

REVISED ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Ms Maidie **Oliveau**, Attorney-at-law, Los Angeles, California, USA

Arbitrators: Mr Christopher **Campbell**, Attorney-at-law, Fairfax, California, USA
Mr Yves **Fortier**, Barrister Q.C., C.C., Montreal, Canada

in the arbitration between

Guillermo Cañas, Buenos Aires, Argentina
Represented by Mr Cédric Aguet, Attorney-at-law, Geneva, Switzerland

and

ATP Tour, Ponte Vedra Beach, Florida, USA
Represented by Mr John F. MacLennan, Attorney-at-law, Jacksonville, Florida, USA

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1. The Parties

- 1.1 The Appellant, Mr Guillermo Cañas (the Player), is a tennis professional from Argentina. He has been a member of ATP Tour since 1995 and a member of the ATP's Player Council since 2004.
- 1.2 The Respondent, ATP Tour is a not-for-profit membership organization composed of male professional tennis players and tournament organizations. The ATP sanctions tennis tournaments and provides league governance and support to its member tournaments and players.

2. The ATP Rules

- 2.1 The rules applicable to the Player as a member of the ATP are contained in the ATP 2005 Official Rulebook (the ATP Rules), Section 7.06 *et seq.* The relevant sections of the ATP Rules are below.

B. Covered Players and Events

1. Any player who enters or participates in a Competition, Event or activity organized, sanctioned or recognized by the ATP, or who is an ATP member or has an ATP ranking (a "**Player**") shall be bound by and comply with all of the provisions of this Program including making himself available for Testing both In-Competition and Out-of-Competition. Further, for each calendar year all such Players shall, as a condition of entering or participating in any event organized or sanctioned by the ATP, deliver to the ATP a signed consent in the form set out in Appendix 2.

C. Doping Offenses

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

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

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

b) Excepting those substances for which a quantitative reporting threshold is specifically identified in the Prohibited List, the detected

presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a Player's Specimen shall constitute a Doping Offense under Article C.1, unless the Player establishes that such presence is pursuant to a therapeutic use exemption granted in accordance with Article E.

K. Due Process

3. Burdens and Standards of Proof

a) The ATP ... shall have the burden of establishing that a Doping Offense has been committed. The standard of proof shall be whether the ATP has established the commission of the alleged Doping Offense to the comfortable satisfaction of the Anti-Doping Tribunal, bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

b) Where this Program places the burden of proof upon the Participant alleged to have committed a Doping Offense to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

L. Automatic Disqualification of Individual Results

1. A Doping Offense committed by a Player in connection with or arising out of an In-Competition test automatically leads to Disqualification of the individual result obtained by the Player involved in that Competition with all resulting consequences, including forfeiture of any medals, titles, computer ranking points and prize money (without deduction for tax) obtained in that Competition.

M. Sanctions on individuals

1. Disqualification of Results in Event During which a Doping Offense Occurs.

b) If the Player establishes that he bears No Fault or Negligence for the Doping Offense, the Player's individual results obtained in the Competition(s) other than the Competition in relation to which the Doping Offense occurred shall not be Disqualified unless the ATP establishes that the Player's results in the other Competition(s) were likely to have been affected by the Player's Doping Offense.

2. Imposition of Ineligibility for Prohibited Substances and Prohibited Methods.

Except where the substance at issue is one of the specified substances identified in Article M.3, the period of ineligibility imposed for a violation of Article C.1 (presence of Prohibited Substance or its Metabolites or Markers), Article C.2 (Use or Attempted use of Prohibited substance or Prohibited Method) or Article C.6 (Possession of Prohibited Substances and/or Prohibited Method(s)) shall be:

First offense: Two (2) years' Ineligibility
Second offense: Lifetime Ineligibility

However, the Participant shall have the opportunity in each case, before a period of ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article M.5.

5. Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances.

a) If the Player establishes in an individual case involving a Doping Offense under Article C.1 (presence of Prohibited Substance or its Metabolites or Markers) or Article C.2 (Use of a Prohibited Substance or Prohibited Method) that he bears No Fault or Negligence for the offense, the otherwise applicable period of ineligibility shall be eliminated. When the case involves a Doping Offense under Article C.1 (presence of a Prohibited Substance or its Metabolites or Markers), the Player must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event that this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the Doping Offense shall not be considered a Doping Offense for the limited purpose of determining the period of Ineligibility for multiple Doping Offenses under Articles M.2, M.3 and M.6.

b) This Article M.5.b applies only to Doping Offenses involving Article C.1 (presence of Prohibited Substance or its Metabolites or Markers), Article C.2 (Use of a Prohibited Substance or Prohibited Method), Article C.3 (failing to submit to Sample collection), Article C.8 (administration of a Prohibited Substance or Prohibited Method) or Article C.9 (refusing or failing to abide by any other provision of this Program). If a Player establishes in an individual case involving such offenses that he bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than eight years. When the Doping Offense involves Article C.1 (presence of Prohibited Substance or its Markers or Metabolites), the Player must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

7. Disqualification of Results in Competition Subsequent to Sample Collection.

In addition to the automatic Disqualification pursuant to Article L. of the results in the Competition that produced the positive Sample, all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition) or other Doping Offense occurred through to the date of commencement of any Ineligibility period shall, unless fairness

requires otherwise, be Disqualified with all of the resulting consequences, including forfeiture of any medals, titles, computer ranking points and Prize money (without deduction for tax).

8. Commencement of Consequences.

Any Consequences set out in the decision of an Anti-Doping Tribunal shall come into force and effect on the date that the decision is issued, save that:

a) For purposes of forfeiture of computer ranking points, the decision shall come into effect at midnight on the Sunday nearest to the date that the decision is issued.

b) The Anti-Doping Tribunal shall have discretion, where fairness requires, to establish an installment plan for repayment of any prize money forfeited pursuant to Articles L and/or M of this Program. For the avoidance of doubt, the schedule of payments pursuant to such plan may extend beyond any period of Ineligibility imposed upon the Player.

c) The period of Ineligibility shall start on the date that the decision is issued, provided that:

i) any period during which the Player demonstrates he has voluntarily foregone Participation in Competitions shall be credited against the total Period of Ineligibility to be served, and

ii) where required by fairness, such as in the case of delays in the hearing process or other aspects of Doping Control not attributable to the Player, the Anti-Doping Tribunal may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection.

O. Appeals

1. Decisions Subject to Appeals.

Decisions made under this Program may be appealed as set out in this Article O. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise.

2. Appeals from Decisions Regarding Doping Offenses and Consequences.

A decision that a Doping Offense has been committed, a decision imposing Consequences for a Doping Offense, a decision that no Doping Offense has been committed, and/or a decision that the ATP lacks jurisdiction to rule on an alleged Doping Offense or its Consequences, may be appealed by any of the following parties exclusively to the Court of Arbitration for Sport ("CAS"), in accordance with CAS's rules relating to Appeal Arbitration Hearings:

a) the Participant who is subject of the decision being appealed;

b) the ATP;

4. *Time for Filing Appeals.*

The deadline for filing an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party.

P. The CAS Appeal

1. *All Appeals before CAS of Anti-Doping Tribunal decisions shall take the form of a rehearing de novo of the issues raised by the case and the CAS Panel shall be able to substitute its decisions for the decision of the Anti-Doping Tribunal where it considers the decision of such Anti-Doping Tribunal to be erroneous or procedurally unsound.*

3. *The decision of CAS shall be final and binding on all parties and no right of appeal will lie from the CAS decision. The CAS decision shall have immediate effect and all parties shall take action to ensure that it is effective.*

T. General

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

3. *...this Program shall be governed in all respects (including, but not limited to, matters concerning the arbitrability of disputes) by the Laws of Delaware without reference to Delaware conflict of laws principles.*

APPENDIX ONE

DEFINITIONS

No Fault or Negligence. *The Player establishing that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had Used or been administered the Prohibited Substance or Prohibited Method.*

No Significant Fault or Negligence. *The Player establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Doping Offense.*

APPENDIX THREE

THE 2005 PROHIBITED LIST
Valid 1 January 2005

The use of any drug should be limited to medically justified indications.

