to what the Player seems to suggest, these Articles make clear that it is entirely up to the Sample Collection Authority, DCO or Chaperone, as applicable, to decide whether another third party ought to be present where the Minor refuses the presence of an adult representative. Therefore, even if it cannot be said that Mr Rooney acted as a third party in observing Mr Paños observe the collection of the Sample from the Athlete, this was not a breach of a mandatory requirement of the ISTI as it was not even necessary for such a third party to be present.

103. Overall, the Player contends that with the presence of an adult representative *“everything would have been different”*; that, due to the Player’s young age, he did not comprehend the importance of the visual inspection of the containers for cleanliness and thus signed the doping control form. Had an adult representative been present, it is submitted by the Player, a proper inspection of the cleanliness of the water bottles and sample collection kit would have been carried out.
104. The Panel is not convinced by this argument for two reasons additional to those set out above.
105. First, at the conclusion of the doping control procedure, according to the testimony provided by the parties, the Player was allowed to go through the contents of the doping control form to ensure that he was happy that all of the information entered on it was correct. Mr Rooney asked if the Player had any comments about the doping control procedure, including any irregularities. The Player did not, so Mr Rooney wrote ‘none’ in the comments section of the doping control form. Mr Paños and Mr Rooney then signed the doping control form to confirm *“that the Sample Collection Session was conducted in accordance with the relevant procedures”*. The Player, without hesitation or comment, signed the doping control form, confirming that *“(a) the information on this form accurately reflects the details of the doping control session; (b) subject to any comments made in section 4, my sample(s) was/were collected in accordance with the requirements of the International Standard for Testing; and (c) my sample(s) has/have been sealed and numbered as indicated above”*. The Player’s signature on the doping control form weighs against a subsequent claim that there were material departures from proper procedures (CAS 99/A/234 and 235; CAS 2002/A/399; CAS 2003/A/493). This is so regardless of the Player’s comprehension of the English language (CAS 2010/A/2277).

106. Second, the Panel notes that the Appellant's submissions in relation to the absence of an adult representative and the contamination of the water and collection materials seem contradictory. On the one hand, the Appellant submits that if an adult had been present during the sample collection procedure "*everything would have been different*" because an adult would have recognized the presence in Meldonium in any of the water bottles or sample collection kit. On the other hand, the Appellant submits that Meldonium would not have been visible to the naked eye. Indeed, the Appellant claims to have conducted a test confirming this (though little further information on these experiments was provided, nor has evidence been provided by the Player from any expert witness on this point). Whatever way it is approached, the Player's argument must fail. If, as the Player argues, Meldonium in the water or the test kit would not have been "*visually visible*", then even if an adult representative were present this would have made no difference. Thus, the absence of an adult representative could have had no causative link to the AAF. If, as the expert evidence of Professor Ayotte suggests, Meldonium in the quantities required to give rise to the amount found in the Player's sample would have been visible to the naked eye, this would have been recognized by the Player, the DCO, or any of his assistants or chaperones.

*b. Conclusion on question of intent*

107. The Panel is of the view that nothing provided by the Player displaces the presumption that the ADRV was intentional.

108. In the Appeal Brief it is submitted that "*Since Mr Arashov did not take Meldonium, it would be a reasonable assumption that Meldonium could be in the said equipment or bottles of water*". No evidence has been provided as to the source of ingestion, but rather the Player is seeking to rely on mere speculation. In essence, the Panel is being asked to accept the Player's bald denial of having taken Meldonium. This is not sufficient to rebut the presumption of intent.

109. A Player seeking to discharge the presumption of intent does not necessarily have to show exactly how the Prohibited Substance entered his sample. However, without showing how the Prohibited Substance entered his sample, it will be very difficult for an Athlete to discharge the presumption of intent, as the factual basis on which the Panel can base such a conclusion will be absent. This has been recognised by CAS Panels considering the question of No Fault or Negligence or No Significant Fault or Negligence under previous versions of the Code where proof of the source of the Prohibited Substance was not a strict requirement:

*CAS 2006/A/1032: "if the manner in which a substance entered an athlete's system is unknown or unclear it is logically difficult to determine whether the athlete has taken precautions in attempting to prevent any such occurrence".*

*CAS 2006/A/1130: "Obviously this precondition is important and necessary otherwise an athlete's degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up".*

110. Similarly, an ITF Anti-Doping Tribunal held that "*[i]n the absence of proof as to how the substance*



*entered the players body it is unrealistic and impossible to decide whether in those unknown circumstances he did, or did not, exercise all proper precautions to avoid the Commission of a doping offence” (ITF v B, ITF Anti-Doping Tribunal decision, dated 13 February 2006).*

