CAS 2012/A/2804 Dimitar Kutrovsky v. International Tennis Federation

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

President:	Mr Yves Fortier C.C., Q.C., barrister-at-law in Montréal, Québec, Canada
Arbitrators:	Mr Jeffrey G. Benz, attorney-at-law in Los Angeles, California, U.S.A.
	The Hon. Michael J. Beloff Q.C., barrister-at-law in London, United Kingdom
Ad hoc Clerk:	Mr William Sternheimer, Counsel to the CAS, Lausanne, Switzerland

in the arbitration between

DIMITAR KUTROVSKY, Bulgaria

Represented by Mr Brent J. Nowicki, attorney-at-law in Buffalo, New York, U.S.A., and Mr Paul J. Greene, attorney-at-law in Portland, Maine, U.S.A.

Appellant

and

INTERNATIONAL TENNIS FEDERATION, London, United Kingdom

Represented by Mr Jonathan Taylor, solicitor-at-law in London, United Kingdom

Respondent

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1 THE PARTIES

1.1 The Appellant, Dimitar Kutrovsky ("**Kutrovsky**" or the "**Athlete**") is a 25-year-old professional tennis player from Bulgaria.

1.2 The Respondent, International Tennis Federation ("**ITF**") is the world governing body for the sport of tennis. Its responsibilities include the management and enforcement of the 2012 Tennis Anti-Doping Programme (the "**Programme**") which adopts in relevant part, *mutatis mutandis*, the World Anti-Doping Code ("**WADC**'').

2 THE DECISION AND ISSUES ON APPEAL

2.1 Kutrovsky appeals a decision of the Independent Anti-Doping Tribunal convened by the ITF (the "**Tribunal**") dated 15 May 2012 (the "**Decision**") imposing sanctions upon him for a doping offence.

2.2 This appeal is against sanctions only, *i.e.* whether Kutrovsky is entitled under the Programme to a reduction of the period of ineligibility of two years imposed by the Decision.

3 FACTUAL BACKGROUND

3.1 Below is a summary of the main relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations 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.

3.2 The facts in this case are straightforward and are not substantially in dispute.

3.3 Kutrovsky is a 25-year-old Bulgarian professional tennis player who reached a career high rank of 312 in the ATP weekly rankings on 27 February 2012.

3.4 On 14 February 2012, Kutrovsky provided a urine sample (n°3041193) at the SAP Open tournament held in San José, California, U.S.A., from 13 to 19 February 2012. The A sample returned an adverse analytical finding ("**AAF**") for the substance "methylhexaneamine" ("**MHA**") and Kutrovsky was charged with a doping offence on 8 March 2012. He had played three qualification games before the match of 14 February 2012.

3.5 On 19 March 2012, Kutrovsky admitted the charge.

3.6 Kutrovsky asserted that (i) he purchased a supplement called "Jack3d" in powder form over the counter in August 2011, (ii) Jack3d contained MHA, (iii) MHA is a "Specified Substance", and (iv) he took Jack3d, after mixing the powder with water, on 13 February 2012 without intent to make use of a prohibited substance and without intent to enhance his sport performance thereby.

3.7 The ITF only disputed and still disputes the proposition that Kutrovsky had taken Jack3d without intent to enhance his sport performance.

3.8 On 19 April 2012, a hearing took place before the Tribunal. Following the hearing, on 15 May 2012, the Tribunal made the following determinations:

> *"[…] the Tribunal:*
>
> *(1) confirms the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 8 March 2012, namely that a prohibited substance, methylhexaneamine, was present in the urine sample provided by the player at the SAP Open in San José, California, on 14 February 2012;*
>
> *(2) orders that the player's individual results must be disqualified in respect of the SAP Open tournament in San José in February 2012, and in consequence rules that the prize money and ranking points obtained by the player through his participation in that event must be forfeited;*
>
> *(3) orders, further, that the player's individual results (including ranking points and prize money) in the ITF Futures Event in Brownsville, Texas, later in February 2012 shall be disqualified and all prize money and ranking points in respect of that competition shall be forfeited;*
>
> *(4) finds that the player has succeeded in establishing by a balance of probability how the prohibited substance entered his body;*
>
> *(5) finds that the player has not succeeded in establishing to the comfortable satisfaction of the Tribunal that his use of the prohibited substance leading to the positive test result in respect of the sample taken on 14 February 2012 was not intended to enhance his sport performance; and*
>
> *(6) declares the player ineligible for a period of two years commencing on 14 February 2012 and expiring at midnight (London time) on 13 February 2014 from participating in any capacity in any event or activity (other than authorised anti-doping education or rehabilitation programmes) or competition authorised, organised or sanctioned by the ITF or any other bodies referred to in Article 10.10.1(b) of the Programme."*

4 PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

4.1 On 22 May 2012, Kutrovsky filed an appeal with the Court of Arbitration for Sport (the "**CAS**") against the Decision pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (the "**Code**").

4.2 On 15 June 2012, in accordance with Article R51 of the Code, Kutrovsky filed his appeal brief.

4.3 On 11 July 2012, in accordance with Article R55 of the Code, the Respondent filed its answer.

4.4 On 8 August 2012, the Respondent filed a new CAS award, CAS 2011/A/2677 *Lapikov v. IWF* of 10 July 2012, together with comments on such award.

5 THE CONSTITUTION OF THE PANEL AND THE HEARING

5.1 By notice dated 7 June 2012, the CAS notified the parties that the appeal hearing panel (the "**Panel**") had been constituted as follows: Mr Yves Fortier C.C., Q.C. as President of the Panel, and Mr Jeffrey Benz and the Hon. Michael J. Beloff Q.C. as co-arbitrators. The parties did not raise any objections as to the constitution and composition of the Panel then or at the hearing.

5.2 On 19 July 2012, an Order of Procedure was made. Each party signed such Order on 26 July 2012.

5.3 The Order of Procedure scheduled a hearing on 30 August 2012 in New York following the parties' agreement in this respect.

5.4 On 30 August 2012, a hearing was duly held at the premises of the International Centre for Dispute Resolution, a division of the American Arbitration Association, in New York.

5.5 The following persons attended the hearing:

For the Appellant:	Mr Paul J. Greene and Mr Brent J. Nowicki, counsel for the Appellant
	Mr Dimitar Kutrovsky, the Appellant
For the Respondent:	Mr Jonathan Taylor, counsel for the Respondent
	Dr Stuart Miller, ITF Anti-Doping Manager

5.6 Mr William Sternheimer, Counsel to the CAS, assisted the Panel at the hearing.

5.7 At the hearing, the Panel heard the detailed submissions of counsel as well as the evidence of the following witnesses:

5.7.1 Kutrovsky, who testified about his ingestion of the Jack3d supplement containing MHA, including his due diligence taken prior to ingesting the supplement.

5.7.2 Mr Christo Kutrovsky (in person), Kutrovsky's brother, who testified about his conversation with his brother concerning the purchase of Jack3d, and about his brother's character.

5.7.3 Mr Andy Roddick (by telephone), who testified about Kutrovsky's character and, on a player's perspective, about the degree of reasonable fault associated with Kutrovsky's ingestion of MHA.

5.8 At the conclusion of the hearing the parties agreed that due process had been fully observed.

6 JURISDICTION OF THE CAS AND ADMISSIBILITY

6.1 Article R47 of the Code provides as follows:

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

6.2 CAS jurisdiction in this matter is derived from Article 12 of the Programme, which states that a participant who is the subject of a decision regarding anti-doping rule violations may appeal such decision to the CAS within 21 days from the date of its receipt.

6.3 The signature of the Order of Procedure by the parties has confirmed it.

6.4 The Decision was rendered on 15 May 2012. Kutrovsky's statement of appeal was filed on 22 May 2012 and is therefore admissible.