SUBSTANCES AND METHODS PROHIBITED AT ALL TIMES (IN- AND OUT- OF COMPETION)

PROHIBITED SUBSTANCES

S5 DIURETICS AND OTHER MASKING AGENTS

Diuretics and other masking agents are prohibited.

Masking agents include but are not limited to:

Diuretics+, epitestosterone, probenecid, alpha-reductase inhibitors (e.g. finasteride, dutasteride), plasma expanders (e.g. albumin, dextran, hydroxyethyl starch).

Diuretics include:

Acetazolamide, amiloride, bumetanide, canrenone, chlortalidone, etacrynic acid, furosemide, indapamide, metolazone, spironolactone, thiazides (e.g. bendroflumethiazide, chlorothiazide, hydrochlorothiazide), triamterene, and other substances with a similar chemical structure or similar biological effect(s).

+ A therapeutic Use Exemption is not valid if an Athlete's urine contains a diuretic in association with threshold or sub-threshold levels of a Prohibited Substance(s).

3. Summary of the Arbitral Proceedings

- 3.1 The Player provided a urine specimen during the ATP sanctioned tournament, the "Abierto Mexicano de Tenis" in Acapulco, Mexico (the Tournament) on 21 February 2005. International Doping Tests & Management (IDTM) is the Anti-Doping Program Administrator (APA) pursuant to a contract between IDTM and the ATP. APA obtained the urine specimen.
- 3.2 APA shipped the specimen sample to the Laboratoire de Controle du Dopage INRS-Institut Armand-Frappier, Montreal, Canada, a World Anti-Doping Agency (WADA) accredited laboratory (the Lab).
- 3.3 The Lab reported that the sample analysis indicated the presence of hydrochlorothiazide (HCT) with a concentration level estimated at 4,900ng/ml. HCT is identified in the ATP Rules under S5. Diuretics and Other Masking Agents (Appendix Three, 2005 Prohibited List) as a Prohibited Substance.

- 3.4 The B analysis conducted by the Lab on 10 May 2005 confirmed the presence of the Prohibited Substance. In this proceeding, the Player does not contest the presence of HCT in his specimen.
- 3.5 The Player exercised his right to a hearing by the Anti-Doping Tribunal (the Tribunal) pursuant to the ATP Rules. The Tribunal determined by a decision on 7 August 2005 that the Player had committed a “Doping Offense” as defined in the ATP Rules by having HCT present in his body on 21 February 2005 during the Tournament. The Tribunal imposed a two-year period of ineligibility on the Player effective from 11 June 2005 and ordered the repayment of monies earned with respect to competitions whose results were disqualified since the Tournament.
- 3.6 A statement of appeal was filed before the CAS on 29 August 2005.
- 3.7 Each party designated an arbitrator. The third arbitrator – the President – was in turn appointed by the President of the Division. Thus the Panel sat in the following composition:
- President: Maidie E. Oliveau
Attorney-at-law, Los Angeles, California, USA
- Arbitrators: Christopher Campbell
Attorney-at-law, Fairfax, California, USA (Appellant’s nominee)
L. Yves Fortier
Barrister Q.C., C.C., Montreal, Quebec, Canada (Respondent’s nominee)
- 3.8 On 10 October 2005, the Appellant filed his appeal brief and Request for Provisional Measures.
- 3.9 On 4 November 2005, the Panel issued its Order on the Request for Provisional Measures partially upholding Appellant’s request, and suspended the requirement for Player to repay monies earned with respect to the competitions whose results were disqualified since the Tournament.
- 3.10 On 2 December 2005, the Respondent filed its answer and statement of defense.
- 3.11 On 4 January 2006, the parties signed the Order of Procedure issued by the President of the Panel.
- 3.12 In accordance with art. R28 of the Code of Sports-related Arbitration (in the version in force as of January 2004) (the Code), the seat of the Panel is established at the Secretariat of the CAS, Chateau de Béthusy, Avenue de Beaumont 2, 1012 Lausanne, Switzerland.
- 3.13 The hearing was held in New York, NY on 19 and 20 January 2006.