111. There may be circumstances in which a Panel can be satisfied that the ADRV was not intentional, despite the source of the Prohibited Substance not being established. The Panel may be so satisfied where it finds, for example, the testimony of the Player credible, that such evidence is corroborated by experts and other relevant individuals, and where the scenario submitted by the Player appears to the Panel to be the most plausible.
112. In CAS 2016/A/4676, a case where there was also no credibly established source, the Panel found that in the “*special circumstances*” of the case, the Player discharged his burden of proving lack of intent. It was satisfied that “[t]he totality of the evidence (...) combined with the Panel’s acceptance of the testimony provided by the Player which the Panel found to be credible, as further supported by evidence of [the Player’s physiotherapist] and of the club doctors” established that the Player had no intent to use a Prohibited Substance. Overall, it found the scenario submitted by the Player to be “*more plausible*” than the alternative submitted by UEFA.
113. In the present case, there are no special circumstances which enable the Panel to find that the Player has discharged his burden to rebut the presumption of intent. First, no statement or other testimony was provided by the Player’s trainer regarding the ADRV, despite the Player’s father explaining that this would be adduced. Second, no evidence was adduced by the Player to demonstrate that he took steps to ensure that he did not consume any Prohibited Substance. Failing to take such steps is a factor that CAS Panels have often taken to be detrimental to an Athlete, albeit when considering the question of No Fault or Negligence or No Significant Fault or Negligence (CAS 2008/A/1489 and 1510; CAS 2009/A/1870; CAS 2012/A/2763).
114. The Player has provided a report from a consultation with a doctor, whom he saw roughly six weeks before the Event for high blood pressure, stabbing pain in the heart area, and periodical dizziness, he was prescribed Aparcam, Stamlo, and Valerian - not Meldonium. The Player claims that the use of Meldonium would have been “*unnecessary*” because Stamlo and Meldonium have similar “*pharmacological properties*”. This cannot and does not convince the Panel, on the balance of probabilities, that the Player was never advised to take Meldonium. All that this particular report demonstrates is that on that one occasion the Player was not prescribed Meldonium.
115. The Panel in CAS 2016/A/4643, also an appeal from a decision of an ITF Tribunal regarding an ADRV involving Meldonium, when considering what should be required by way of evidence in order to establish No Significant Fault, reasoned that “*the ‘bar’ should not be set too high*”. Likewise, evidential ‘bars’ should not be set too low.
116. Meldonium is not something that is found as a contaminant in supplements or otherwise in the environment. Rather, it is a medication that can only be bought, in tablet or liquid form, from a pharmacy, or online (with or without a prescription). Meldonium is specifically marketed to athletes to help them to cope with the physical demands of a rigorous training and competition schedule and its use amongst professional athletes in Eastern Europe for exactly this purpose

was widespread - one of the reasons why WADA put it on the Prohibited List for 2016.

117. The purpose of the TADP is, as Article 1.1 underlines, to “*maintain the integrity of tennis*”. Should a Player be able to have his period of ineligibility reduced on the basis of unsubstantiated hypotheses of contamination or other unverified allegations, the integrity of the sport would soon be destroyed.
118. The ITF, not cross-appealing and seeking for the period of ineligibility that was imposed to be increased, also requests that the Panel finds the Player lacked intent. The ITF submits that the Panel should accept the Tribunal’s conclusion that the most probable explanation for the presence of the Prohibited Substance in the Player’s urine sample was that, “*on advice, he was given and took Meldonium in the period prior to 9 July 2016 (probably in consequence of his medical condition)*” and the related finding of the Tribunal that, in the period leading up to the Event, the Player was “*an inexperienced and naïve/innocent youngster, who might have allowed himself to be guided badly by others*” and that, therefore, “*he might not have known that what he was advised to take in addition [to the medications prescribed by his doctor] (perhaps by one of his coaches or by a medical practitioner) contained a Prohibited Substance such as Meldonium*”.
119. In the view of the Panel, the theory that the Player took Meldonium on advice from others is just as speculative as all other theories. Under TADP Article 10.2.1 the burden is on the Player to rebut the presumption of intent. He has not done so. In such circumstances, it is not incumbent on the Panel to engage on its own speculative course of how the Prohibited Substance entered the Player’s sample.
120. The Player submits that “*until the source has been established it is impossible to admit Mr Arashov’s Fault in violating the anti-doping rules*”. Under the TADP, however, the burden is on the Player to both rebut the presumption of intent and establish the absence of Fault. The consequence for failing to establish the source of the Prohibited Substance found to be present in the urine sample lies with the Player. Establishing the source of the Prohibited Substance is not indispensable to rebutting the presumption of intent, but without any credibly established source, it will be more difficult for a Panel to be satisfied that the ADRV was not committed intentionally.