7 APPLICABLE LAW

7.1 Article R58 of the Code provides as follows:

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

7.2 This appeal is governed by the provisions of the Programme and the WADC, as interpreted and applied by the CAS (with relevant decisions of other sports panels of persuasive authority). The comments to the WADC are to be used as a guide to the interpretation of the Programme, and English law applies complementarily (see Article 12.6.3 of the Programme).

8 THE PARTIES' SUBMISSIONS

A. Appellant's Submissions and Requests for Relief

8.1 Kutrovsky requests the Panel to impose on him the following sanctions:

8.1.1 a period of ineligibility of three to six months, backdated to the date of sample collection (14 February 2012); and

8.1.2 disqualification of results, including points, at the discretion of the Tribunal.

8.2 In summary, Kutrovsky submits that he did not intend to ingest MHA to enhance his sporting performance. Therefore, Article 10.4 of the Programme applies and the two-year period of ineligibility should be replaced with a period of ineligibility in the range of a reprimand to two years since this is his first offence:

8.2.1 It is undisputed that MHA is a Specified Substance and that Jack3d was the source of the MHA. Jack3d was labelled as containing "1,3-Dimethylamylamine HCI" which is another name for MHA, which name does not appear on the WADA Prohibited List.

8.2.2 However Kutrovsky did not know that Jack3d contained MHA and did not even know what MHA was so he could not have taken MHA with intent to enhance his sporting performance; he did not know that "1,3-Dimethylamylamine HCI" was a synonym of MHA. Therefore, the Tribunal, when it prevented the application of Article 10.4 of the Programme on this basis alone, made an incorrect application of the WADC.

8.2.3 Steps taken by Kutrovsky to avoid commission of a doping offence were reasonable considering his youth and lack of experience and anti-doping education: (i) the salesman at the GNC outlet where Kutrovsky bought the product, whom Kutrovsky had informed that he was as professional athlete subject to drug testing, explained to him that it was designed to give athletes extra energy for training and recovery, like a "*Red Bull, but stronger*", (ii) despite having no anti-doping education, Kutrovsky searched on the Internet for the "*banned substance list*" and cross-referenced the ingredients of Jack3d with the WADA List of Prohibited Substances which resulted in no matches, and (iii) Kutrovsky had discussions with his brother and other athletes about the product and the way he was using it.

8.2.4 Kutrovsky took Jack3d after a match he had played on the same day, and the day before the match at which he underwent drug testing. He could not have intended and did not intend to enhance his sporting performance in the latter match: he took Jack3d only to combat the effects of fatigue because of his arduous travel schedule leading up to the SAP Open in San José (he crossed 38 time zones in one month) and his efforts required changing hotels that day. Looking for a "boost" does not necessarily mean that Kutrovsky wanted to enhance his sport performance.

8.2.5 The fact that Kutrovsky took Jack3d before a training session did not have any impact on his performance in the match the next day, even if MHA remained in his system. In that training session he only hit a few balls and stayed loose for 15 minutes. This could have easily been accomplished without Jack3d. He did not take Jack3d to help him recover sufficiently for the match the next day.

8.2.6 In short he did not intend to enhance his sporting performance by use of Jack3d, and the MHA had in fact no effect on his sporting performance.

8.3 There is a difference in meaning between the terms "improve", which has a positive connotation and equates to legitimate self-betterment, and "enhance", which has a negative connotation, and equates to illegitimate cheating. The WADC prevents "enhancement" and not "improvement".

8.4 CAS decisions make clear that an athlete's lack of knowledge that the product he ingested contained a prohibited substance is by itself sufficient to establish that the

athlete had no intent to enhance his sport performance or cover the use of another prohibited substance (see CAS 2010/A/2107 *USADA v Oliveira*, CAS 2011/A/2645 *UCI v. Alexander Kolobnev*, and CAS 2010/A/2229 *WADA v. FIV & Berrios*).

8.5 Jurisprudence from other sports federations and associations supports the CAS decisions above:

8.5.1 *UKAD v. Dooler*, NADP award dated 24 November 2010 – the award states "*that the intent relates to the Prohibited Substances, which is, or is to be treated as, a Specified Substance is apparent from the words used in Article 10.4.1. The intent is explicitly referenced to the Specified Substance as opposed to any product, supplement, material or the like, such as Xtreme Nox Pump, of which the Specified Substance was a component*".

8.5.2 *International Rugby Board v. Duncan Murray*, decision of the International Rugby Board Judicial Committee dated 27 January 2012 – the Oliveira decision reflects the correct application of the context of the rules.

8.6 Even if the Panel is not persuaded by the *Oliveira* approach and prefers the approach in CAS A2/2011 *Foggo v National Rugby League*, Kutrovsky can still rely upon Article 10.4 of the Programme:

8.6.1 In *Foggo*, the Panel did not agree with the *Oliveira* approach and determined that an athlete must produce corroborating evidence sufficient to demonstrate the absence of the athlete's intent to enhance his sport performance; an athlete's lack of knowledge that a product contains a prohibited substance is not enough.

8.6.2 Kutrovsky has provided sufficient corroborating evidence to satisfy the *Foggo* standard and his sanction should therefore still be reduced by virtue of Article 10.4 of the Programme.

8.7 The Panel should consider Kutrovsky's degree of fault by a test of balance of probability. Both the WADC and the Programme direct the Panel to consider an athlete's degree of fault for ingesting a Specified Substance when determining a period of ineligibility. When considering an athlete's fault, a tribunal may focus on three points (see *Koubek*¸ decision of the ITF Anti-Doping Tribunal dated 18 January 2005, at paragraphs 97 to 99):

8.7.1 The fault must be the player's own (it is accepted that any fault associated with Kutrovsky's action is his own).

8.7.2 The Panel should be concerned with operative fault, *i.e.* "*greater weight should be placed on culpable conduct that is causative of the doping offence being committed than on culpable conduct forming part of the factual matrix in the case but which, even if absent, would not have prevented the offence from being committed*", and any sanction must be sufficient to send a message to other players.

8.7.3 Where the player neither sought nor obtained any actual unfair sporting advantage from ingesting a banned substance and there is consequently no

unfairness to other players, a tribunal must respect the principle of proportionality in imposing any sanction.

8.8 The Panel should have firmly in mind and consider the numerous cases involving the same specified substance and the same (or similar) product ingested under similar circumstances even though Kutrovsky does not dispute that each case is, and should be, treated on its own merits and based on its own facts:

8.8.1 CAS A2/2011 *Foggo v National Rugby League* - a professional rugby league player purchased and used Jack3d, which resulted in an adverse analytical finding for MHA. The athlete's club encouraged the use of pre-workout supplements. The athlete himself had received very limited formal anti-doping education. However, the athlete had been assured by the store owner that the product was clean, and had consulted his conditioning coach, and had undertaken research on the ASADA website in respect of the ingredients of Jack3d which had not resulted in the identification of any specified substances. A sanction of six months ineligibility was imposed.

8.8.2 *Matthew Duckworth v. U.K. Anti-Doping*, National Anti-Doping Panel Appeal Tribunal's decision dated 10 January 2011 – a young rugby player ingested Jack3d after checking every ingredient on the label against the Global Drug Reference website. He used the product openly and confirmed with a supplement salesman that the product was legal. The athlete tested positive for MHA and the tribunal sanctioned him for six months.

8.8.3 *Jasdeep Toor v. Canadian Anti-Doping Program*, Sport Dispute Resolution Centre of Canada's decision of 3 February 2012 – a 27-year old soccer player, who had no team doctor or trainer and no formal doping education, purchased Jack3d at a GNC at the recommendation of the store salesman. The athlete did not check the labelled ingredients or speak with his trainer or coach about the product. In assessing the athlete's degree of fault, the tribunal noted: "*the protein shake powder was sold by a reputable national vitamin supplement store over the counter. The fact the product was marketed and sold over the counter while containing a banned substance cannot be ignored when the athlete's degree of fault is assessed in this case*". Based on the totality of the evidence, the tribunal sanctioned the athlete for two months.