3.14 The following persons gave oral evidence:

For the Appellant: Guillermo Cañas, Appellant
Michael Ducote, Player's agent
Herman Gumy, Player's previous coach
Mario Antonio Salgado, Player's attorney from Acapulco
Gina Aguilar, worker at the Tournament
Paulo Sergio Carvallo, coach of another player in the
Tournament

For the Respondent: Julian Cavazos, Doping control officer at the Tournament
Dr. Salvador Chincilla, Tournament doctor
Raul Zurutuza, Tournament director

3.15 The parties agreed to have the Panel consider the written testimony of the following persons without cross examination:

For the Appellant: Dr. James
Dr. Gotelli
Prof. Solis
Mr. Garcia
Mr. Massa
Mr. Pérez-Barbadillo
Mr. Moya
Mr. Saenz
Mr. Rendon
Mr. Monaco
Ms Cisneros
Mr. Zabaleta
Mr. Campos

For the Respondent: Dr. Ayotte
Dr. Mercader
Mr. Ings

3.16 On 1 February 2006, Appellant filed a request for a reopening of the case based on new facts and on new evidence pursuant to the exceptional circumstances provision of art. R56 of the Code which provides that:

“Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the grounds for the appeal and of the answer.”

3.17 On 27 February 2006, Respondent filed its reply to Appellant's request.

3.18 At the request of the Panel, on 13 April 2006, both parties filed closing submissions which were to have been limited to the issue of relevance of the new evidence. The

Panel considered only those parts of the submissions which related to the new evidence.

- 3.19 On 23 May 2006, the Panel issued its award which was notified to the parties by the CAS Court office on the same day.
- 3.20 On 22 March 2007, the Swiss Federal Tribunal determined that the Appellant's right to be heard was disregarded by the Panel and on that basis, the Swiss Federal Tribunal annulled the Panel's award.
- 3.21 In the light of the judgment of the Swiss Federal Tribunal, the Panel has reviewed the submissions and evidence originally submitted by the parties and hereby issues a new revised award in substitution of the award rendered on 23 May 2006.

4 Appellant's contentions

- 4.1 The Appellant claims that he ingested Rofucal, a medication containing HCT, which he received from Tournament personnel after requesting that a prescription from the Tournament doctor to treat congestion be filled and Appellant instead received a prescription intended for the coach of another participant in the Tournament, Mr Carvallo. He claims that the HCT was present in his urine as a result of taking the medication intended for Mr Carvallo. As a result, the Appellant bears no fault or negligence.
- 4.2 The Appellant contends that the Tournament doctor is someone in whom he can have confidence, the Tournament personnel are expected to assign a person to fulfill this request with due care and as such his duty of care as set forth in the ATP Rules is reduced when he has received a prescription from the Tournament doctor which was picked up at the pharmacy by Tournament personnel and delivered back to him.
- 4.3 In the alternative, Appellant contends that even if the standard of care is not reduced when the Player has received a prescription from the Tournament doctor, it is not foreseeable that an error by Tournament personnel dedicated to serving the players on site in filling the prescription would occur and thus, Appellant had no need to read the label of the medications he was taking. He cannot be expected to foresee that a third party would make a mistake in purchasing his medication which would then require him to read the label on the medication prior to consuming it.
- 4.4 Further, Appellant argues that the sanction of two years' ineligibility is disproportionate under the circumstances as the violation of the ATP Rules in this instance is unintentional. Under Delaware law, applicable as required by the ATP Rules, the proportionality test includes the mental state of the offender, the actual or potential injury caused by the misconduct, and aggravating and mitigating circumstances. The Appellant claims that the standards reflected in the ATP Rules to reduce the period of ineligibility otherwise required in the event of a doping violation are too strict and thus illusory and fall short of the proportionality doctrine. In particular, they do not provide the Panel with sufficient discretion to consider all