## **2. Proportionality**

121. The Tribunal, finding that the Player had not rebutted the presumption of intent and that he could neither, therefore, benefit from any reduction in the period of ineligibility on the basis of No Fault or Negligence or No Significant Fault or Negligence, reduced the period of ineligibility to two years on the basis of proportionality. Having concluded that the most probable explanation is that, on advice, the Player was given and took Meldonium in the period prior to 9 July 2016, reasoned that “*it would be disproportionate to impose a four year ban on Mr Arashov, who is right at the start of his career and someone who was clearly naïve and immature at the moment when he was advised and persuaded to take inappropriate medication*”.
122. The ITF has not cross-appealed. It has not asked for the Player’s period of ineligibility to be increased from the two years that the Tribunal imposed. Rather, the ITF has simply suggested

that the Panel might substitute the basis of the two-year period of ineligibility from proportionality to lack of intention. The Panel has not accepted the invitation to reduce the period of ineligibility on grounds of lack of intention for the reasons set out above.

123. That proportionality may require reduction of a sentence below the stipulated minimum is recognized both under Swiss law and is “*a widely generally accepted principle of sports law*” (CAS 2005/A/830).
124. The cases which necessitate the exercise of this flexibility are rare. As was held in CAS 2013/A/3327 and 3335, an appeal from a decision of an ITF Tribunal, “[o]nly in the event that the outcome would violate the principle of proportionality such that it would constitute a breach of public policy should a tribunal depart from the clear wording of the text”.
125. The Code is intended to harmonise sanctions in such a way that is equally applicable to athletes young and old, amateur or professional. This is supported by CAS case law (CAS 2015/A/4273, CAS 2012/A/2959, CAS 2009/A/2012 and CAS 2010/A/2268). The Panel in CAS 2005/A/847 explained this as follows:

*“the WADC [the Code] does not provide that the athlete’s personal history also has to be taken into account when fixing the penalty. The same applies to the question of how severe the penalty impacts upon the athlete in his personal life. The athlete’s age, the question of whether taking the prohibited substance had a performance-enhancing effect or the peculiarities of the particular type of sport are not - according to the WADC - matters to be weighed when determining the period of ineligibility. To be sure, the purpose of introducing the WADC was to harmonise at the time a plethora of doping sanctions to the greatest extent possible and to un-couple them from both the athlete’s personal circumstances (amateur or professional, old or young athlete, etc.) as well as from circumstances relating to the specific type of sport (individual sport or team sport, etc.)”* (para. 30).

126. In CAS 2006/A/1025, the Panel did apply the principle of proportionality to reduce the sanction imposed by the lower Tribunal. The Panel found that what it identified as a gap or lacuna in the Code, enabled it to reduce what was a mandatory 8-year sanction for a second offence to two years in unusual and sympathetic circumstances. It was established that the player had accidentally drunk from a glass which appeared to him to be empty but had been used by his wife as a vessel for premenstrual tension medicine containing a prohibited substance. The amount ingested was negligible and incapable of enhancing performance. The penalty *prima facie* applicable under the Code resulted from the player having sustained a previous positive test for an asthma medication for which he could have - but had not - obtained a Therapeutic Use Exemption (“TUE”). In applying the principle of proportionality, the Tribunal noted that the circumstances in which the Code provides for tribunals to exercise a discretion are “*certain [and] limited*” and that the Code “*does not bestow upon tribunals a general discretion*”, noting that “*the existence of such a general discretion would be inimical to the WADC [the Code], which seeks to achieve consistency and certainty. The Panel does not believe that such a discretion exists, and would not welcome its existence*”. It emphasised that the decision should not be understood as “*a weakening of the war against doping*”.
127. Though the Player is a minor, that alone cannot justify a reduction on the basis of

proportionality. First, the Player was 16 at the time of the sample collection. His circumstances are different to that of, say, a 10-year old. Second, the Player was competing in in the ITF international Pro Circuit, which are not junior competitions. The Event in Gandia, Spain, for example, was open to participants under the age of 21. Third, the Player has insisted that he was fully aware that Meldonium was a Prohibited Substance, adding that during his sports activities in the martial arts he had been “*repeatedly notified of the prohibition to taking prohibited substances*” and he knew the consequences of doing so.

### **C. Disqualification of results**

128. The Tribunal confirmed that under TADP Article 9.1 the results that the Player obtained at the Event are automatically disqualified. The Player has not challenged this aspect of the Decision. However, the Tribunal noted that it had discretion not to disqualify his subsequent results if fairness required otherwise, and decided not to disqualify any subsequent results. Neither Appellant nor Respondent challenges this aspect of the Decision.

## **ON THESE GROUNDS**

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

1. The Appeal filed on 19 May 2017 by Mr Arsan Arashov against the decision rendered by the International Tennis Federation Independent Anti-Doping Tribunal on 10 April 2017 is dismissed.
2. The decision rendered by the International Tennis Federation Independent Anti-Doping Tribunal on 10 April 2017 is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.