8.8.4 *International Basket Federation v. Anthony Weeden*, FIBA Disciplinary Panel's decision dated 31 March 2011 – a veteran basketball player purchased Jack3d at a supplement store while visiting the U.S.A. and used it periodically during his sport season. The athlete had not received any anti-doping education and his home club had no specialist advising him on supplement use. Furthermore, the athlete conducted little, if any, research about the supplement and the tribunal sanctioned him for six months for ingestion of MHA.

8.8.5 *RFU v. Nico Steencamp*, decision of the RFU Judicial Committee of 22 March 2011 – a young athlete purchased a product called "USN Anabolic Nitro" to assist with fatigue. A trainer pitched this product to the athlete as

"*like a Red Bull but stronger*". The athlete had not been in the "*anti-doping regime*" before and had only limited education. He informed the salesman that he was a professional athlete subject to drug testing and was aware that he needed to check out the ingredients. The product was taken without any clear pattern. Despite his efforts to avoid problems, the athlete ingested the product, which contained MHA, and the tribunal sanctioned him for three months.

8.8.6 *U.K. Anti-Doping v Steven Lee Dooler*, U.K. NADP award of 24 November 2010 – a semi-professional rugby league player tested positive for the presence of MHA. The source of this result was a product called "Xtreme Nox Pump" which he had taken to assist with aching muscles, fatigue and recovery. He made Internet searches against the WADA List of Prohibited Substances, which did not readily have identified that the product might contain MHA. A sanction of four months ineligibility was imposed.

8.8.7 CAS 2011/A/2518 *Robert Kendrick v. ITF* – the athlete ingested an unlabeled energy supplement to assist with jetlag. He was a veteran tennis player on the tour and had participated in various anti-doping education programs. Because of his experience on tour, his anti-doping education, his "*serious lack of due diligence*" when taking an unlabeled drug, the panel sanctioned the athlete for eight months.

8.9 Alternatively, Kutrovsky submits that should he not succeed under Article 10.4 of the Programme, he should succeed under Article 10.5.2 of the same ("No Significant Fault or Negligence") since he has established that his fault, viewed in the totality of the circumstances, was not significant in relation to the doping offence. In particular, Kutrovsky's youth and lack of anti-doping education and experience are factors to be considered in determining an athlete's fault under the WADC (see Comments to Articles 10.5.1 and 10.5.2).

B. Respondent's Submissions and Requests for Relief

8.10 The ITF requests that the appeal be dismissed in its entirety. The ITF's submissions to that effect can be summarized as follows.

8.11 With respect to the Panel's scope of review, the Decision is entitled to a fair measure of respect since, inter *alia*, it is cogent and well-reasoned, so that the Panel should not depart from it unless it identifies a compelling reason to do so.

8.12 The appeal relates to Article 10.4 WADC. Kutrovsky voluntarily took Jack3d to help him recover from a previous match, knew that it contained 1,3-Dimethylamylamine HCI, but did not know that the latter was a banned stimulant.

8.13 The fact that Kutrovsky knew that Jack3d contained the substance which was in fact prohibited (even though he did not know it was prohibited) means that the Panel does not have to revisit or resolve the issue raised in *Oliveira* and *Foggo*. However, the Panel needs to address the following issues: (i) whether the "*intent to enhance performance*" under Article 10.4 WADC is equivalent to an intent to cheat, and (ii)

whether only direct enhancement of performance counts or should indirect enhancement of performance, such as an accelerated recovery, be considered as well.

8.14 The words "enhance" and "improve" are synonymous and simply mean "to lift, raise the level of" (see *FA v. Marshall*, decision of the FA Regulatory Commission of 8 May 2012, par. 61).

8.15 Kutrovsky's degree of fault needs to be determined in the same way whether in the context of Article 10.4 (if applicable) or of Article 10.5.2 WADC (see *Kendrick* (cited above) at paragraph 10.16).

8.16 The ITF accepts that Kutrovksy did not know that MHA, or more precisely its scientific name as contained in the list of ingredients on the Jack3d, was a prohibited specified substance. However, the ITF considers that this does not enable him to engage Article 10.4 WADC as the "*intent to enhance sporting performance*" is not synonym to an "*intent to cheat*":

8.16.1 In *Oliveira* and *Kolobnev*, the athlete did not know that the product he was using contained the specified substance in question, as it was not listed as an ingredient on the product. Therefore, the ruling of the panels in each of those appeals was limited to the proposition that an athlete could not be said to have used a substance with intent to enhance his performance if he did not know he was ingesting that substance (see also CAS 2011/A/2677 *Lapikov v. IWF*, award of 10 July 2012). The present case is therefore very different, as Kutrovsky knew that MHA was one of the active ingredients of Jack3d, even though he did not know it was a prohibited substance.

8.16.2 If Kutrovsky intended to take Jack3d to enhance his sport performance, he must also be found to have intended to take MHA to enhance his sport performance.

8.16.3 The Tribunal was right to reject the proposition that "*absence of intent to enhance performance*" in Article 10.4 WADC must be interpreted to mean absence of intent to cheat (see *USADA v. Piasecki*, AAA Case N°30 190 00358 07, award dated 24 September 2007, paragraph 32).

8.16.4 Article 10.4 WADC does not allow for any discretion as to sanction unless an athlete can show either that he did not take the specified substance to enhance his sport performance or that while he took the product to enhance his sport performance he did not know the specified substance which it contained was a prohibited substance (see *Korda v. ITF*, decision of 25 March 1999).

8.16.5 The ITF is not aware of any authority at CAS or elsewhere that supports Kutrovsky's proposed construction of Article 10.4 WADC. On the contrary, in *FA v. Marshall*, decision of the FA Regulatory Commission of 8 May 2012, the same approach as the one of the Tribunal was adopted.

8.16.6 Therefore, if an athlete takes a supplement in order to enhance his sport performance, knowing that it contains a particular substance, then he intends to take that substance to enhance his sport performance, and so cannot rely

on Article 10.4 WADC, even if he does not know that that substance is banned in his sport.

8.17 The Tribunal was right on the evidence to be comfortably satisfied that Kutrovsky did take Jack3d in order to enhance his sport performance.

8.18 There is a distinction between cases on the one hand where the connection between the use of the product and taking part in competition is remote and the Panel can then be comfortably satisfied that there was no intent to enhance performance, and on the other where that connection is too close for the Panel to be so satisfied (see *International Rugby Board v. Duncan Murray* (cited above), *Foggo* (cited above), and *Drug Free Sport NZ v. Takerei*, decision of NZ Sports Tribunal of 8 June 2012).

8.19 A lack of intent to enhance sport performance is harder to prove in supplement cases that in medication cases because of (i) the nature of supplements, and (ii) the fact that the normal reason for a sportsman to use them is to improve his physical condition and therefore his performance (see Drug *Free Sport NZ v. Takerei* (cited above); CAS 2008/A/1489 *Despres v. CCES*, award if 30 September 2008; and *ICC v. Smartl*, decision of the Anti-Doping Tribunal of 14 December 2011). If an athlete takes a supplement close to a match, as part of his effort to recover from previous matches and/or to better prepare for the forthcoming match, it is going to be extremely difficult for him to "*comfortably satisfy*" the Panel that he did not take the supplement in order to enhance his sport performance in that match for purposes of Article 10.4 WADC.