relevant factors and, as a result of such consideration, arrive at a result that meets the justice of the overall case. Since in this case, the violation was caused by the accidental presence of the Prohibited Substance in Player who never intended to cheat, a different sanction should be imposed than where there is intent to cheat. In addition, under Delaware law, the Appellant contends that the consequences under the ATP Rules are considered a forfeiture which is void as against public policy; and that they also constitute an abuse of dominant position or are anticompetitive under the Sherman Antitrust Act.

- 4.5 Appellant also argues that his appeal is an international arbitration conducted under Swiss law, based on Respondent and Appellant not having their domicile or seat in Switzerland at the time of the signing of the arbitration clause or at the time the arbitral proceedings started. He further argues that Swiss law and EU law, specifically EU antitrust regulations, could apply, since Respondent holds a tournament in Basel, Switzerland. Nevertheless Appellant previously relied on arguments specifically based on U.S. antitrust laws as referenced above.
- 4.6 The Player submitted at the first hearing held before the Tribunal that pursuant to the ATP Rules, the sanction should either be eliminated or reduced based on the *No Fault or Negligence* provision that permits the otherwise applicable period of ineligibility to be eliminated; or based on the *No Significant Fault or Negligence* provision which permits the reduction of the period of ineligibility to be reduced. The Tribunal found that the Player did not meet his burden of proof to show how the medication was in the Player's system and found him to be at fault even on his own version of the events that transpired.
- 4.7 At the first hearing, Player did not present witnesses supporting his contention that he had received a prescription from the Tournament doctor, nor had he yet located Mr Carvalho who received medication other than the Rofucal he had requested from the receptionist at the Tournament on the same day and at the same time as Appellant received his medications. At the hearing before this Panel, Appellant presented written statements and oral testimony to the effect that people had seen him go to the Tournament doctor's office, walk out with a prescription, hand the prescription to his coach who handed it to the receptionist in the area outside the doctor's office and then later in the same day, pick up the prescription from the receptionist. The Tournament doctor denied treating Player and was adamant that had he done so, he would have remembered, as it would have been "an honor to treat Player". The Tournament doctors maintain logs required by the ATP, listing the people they have treated and the treatment. Their logs did not reflect the treatment of the Appellant, but it appears that the treatment of at least one other player was not logged in the Tournament doctors' records.

5 Respondent's contentions

- 5.1 The Respondent contends that, if the Appellant's version of the circumstances leading up to the Appellant's positive specimen is accepted, Appellant has met his burden

under ATP Rules M.5.b to demonstrate how the prohibited substance entered his system. However, Respondent points out that the Appellant did not read the label on the medication he received. He did not ask the physician from whom he received the prescription what medication was being prescribed. He did not compare the label (which clearly identified the ingredient in Rofucal as the prohibited substance HCT) to the wallet card which the Player testified he always carried with him. Therefore, the Appellant was at fault.