8.20 "*The time at which the absence of intent is to be shown is the time of ingestion of the substance. The athlete must negate an intention at that time to enhance his or her performance in the relevant sport … by the taking of the substance*" (CAS A2/2011 *Foggo v. NRL*, award of 3 May 2011). Therefore, the question is what was Kutrovsky's intent on 13 February 2012, when he took Jack3d which caused the MHA to be in his system during his match the next day. In this respect, given the chronology and lapse of time since his last flight and his last match, Kutrovsky did not take Jack3d to recover from jet lag but rather to recover from fatigue resulting from previous matches and to be fit in time for the next match, the first ever for him in the main draw of an ATP Tour event. Kutrovsky therefore had the intent to enhance his sport performance. In any case, even if the MHA did not have any direct effect on Kutrovsky on the match day after he took Jack3d, his performance was still indirectly enhanced by having had the MHA in his body the previous afternoon, improving his recovery time and enabling him to train more effectively than he would otherwise have done.

8.21 Article 10.4 WADC does not require direct enhancement of performance:

8.21.1 The wording of Article 10.4 WADC requires the athlete to show he did not intend to enhance his performance, not to show that his performance was not in fact enhanced.

8.21.2 On this issue the authorities are against Kutrovsky's submission: an athlete who uses a supplement to recover faster/prepare better for competition would not be able to rely on Article 10.4 WADC (see *USADA v. O'Neil*,

AAA case n° 77 190 00384 09, award of 9 December 2009; and *Drug Free Sport NZ v. Takerei* (cited above)).

8.22 This is not a case where the nexus between the athlete's ingestion of the substance in question and his participation in sport was remote. On the contrary, the nexus is a very close one. The Panel should not be comfortably satisfied that the stimulating effect of the MHA in the Jack3d ended before Kutrovsky stepped on court on 14 February 2012. Alternatively, the Jack3d was taken specifically to help Kutrovsky to recover from previous matches and to help him prepare more effectively for the next match. Therefore, Article 10.4 WADC cannot apply.

8.23 If, contrary to the ITF's primary position, the Panel is satisfied that Kutrovsky had no relevant performance enhancing intent, so that Article 10.4 WADC applies, it will have to decide how much fault Kutrovsky bears for having a banned stimulant present in his system during his match at the SAP Open in order to determine the ban to be applied. Alternatively, if the Panel is to determine that Article 10.4 WADC does not apply, the Panel will still have to determine whether Kutrovsky bears No Significant Fault or Negligence for that presence, within the meaning of Article 10.5.2 WADC, and to determine where his ban should be fixed. The two points can be considered together as CAS considers that the assessment of fault is the same under Articles 10.4 and 10.5.2 WADC (see CAS 2011/A/2518 *Kendrick v. ITF*). The question to the Panel is what standard of behaviour was expected of the athlete, and how far did he depart from that standard.

8.24 The athlete's fault is "measured against the fundamental duty which he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance" (CAS 2011/A/2518 *Kendrick v. ITF*). This standard is rigorous. CAS case law on the issue of accidental and inadvertent doping is very strict (see for example CAS 2006/A/1025 *Puerta v. ITF*, award of 12 July 2006). When the athlete knows that he is taking something that could contain a prohibited substance, the analysis is even more rigorous. With respect to supplements, the CAS has made it clear that the diligence required of an athlete is even greater than normal as the risk that such products include banned steroids or stimulants is so great and so well-known (CAS 2009/A/1870 *WADA v. Hardy & USADA*, award of 21 May 2010):

8.24.1 The clear and well established risk that supplements may contain prohibited substances means that there are effectively no circumstances in which an athlete who tests positive from a supplement can plead No Fault or Negligence, even if the banned substance was a contaminant rather than a declared ingredient and the athlete did everything he could to ensure it was safe to use (see CAS 2005/A/847 *Knauss v. FIS*, award of 20 July 2005; and CAS 2011/A/2495 *FINA v. Cielo*, award of 21 July 2011).

8.24.2 The athlete will not even be able to sustain a plea of No Significant Fault or Negligence unless he can show that he made "*a good faith effort to leave no reasonable* stone unturned" in his efforts to ensure the supplement was clean (see CAS 2008/A/1489 & 1510 *Despres v. CCES*).

8.24.3 In practical terms, simply reading the product label and asking friends for their view on the product is not enough (see CAS 2003/A/484 *Vencill v. USADA*, award of 11 March 2004).

8.24.4 An athlete is still significantly at fault even if he sources the supplement from a trusted supplier and gets assurances from that supplier, and/or finds a guarantee of purity on the manufacturer's website, because these sources are not impartial, and there is more that the athlete could and should do in such circumstances (see CAS 2008/A/1489 & 1510 *Despres v. CCES*).

8.24.5 Even if the athlete goes further and obtains a written guarantee direct from the manufacturer that its products are clean, his plea of No Significant Fault or Negligence may be sustained, but he only stands to get a small reduction from the standard two-year ban (see CAS 2005/A/847 *Knauss v. FIS*).

8.24.6 To receive a more substantial reduction, an athlete has to have taken not only all of the above steps, but also has to have consulted with independent and qualified medical professionals, such as the team nutritionist (see CAS 2009/A/1870 *WADA v. Hardy & USADA*).

8.24.7 In addition, where the athlete has access to the Internet, he needs to be able to show that he has researched the product online to see if he can find out whether it contains any prohibited substances. This Internet research must not be merely cursory but has rather to be thorough and meaningful (see CAS 2011/A/2518 *Kendrick v. ITF*; and CAS 2008/A/1489 & 1510 *Despres v. CCES*). In particular, if the athlete's investigations uncover any potential red flags, he has to show that he investigated them thoroughly to be said to have "*left no reasonable stone unturned*" (see CAS 2009/A/1870 *WADA v. Hardy & USAD*A). Only in such circumstances could a material reduction in sanction be considered.

8.25 If the requirements are so stringent when the banned substance is an undeclared contaminant of a supplement, then *a fortiori* any reduction in the standard two-year ban will be all the harder to secure where the banned substance was declared openly on the list of ingredients of the supplement, and its banned status could have been ascertained by any reasonable effort and investigation (see for example CAS OG 04/003 *Edwards v. IAAF*, award of 17 August 2004).

8.26 In the present case, Kutrovsky was well aware of the risk that supplements such as Jack3d might contain prohibited substances. He therefore needed to check very carefully before even considering using the product. Given the red flags on the product label and on the GNC website, Kutrovsky should have taken every possible reasonable step to determine whether Jack3d contained any prohibited substance.

8.27 However, Kutrovsky only took two steps: (i) he told the GNC salesman that he was a professional athlete subject to drug testing which is very limited and which brought a limited response, and (ii) he used Google to search for the banned list and did not identify on such list 1,3-Dimethylamylamine HCI or Dimethylamylamine.

8.28 CAS jurisprudence is very clear that no reliance can be placed on the informal assurances of unqualified (and partial) third parties. Therefore, the first step counts for nothing.

8.29 The ITF would accept that while by contrast the Internet search Kutrovsky did counts for something, it was insufficient. Given the open-ended nature of the Prohibited List, panels have consistently ruled that simply checking the ingredients of a supplement product against the Prohibited List "*is only the first level of inquiry to be made when taking supplements*" and it is clearly inadequate to make no further inquiry (see *USADA v. Plasecki*, AAA case n° 30 190 00358 07, award of 24 September 2007; *FA v. Marshall* (cited above)). There were numerous ways that any athlete, committed to keeping himself drug-free could have used to check the Jack3d supplement prior to use, any one of which would have quickly led to the discovery that it contained a banned substance.

8.30 Kutrovsky's limited efforts cannot be excused given his youth and lack of experience:

8.30.1 Kutrovsky was 24 years old when he took Jack3d, which is not particularly young for a professional tennis player, and he has played elite-level tennis continuously since 2002.

8.30.2 Kutrovsky knew that supplements could contain prohibited substances and he was specifically told not to use any supplement without checking with the authorities first.

8.30.3 Kutrovsky is very computer literate.

8.31 CAS case law (or other cases) is of limited value as precedents because they are necessarily very fact-specific (see CAS 2011/A/2495 *Cielo v. FINA*). If the Panel is looking for a benchmark, the ITF would recommend the *Oliveira* case, which in comparing the two on the facts, Kutrovsky took much less care than Ms Oliveira and should be entitled to a lesser, if any, discount.

8.32 In view of the above, the only proper finding in these circumstances is that Kutrovsky's fault in playing with a banned stimulant in his system was very significant measured against the very strict standards of behaviour expected of professional athletes taking supplement products. Such finding would preclude application of Article 10.5 WADC and greatly limit the scope for exercising discretion under Article 10.4 WADC.

9 MERITS OF THE APPEAL

A. The Panel's scope of review

9.1 Under Article R57 of the Code, the Panel has full power to review the facts and the law on this appeal.

9.2 While in CAS 2011/A/2518 *Kendrick v. ITF* the panel stated that the more cogent and well-reasoned a decision is, the less likely a CAS panel would be to overrule it, this was no more than a statement of the obvious and provides no support for the

ITF's submission that the Panel can only depart from a first instance decision if it identifies a "*compelling reason*" to do so. Such a restriction would contradict the clear language of Article R57 of the Code.

9.3 The Panel draws attention to the statements made by the panel in *Kendrick* at paragraphs 10.2 and 10.6:

> *"10.2 Rule 57 of the Code […] is phrased in the widest terms. The power is firstly a "full one" and, secondly "to review the facts and the law"; i.e. both. It has been described in awards too numerous to name as a de novo power. […]*
>
> *[…]*
>
> *10.6 Where, as is the case with Article R57 of the Code, rules or legislation confer on an appellate body full power to review the facts and the law, no deference to the tribunal below is required beyond the customary caution appropriate where the tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses." (emphasis added)*

B. The first of the grounds for appeal: reduction of the period of ineligibility based on Article 10.4 WADC

9.4 Article 10.4 WADC, which is identical to Article 10.4 of the Programme, states:

> *"10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances*
>
> *Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:*
>
> *First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility. To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance-enhancing substance. The Athlete's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility."*

9.5 According to Article 10.4 WADC, two conditions must be satisfied to allow for the possibility of a reduction of the period of ineligibility. The first condition that the athlete must satisfy is whether he can establish how the specified substance entered his body (the "**First Condition**"). The second condition that the athlete must satisfy is whether he can establish that such specified substance was not intended to enhance his sport performance (the "**Second Condition**").

The First Condition

9.6 The parties have accepted that the source of Kutrovsky's anti-doping rule violation was the ingestion of Jack3d, thereby satisfying the First Condition. Where the parties differ is whether Kutrovsky satisfies the Second Condition, i.e. whether he took Jack3d with the intent of enhancing his sport performance.

The Second Condition

The Test

9.7 In order to satisfy the Second Condition, Kutrovsky must demonstrate that the substance, at the time of its ingestion, was not intended to enhance his performance. Article 10.4 WADC also requires the production of corroborating evidence, in addition to the athlete's own statement, to establish the absence of intent to enhance sport performance. This requires in turn the Panel to make an objective evaluation of all this evidence.

9.8 The commentary to Article 10.4 WADC provides a non-exhaustive list of examples of the type of objective circumstances which might corroborate an athlete's non performance-enhancing intent as they help determine the nexus between the ingestion of the substance and the actual sporting event. These circumstances include the fact that the nature of the Specified Substance or the timing of the ingestion would not have been beneficial to the athlete, the athlete's open use or disclosure of his use of the Specified Substance, and a contemporaneous medical records file substantiating the non sport-related prescription of the Specified Substance.

9.9 Article 10.4 WADC also states that an absence of intent to enhance sport performance must be established by this evidence to the comfortable satisfaction of the hearing panel. Article 3.1 WADC states that this is a higher standard of proof than the balance of probability.

9.10 There are two issues of construction arising in respect of the Second Condition:

9.10.1 What must the athlete show to prove that he did not intend to enhance his sport performance (the "**First Issue**")?

9.10.2 What is meant by enhancement of sport performance (the "**Second Issue**")?

The First Issue: what must the athlete show to prove that he did not intend to enhance his sport performance?

9.11 There are in principle various possibilities as to an athlete's state of knowledge.

9.11.1 He had no knowledge that the product he took contained the substance which was a specified substance ("**Type A Case**"). Cases of contamination classically fall into this category.

9.11.2 He had no knowledge that the substance, which he did know was contained in the product, was a specified substance ("**Type B Case**"). The Panel believes that this category corresponds to the facts in the instant case.

9.11.3 He knew that the product contained a substance and that it was a specified substance ("**Type C Case**").

9.12 Kutrovsky has submitted that, pursuant to the CAS ruling in CAS 2010/A/2107 *Oliveira*, an athlete does not need to prove an intent to enhance his sport performance since, on a literal reading of the Second Condition in Article 10.4, he cannot be said to have this intent if he is not aware that the product he is taking contains a specified substance, so that in Type A and B Cases, the athlete would necessarily satisfy the Second Condition (see also *Berrios* (cited above) at paragraphs 81 and 82; *Kolobnev* (cited above) at paragraph 82; and, to the same effect, *Murray* (cited above) at paragraphs 58-68).

9.13 The ITF on the other hand relies on CAS A2/2011 *Foggo*, which held that the mere fact that the athlete did not know the product contained a specified substance did not itself establish the relevant absence of intent. The ITF also relies, in the alternative, on the CAS's most recent case CAS 2011/A/2677 *Dmitry Lapikov v. International Weightlifting Federation (IWF)*, which appears to favour the *Oliveira* presumption approach in Type A Cases only, thereby excluding Type B Cases like the present case.

9.14 The Panel is conscious of the eminence of the previous panels. The fact that they have differed so radically in their outcome on this issue illustrates that there are arguments both ways. Indeed, the Panel is split on this issue. Nonetheless, this conflict in the jurisprudence is unsatisfactory for those who have to apply and adjudicate upon cases in which the Second Condition of Article 10.4 is in play. The Panel is aware that (i) as presently envisaged in the latest draft to the proposed amendments to the WADC, which would be effective from 1 January 2015, the conflict may possibly be resolved in favour of *Foggo*, and (ii) there is another case pending before CAS in which the issue may also be decided one way or the other. Nonetheless, the Panel considers that given that Kutrovsky has relied on *Oliveira* in his appeal, and that more than two years will elapse before 1 January 2015, it must address the issue. The Panel does so on the basis of the 2009 WADC version which is currently in force.

9.15 In summary, a majority of the Panel does not agree with Kutrovsky's submission or the jurisprudence said to support it. The majority of the Panel is of the view that an athlete's knowledge or lack of knowledge that he has ingested a specified substance is relevant to the issue of intent but cannot, pace *Oliveira*, of itself decide it. The majority of the Panel is also of the view that the evidence submitted as to why the athlete did not know the product contained a substance which is a specified substance will prove relevant in the evaluation of his degree of fault should no intent to enhance performance be found. The majority of the Panel reaches this conclusion on the basis of the following considerations.

9.15.1 The *Oliveira* approach is based on a reading of the Second Condition which differentiates between the specified substance and a product in which it may

be contained. A majority of the Panel does not accept that any such differentiation is intended. The First and Second Conditions must be read together since the Second Condition only falls to be considered if the First Condition is satisfied (as it has been here). Consideration of what such specified substance means in the Second Condition therefore assumes that the First Condition has been satisfied, and indeed, by use of the word "such", looks back to it. The majority of the Panel therefore interprets such specified substance in the Second Condition to refer to the specified substance in the form in which it has been established under the First Condition to enter the athlete's body *i.e.* here Jack3d. It follows that the Second Condition requires the athlete to show that in taking the specified substance in the form in which he took it, he did not intend to enhance his performance. The majority of the Panel considers that this interpretation is consistent with the language of the Second Condition and is supported by the linguistic and contextual considerations below.