- 5.2 The Respondent then addresses whether the Appellant has demonstrated if he bears *No Significant Fault or Negligence* under the ATP Rules. In so doing, the Respondent looks to a comment to WADA Code (WADC) Section 10.5 from which the ATP Rules are derived, which discusses circumstances which might support a finding of *No Significant Fault or Negligence*: “For example, reduction may well be appropriate in illustration (a) [a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement] if the athlete clearly establishes that the cause of the positive test was contamination in the common multiple vitamin purchased from a source with no connection to prohibited substances and the athlete exercised care in not taking other nutritional supplements.” Based on the Appellant’s admission that he did not read the label, under the reasoning of the WADC comment, the Player is guilty of *Significant Fault or Negligence*. According to the ATP Rules, C.1.a: “It is each Player’s personal duty to ensure that no Prohibited Substance enters his body.” Thus, Player was significantly negligent in not conducting further research before taking the medications, especially since the medication was not received from the Tournament doctor himself.
- 5.3 In response to Appellant’s argument that the consequences of taking the medication were not foreseeable, Respondent argues that the issue is not whether another’s negligence was foreseeable, but rather is it foreseeable that a player who fails to read the label on a medication containing a Prohibited Substance and ingests that substance will test positive for that substance, which it was.
- 5.4 With respect to proportionality, the Respondent relies on a legal opinion obtained by WADA in 2003 which concludes that the fixed two-year period of ineligibility regardless of the seriousness of the doping offense does comport with fundamental principles of law because of the need for harmonization of penalties among the various sports. In addition, Respondent argues that flexibility as to penalty should be narrowly circumscribed, based on the fault or negligence on the part of the Player.

6 Jurisdiction

- 6.1 The competence of the CAS to act as an appeal body is based on art. R47 of the Code which provides that:

“A party may appeal from the decision of a disciplinary tribunal or similar body of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the appellant

has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body.”

- 6.2 The competence of the CAS is also based on the above-quoted ATP Rules O.1 and O.2.
- 6.3 Moreover, the competence of the CAS is explicitly recognized by the parties in their briefs and in the Order of Procedure which they signed.
- 6.4 In accordance with the ATP Rules O.4., the time limit for appeal of twenty-one days from the receipt of the decision appealed against, the appeal was timely filed by the Appellant based on his receipt of the Tribunal’s decision as of 8 August 2005.
- 6.5 According to the Code, the appeal is admissible.

7 Applicable Law

- 7.1 Art. R58 of the Code provides:

“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in absence of such choice, according to the law of the country in which the federation, association or sports body which has issued the challenged decision is domiciled.”
- 7.2 Such provision was expressly mentioned in the Order of Procedure signed by both parties.
- 7.3 The “applicable regulations” in this case are the ATP Rules, in particular the doping control Rules referred to in 2 above.
- 7.4 The ATP Rules specifically provide that Delaware law shall apply and the Panel shall apply Delaware law on a complementary basis. The Parties have not agreed to apply any other law.
- 7.5 The applicable procedure in this case is the appeal procedure provided for by art. R47 *et seq* of the Code. Pursuant to art. R57 of the Code:

“The Panel shall have full power to review the facts and the law.”

This is fully supported by the ATP Rules which provide in P.1:

“All Appeals before CAS of Anti-Doping Tribunal decisions shall take the form of a rehearing de novo of the issues raised by the case and the CAS Panel shall be able to substitute its decisions for the decision of the Anti-Doping Tribunal where it considers the decision of such Anti-Doping Tribunal to be erroneous or procedurally unsound.”