9.15.2 There is no doubt that the specified substance in the Second Condition is the same specified substance as is referred to in the First Condition; again the word "such" allows no other conclusion. A specified substance may be an ingredient in another product, for example a supplement, but it need not be simply an ingredient in another substance but rather the entirety of what the athlete has ingested, for example cannabis. In such circumstances, there is no distinction to be drawn between a product and the specified substance: an interpretation given to specified substance in the Second Condition ought to embrace both possibilities.

9.15.3 If absence of knowledge of the specified substance was conclusive as to the satisfaction of the Second Condition (following the *Oliveira* approach), one wonders why the commentary to Article 10.4 WADC makes no mention of it.

9.15.4 Furthermore, the *Oliveira* approach does not respect the structure of Article 10.4 WADC since, if an athlete could simply, by showing that he was not aware that the product he ingested contained a specified substance, satisfy the Second Condition, then the Article's requirement for corroborating evidence of absence of performance enhancing intent would be made effectively redundant (even if a panel would have made a negative finding in this respect) and the analysis of the evidence would proceed directly to the evaluation of degree of fault under Article 10.4.

9.15.5 There is no juxtaposition of product or supplement on the one hand and specified substance on the other in Article 10.4 WADC. Throughout the Article, "specified substance" is referred to.

9.15.6 In the Second Condition, the phrase "such Specified Substance" is not qualified by words such as where the athlete was aware that he had ingested the same.

9.15.7 In the part of the Second Condition which deals with corroboration of absence of intent to enhance sport performance, no distinction between

supplement and specified substance is made; it refers neutrally to that which has been ingested.

9.15.8 The examples given in the commentary where a panel might be comfortably satisfied that there was no performance enhancing intent (for example that something was taken for medicinal or recreational purposes) do not assume that knowledge of the specified substance was a necessary precondition of being found to have had such intent. On the contrary, they point the other way. An example given is of medical records substantiating the non-sport related prescription for a specified substance. However, prescriptions will rarely be for a specified substance: they will be for products which contain it. Another example is disclosure of use of the specified substance; however what an athlete discloses on the doping control form will normally be use of the product, not the substance it contains.

9.15.9 It is counter-intuitive that in a code which imposes on an athlete a duty to take responsibility for what he ingests, ignorance alone works to his advantage.

9.15.10 The majority of the Panel also notes that the commentary on Article 2.1.1 WADC in its overview of strict liability refers to the athlete's ability nonetheless to avoid sanctions as including where he "*'in certain circumstances did not intend to enhance his performance (article 10(4))*." This is consistent with the majority of the Panel's view that it is the absence of intention to enhance performance by taking whatever was taken that is the true focus of the Second Condition of Article 10.4 WADC.

9.16 The majority of the Panel now turns to see whether there are any decisions which compel a different conclusion.

9.16.1 The Panel in *Oliveira* noted an ambiguity since the Second Condition does not explicitly provide for the athlete to disprove an intent to enhance sport performance through the use of the product itself as distinct from a specified substance. On that premise, the CAS panel adopted an interpretation favourable to the athlete. It suggested at paragraph 9.15 that otherwise the only potential basis for an athlete to eliminate or reduce the presumptive two year period of ineligibility for ingestion of a specified substance in a nutritional supplement would be to satisfy Article 10.5 WADC. The majority of the Panel accepts the premise but not the implied conclusion since the athlete could still show that the nature of the specified substance or the timing of the ingestion could not have been beneficial to him. It is again counter intuitive that an athlete should have the opportunity to reduce the period of ineligibility below 12 months (in contrast to Article 10.5.2 WADC which envisages a range of 12 months to 24 months) when it is the primary duty of an athlete to assume responsibility for any prohibited substance present in his sample.

9.16.2 In *Murray*, on the premise of the same ambiguity, the IRB Panel considered it should adopt the more reasonable interpretation. It suggested that the *Foggo* approach would "emasculate" the more flexible approach that the

second version of WADC intended to achieve. With respect, the majority of the Panel does not see why this should be so. The commentary to WADC at paragraph 4.2.2 says:

> *"In drafting the Code there was considerable debate among stakeholders over the appropriate balance between inflexible sanctions which promote harmonization in the application of the rules and more flexible sanctions which better take into consideration the circumstances of each individual case. This balance continued to be discussed in various CAS decisions interpreting the Code. After three years experience with the Code, the strong consensus of stakeholders is that while the occurrence of an antidoping rule violation under Articles 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers) and 2.2 (Use of a Prohibited Substance or Prohibited Method) should still be based on the principle of strict liability, the Code sanctions should be made more flexible where the Athlete or other Person can clearly demonstrate that he or she did not intend to enhance sport performance. The change to Article 4.2 and related changes to Article 10 provide this additional flexibility for violations involving many Prohibited Substances. […]"*

Under Article 10.4 in a case of products containing specified substances of which the athlete was ignorant, there would still be an opportunity to establish an absence of intent in relation to the product, which would allow for flexibility and reasonableness. In some cases the athlete would succeed, in others not.

9.16.3 In *Lapikov*, the pendulum swung in the other direction. The CAS panel in that case held that Article 10.4 could apply only when an athlete was ignorant that what he did ingest contained a specified substance because no one who knowingly took a specified substance could satisfy the Second Condition by saying that this specified substance was not intended to enhance performance. However this situation is precisely envisaged in the commentary where one of the corroborating evidence examples listed for absence of intent is contemporaneous medical records substantiating the non sport-related prescription of the specified substance. In such a situation the athlete would (or at any rate might) have knowledge of what he ingested.

9.17 *Lapikov* also noted that the cases of *Oliveira*, *Berrios* and *Kolobnev* were Type A Cases whereas the present case is a Type B Case; the ITF suggested that this case should be distinguished on that basis. The majority of the Panel is not persuaded of the logic of the distinction in law, although it recognises the distinction in fact, with an impact on the effect of the law in that it might perhaps be easier to prove an absence of intent in Type A Cases (contamination cases) than in Type B Cases.

9.18 The majority of the Panel has thus come to the conclusion that the interpretation of WADC 10.4 in *Foggo* at paragraph 47 is the correct one and adopts it:

> *"WADC 10.4 would not be satisfied if an athlete believes that the ingestion of the substance will enhance his or her performance although the athlete does not know that the substance contains a banned ingredient. The athlete must demonstrate that the substance "was not intended to enhance" the athlete's performance. The mere fact that the athlete did not know that the substance contained a prohibited ingredient does not establish absence of intent."*

9.19 The majority of the Panel has ignored in reaching that conclusion material placed before it which suggests that WADA believes it to reflect the "*intention of the draftsman*". The majority of the Panel is not persuaded that such material is admissible on the issue of construction and prefers to concentrate on text and context.

The Second Issue: what is meant by enhancement of sport performance?

9.20 As to the enhancement of performance, the Panel agrees with the decision in *Marshall* (Decision of FA Regulatory Commission dated 8 May 2012) that enhancement is a synonym of improvement. The Panel rejects the submission that it carries with it any connotation of cheating. The Oxford English Dictionary's definitions of "enhancement" and "improvement" are congruent with that interpretation.

9.21 The parties discussed at the hearing what sport performance had to be enhanced: competition only or training as well.

9.22 The solution for the most part is provided by the WADC itself. Prohibited substances are specified substances, with these critical exceptions (see Article 4.2.2 WADC):

9.22.1 substances in the class of anabolic agents and hormones; and

9.22.2 those stimulants and hormones antagonists and modulators so identified in the prohibited list.

It is, accordingly, unlawful to make use of such substances during periods of training.

9.23 However, MHA is a substance prohibited in competition only under section 6 of WADC – stimulants.

9.24 The question whether those stimulants (not prohibited in competition only) can be lawfully used to enhance the intensity of training, which indirectly will enhance performance in some future competition, need not be resolved in the present case. It seems to the Panel that this involves questions not dissimilar to those which arise in the field of remoteness of damages in tort.

9.25 As the Panel has determined that no presumption should be linked to the notion of intent under the Second Condition of Article 10.4 WADC and that each case should be decided on its own facts, the Panel will therefore have to evaluate whether Kutrovsky, in taking Jack3d on 13 February 2012, intended to enhance his performance.

Application of the Test to the Facts at Hand

9.26 After an objective review of the evidence submitted before it, the Panel is of the view that Kutrovsky has not established to the comfortable satisfaction of the Panel that he had no intent of enhancing his sport performance. The nexus between his ingestion of Jack3d in the late afternoon of 13 February, which contained a specified substance, and his sporting event, the main draw match in the morning of 14 February 2012, is simply too close.

9.27 The Panel finds that, although there were occasional inconsistencies in Kutrovsky's evidence and his omission to declare his use of Jack3d on his doping control form was not wholly satisfactorily explained (see paragraph 9.34 below), the ITF did not advance a case that he was a doping cheat, and the Panel makes no finding to that effect. However, as prescribed by Article 10.4 WADC, the Panel also needs to evaluate, in addition to Kutrovsky's word, corroborating evidence of the objective circumstances listed in the comment to Article 10.4 WADC.

9.28 The evidence submitted with respect to each of the objective circumstances can be summarized as follows:

a. Nature of the product

9.29 Kutrovsky's affidavit indicates that he purchased Jack3d as a supplement designed to assist with energy and recovery and that the product was described to him by the salesman as a "*Red Bull, but stronger*". This is corroborated by the testimony of the Kutrovsky's brother, Mr Christo Kutrovsky.

9.30 The transcript of the hearing before the Tribunal also indicates that, in cross-examination, Kutrovsky answered that the reason he ingested Jack3d at the time he did was to help him recover in time to play his next match the following morning. Following the question from Counsel for the Respondent: "*So the reason you took the Jack3d on the Monday afternoon was to help you to recover in time to play your match the next morning*", Kutrovsky answered: "*Yes*". The Panel accepts that evidence which is closer to the events he is referring to than any later versions.

b. Timing of the ingestion

9.31 Kutrovsky's affidavit, confirmed in his testimony before the Panel, indicates that in general, there was no pattern to taking the product: he took it during his training or following training and matches on days when he was overly tired. In particular, his affidavit reveals that he ingested Jack3d on 13 February 2012 after a match, on his third day of a four day tournament, on the day before his first main draw match, and approximately 18 hours prior to his urine sample collection.

9.32 In a letter of 11 April 2012, the Director of the WADA accredited doping control laboratory in Montreal, Québec, where Kutrovsky's urine sample was tested, concluded that it was impossible to say from the laboratory analysis whether Kutrovsky had ingested MHA two hours or twenty-four hours before collection of his sample which occurred right after the main draw match since there is no available evidence of what dose was taken.

9.33 The Panel accepts Kutrovsky's evidence that the MHA was ingested on 13 February 2012, approximately 18 hours prior to his sample collection, especially since Mr Paul Scott, an expert retained by Kutrovsky, was able to conclude that his findings in relation to the collection testing were consistent with Kutrovsky's testimony.

c. Athlete's open use or disclosure of his use of the Specified Substance

9.34 Kutrovsky did not declare Jack3d on the doping form control on 14 February 2012, an omission he attributed to inexperience, but he did use Jack3d openly otherwise as corroborated by the affidavit of Mr Borvanov, a fellow player.

d. Contemporaneous medical records file substantiating the non sport-related prescription of the Specified Substance

9.35 The Panel notes that this issue is not applicable in the present case.

9.36 The Panel has formed the view that Kutrovsky has not produced any corroborating evidence in addition to his word. The Panel's analysis is summarized below.

a. Nature of the product and timing of ingestion

9.37 The New Zealand Sports Tribunal in *Drug Free Sport NZ v. Prestney*, decision of 15 December 2011, found at paragraph 28 that "athletes who take supplements or substances such as Jack3d for purposes relating to their physical wellbeing or improvement run a very high risk that they will be held to have taken them to enhance their sports performance". The Panel agrees with this finding.

9.38 The Panel finds that Jack3d is a stimulant, which helps athletes combat fatigue. Thus, it cannot be maintained that the nature of Jack3d would not have been beneficial to Kutrovsky.

9.39 Moreover, Kutrovsky ingested this stimulant on a match day in the middle of a multi-day competition, at a time when he had successfully completed his preliminary rounds and was about to play his first main draw match. The nexus between the ingestion and Kutrovsky's first main draw match is very close, especially since he said that the reason why he took Jack3d when he did was to help him recover in time to play his main draw match the next morning. In CAS 2011/A/2645 *Union Cycliste Internationale v. Alexander Kolobnev*, the CAS panel commented at paragraph 82 that an intent to enhance performance is present when a substance is taken *"… to help an athlete recover from physical effort or better prepare for a sporting performance*".

9.40 Finally, no corroborating evidence supports the proposition that the timing of the ingestion would not have been beneficial to Kutrovsky. Indeed, Mr Paul Scott's report did not exclude that performance could be enhanced through improved recovery. In addition, Mr Scott did not confirm, on the basis of the dose taken, that there had not been actual enhancement of performance on 14 February 2012.

b. Athlete's open use or disclosure of his use of the Specified Substance

9.41 Although there is corroborating evidence of open use of Jack3d, there is no corroborating evidence of open use on 13 February 2012 at the time of the ingestion of the product. In fact, it can be said that there is corroborating evidence of non-open use since Kutrovsky did not declare Jack3d on the doping control form whilst he disclosed "vitamins" and "advil". The Panel does not accept Kutrovsky's submission

that his failure to disclose Jack3d was due to his lack of experience when the doping control form specifically requires disclosure of supplements, in the broadest meaning of the term, taken in the last seven days.

9.42 Consequently, the athlete has failed to establish to the comfortable satisfaction of the Panel the absence of an intent to enhance his sport performance. The Panel repeats that it is not making a finding that Kutrovsky is a doping cheat: there are simply no objective circumstances, as prescribed by Article 10.4 WADC, which corroborate Kutrovsky's word and establish the comfortable satisfaction of the Panel the absence of an intent to enhance his sport performance.

C. The second of the grounds for appeal: reduction of the period of ineligibility based on Article 10.5.2 WADC

9.43 Since the Panel has found that Article 10.4 WADC was not applicable, Kutrovsky's degree of fault under this provision need not be considered.

9.44 The Panel notes that Kutrovsky has requested that, in the event Article 10.4 WADC is considered not applicable, Kutrovsky's evaluation of fault should be assessed under Article 10.5.2 WADC.

9.45 Article 10.5.2 WADC provides in its relevant part as follows:

> *"10.5.2 No Significant Fault or Negligence*
>
> *If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. (…)"*

9.46 It is well established that under this provision, Kutrovsky must establish that his fault or negligence, viewed in the totality of the circumstances and having regard to the criterion for "No Fault or Negligence", is not significant having regard to the doping offence.

9.47 The criterion of "No Fault or Negligence" is defined under the WADC as requiring that an athlete did not know or suspect, or could not reasonably have known or suspected even with the exercise of utmost caution, that he used the prohibited substance.

9.48 The Panel is of the opinion that even if Kutrovsky has failed to prove, to the comfortable satisfaction of the Panel, that he did not intend to enhance his sport performance by taking Jack3d, his ignorance that Jack3d contained a specified substance allows the application of Article 10.5.2 WADC. The Panel must examine the reasons why Kutrovsky was ignorant that Jack3d contained a specified substance and then determine whether the two year sanction may be reduced if he bears no significant negligence.

9.49 The athlete's fault is measured against the fundamental duty that he or she owes under the Programme and the WADC to do everything in his or her power to avoid

ingesting any Prohibited Substance. In CAS 2003/A/484 *Vencill v. USADA*, at para. 57, the CAS panel stated:

> *"We begin with the basic principle, so critical to anti-doping efforts in international sport…that "[i]t is each Competitor's personal duty to ensure that no Prohibited Substance enters his or her body" and that "Competitors are responsible for any Prohibited Substance or its Metabolites or Markers found to be present their bodily Specimens". The essential question is whether [the athlete] has lived up to this duty…"*

9.50 It is important to note that the Panel is not limited to seeking such guidance as may be useful from cases involving the same substances: under the WADC, the Panel is required to evaluate the facts and circumstances of each case and the athlete's degree of fault in each case, as it often happens that two athletes can ingest the same substance in situations that indicate very different degrees of fault.

9.51 In the Panel's view, circumstances favourable to Kutrovsky include the following.

9.51.1 He actually did some research and that research was directed precisely to comparing the Jack3d label to the WADA Prohibited List. This was, in the Panel's view, not only an intelligible, but the most rational first step.

9.51.2 No matter what he did in this respect, he would have never found the Specified Substance on the WADA Prohibited List as it is unfortunately not on the list as labelled. In this respect, the responsibility for this must be attributed not to him but rather to (i) WADA for not ensuring that the Prohibited List contains the appropriate level of detail for common supplement additives (WADA is or at least should be aware of the many examples in CAS jurisprudence and in the market), and (ii) manufacturers for not using, perhaps deliberately, the substance's chemical name as listed by WADA on the product's label.

9.51.3 He was provided with no anti-doping education by his international federation or any National Anti-Doping Organization, and virtually no anti-doping education by his university. For example, contrary to other tennis athletes, he was never provided with an anti-doping wallet card.

9.51.4 He has only recently reached a top-level event and therefore had very limited experience with anti-doping literature and processes.

9.52 Circumstances adverse to Kutrovsky include the following.

9.52.1 Just as it is risky to purchase and ingest a supplement without enquiring directly from the manufacturer, a doctor or other expert, it was naïve and risky on Kutrovsky's part to trust the recommendation and assurances of a store employee trying to sell him a product in determining whether that product, in this case Jack3d, was risk-free in terms of its compatibility with anti-doping requirements.

9.52.2 He did not seek guidance from the ITF or WADA, whose guidance was suggested in the participation form that he signed for the SAP Open

tournament held in San José, California, U.S.A., and to which he conceded he paid scant attention.

9.52.3 His enquiries with respect to the contents of Jack3d were inadequate in that, in an era of easy and fast access to information via the Internet and other means, he did not contact any of the relevant sport or anti-doping organisations, and based on Dr Miller's evidence, if he had conducted further Internet searches by simply typing "Jack3d" in Google Search, he would have been able to find alerts on the drug-testing issues related to this product arising on the first page of any search results.

9.52.4 He failed to disclose the product on his anti-doping control form whilst he disclosed "vitamins" and "advil".

D. The Appropriate Sanction

9.53 The Panel notes that the parties agree that whatever decision the Panel makes as to the length of the sanction, 14 February 2012 is the appropriate starting date, and the Panel has no reason to disagree with the parties' agreement on this point.

9.54 The Panel considers that although consistency of sanctions is a virtue, correctness remains a higher one: otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interests of sport.

9.55 It seems to the Panel that, absent circumstances evidencing a high degree of fault bordering on serious indifference, recklessness, or extreme carelessness, a 24-month sanction would be at the upper end of the range of sanctions to be imposed in a case falling within Article 10.5.2 WADC. A 12-month sanction is the mandatory minimum. Article 10.5.2 WADC permits a reduction of the period of ineligibility but sets as the minimum allowable period of ineligibility in cases of no significant fault to be one half of the period otherwise applicable, in this case one half of two years. Is a panel bound to start from the premise that only a case involving the least significant amount of fault will result in a 12 months period of ineligibility with the consequence that a panel is required to assess fault relative to that baseline and increase it from there or is there some other way to look at Article 10.5.2 and the reduction of penalty envisaged by it? Article 10.5.2 WADC and its comments offer no precise guidance. In the light of the perceptible purpose of Article 10.5.2, in the context of the WADC, as a whole this Panel starts from the position that a sanction of 12 months will only stand where there is a very low degree of significant fault on the part of the athlete. In Kutrovsky's case, the Panel has determined that there is more than the minimum lack of significant fault present so it must assess a penalty, greater than 12 months but, since the fault was not egregious, one substantially less than 24 months.

9.56 Having regard to all of the circumstances, the Panel has come to the conclusion that the 24-month sanction imposed by the Decision was too severe. Having regard to Kutrovsky's degree of fault and, to both the mitigating and aggravating factors listed above, the Panel concludes that an appropriate sanction would be a period of Ineligibility of 15 months. The Panel emphasises that this is not simply a decision to, effectively, split the difference between the periods of Ineligibility urged by the

parties but, rather, represents the Panel's own evaluation and weighing of the evidence and the submissions received, as well as the Panel's careful, if cautious, consideration of the authorities that it has found of relevance.

10 CONCLUSION

10.1 The Panel would allow Kutrovsky's appeal to the extent that the 24-month period of Ineligibility imposed by the Decision should be reduced to 15 months. The starting date for the term of Ineligibility is 14 February 2012.

11 COSTS

11.1 For disciplinary cases of an international nature ruled in appeal, such as this case, Article R65 of the Code in its relevant parts provides as follows:

> *"R65.2 Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS are borne by the CAS.*
>
> *Upon submission of the statement of appeal, the Appellant shall pay a Court Office fee of Swiss francs 1000.— without which the CAS shall not proceed and the appeal shall be deemed withdrawn. The CAS shall in any event keep this fee.*
>
> *R65.3 The costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties."*

11.2 As this is a disciplinary case of an international nature, the proceedings will be free, except for the Court Office filing fee of CHF 1'000, which Kutrovsky already paid. The CAS shall retain this fee.

11.3 In accordance with the constant practice of the CAS, any amount granted on the basis of Article R65.3 of the Code is a contribution towards the legal fees and other expenses incurred by the prevailing party in connection with the proceedings and not the full amount spent by such party for his/her claim or defence.

11.4 In the present case, in consideration of the divided success achieved by the parties to this appeal, the Panel finds reasonable to order that each party shall bear his/its legal and other costs incurred in connection with these arbitration proceedings**.**

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Dimitar Kutrovsky on 22 May 2012 against the International Tennis Federation concerning the decision of the Independent Anti-Doping Tribunal convened by the ITF of 15 May 2012 is partially upheld.
2. The decision of the Independent Anti-Doping Tribunal convened by the ITF dated 15 May 2012 is set aside.
3. Mr Dimitar Kutrovsky is suspended for a period of 15 months from 14 February 2012.
4. Mr Dimitar Kutrovsky's individual results obtained at the SAP Open tournament in San José, California, U.S.A. in February 2012 are disqualified. The prize money and ranking points obtained by Mr Dimitar Kutrovsky through his participation in that even are forfeited.
5. Mr Dimitar Kutrovsky's individual results in the ITF Futures event in Brownsville, Texas, U.S.A. later in February 2012 are disqualified. The prize money and ranking points obtained by Mr Dimitar Kutrovsky through his participation in that event are forfeited.
6. This award is pronounced without costs, except for the Court Office fee of CHF 1'000 paid by Mr Dimitar Kutrovsky, which shall be retained by the CAS.
7. Each party shall bear his/its legal and other costs incurred in connection with these arbitration proceedings.
8. All other or further claims are dismissed.

Lausanne, 3 October 2012

THE COURT OF ARBITRATION FOR SPORT

L. Yves Fortier C.C., Q.C.

President of the Panel

Jeffrey G. Benz

Arbitrator

Michael J. Beloff QC

Arbitrator

William Sternheimer

Ad hoc Clerk