8 Analysis

- 8.1 Under the ATP Rules, since a Prohibited Substance was present in the Player's specimen, there is a Doping Offense. The only issue to be determined is what are the *Consequences* based on this Doping Offense.
- 8.2 The burden of proof shifts to the Appellant under ATP Rules, K.3.b. to establish by a balance of probability: first how the prohibited substance entered his system; and second, that he bears *No Fault or Negligence*, or in the alternative *No Significant Fault or Negligence*, for the Doping Offense in order for the two years period of ineligibility to be eliminated or reduced.
- 8.3 With respect to the first requirement of how the Prohibited Substance entered his system, Appellant established that he ingested Rofucal delivered to him by Tournament staff. The evidence before the Panel on this crucial point was contradictory. Having considered this evidence, the Panel, applying the standard of balance of probability, concludes that the Appellant has met his burden of proof and that the Tournament doctor prescribed a different medication for Appellant, but this prescribed medication was not delivered to Appellant as he mistakenly was given the Rofucal intended for Mr Carvallo. The Panel accepts Appellant's version of the events concerning the prescription and the delivery to him of the Rofucal rather than the prescribed medications. The Panel notes that the Tournament doctor's testimony with respect to two issues was in direct contradiction with facts established by the uncontested testimony of other witnesses: 1) that medications for cold symptoms were in stock in the doctor's office at the Tournament venue, which they were not on the date in question, according to Mr Juan Monaco (another ATP player)'s uncontested witness statement; and 2) that the records were carefully maintained, which they clearly were not, as a record of Mr Monaco's visit to the Tournament doctor had to be created after this matter arose due to incomplete records. In addition, several witnesses either testified at the hearing or by written statement, to having seen Appellant enter the Tournament doctor's office and exit with a prescription. There was further confirmation of the visit by Player to the Tournament doctor when a Tournament car and driver were sent to fill the prescription shortly after the Player's visit to the Tournament doctor.
- 8.4 Another aspect of the evidence before the Panel which gave rise to conflicting testimony concerns the doping control form completed by Player which did not list the medications prescribed by the Tournament doctor. The APA's doping control officer, Mr Julian Cavazos, who obtained the urine specimen from Player at the Tournament, was known to Player since 1998. He contradicted the Player's testimony that when he was listing medications and supplements on the doping control form at the doping control station, he advised Mr Cavazos that he was taking medications prescribed by the Tournament doctor but did not know their names. According to Player, Mr Cavazos said it was not necessary to list those medications if they were prescribed by the Tournament doctor. According to Mr Cavazos, he never said that, as it was standard protocol to list every medication on the form and he always encouraged the players to write down any medications they were taking on the doping control form. He had no recollection of Player having mentioned the medications he was taking.

The only people present in the doping control station were Mr Cavazos, Player and Mr Cavazos' assistant, Mr Shane Wooten. Appellant provided the witness statement of Mr Mariano Zabaleta, an Argentinean ATP player, who stated with respect to the doping control procedure at ATP tournaments, that the medications listed on the doping control form do not necessarily coincide with the medicines consumed but rather, in general the listing is discussed with the doping control officer and it is determined which ones should be listed because they could cause a problem. The Panel is unable to reconcile the two different versions of the testimony with respect to the doping control procedure and the form completion process. Mr Cavazos appeared to the Panel to be a credible witness on this subject as was the Appellant. The Panel is troubled by the Player's lack of disclosure of the prescribed medication on the form but remains convinced by the rest of his testimony that Player believed he was taking medication prescribed by the Tournament doctor.

- 8.5 Once the Panel accepts that Appellant has met his burden of proving how the Prohibited Substance entered his system, the question of his level of fault or negligence needs to be determined.
- 8.6 Appellant is responsible for the presence of the Prohibited Substance in his specimen. He is an experienced professional athlete, active in the ATP Player Council and fully aware of the risks of doping, as evidenced by his testimony and the fact that he carries the ATP wallet card with the list of Prohibited Substances with him.
- 8.7 He took the medication he received with no review whatsoever of the contents of the box, even though he knew that the medication had been through several hands before being delivered to him. He and Mr Gumy, Player's coach and a retired ATP player, testified that they never consulted their ATP wallet cards when receiving a prescription from a Tournament doctor as they believed that the doctors were exercising care in prescribing medications that did not contain Prohibited Substances, i.e. that "the doctor knew best." The testimony of the Tournament doctor was consistent with this expectation, as the Tournament doctors took extreme care to stay up to date on the Prohibited Substances list and to avoid prescribing medications which might put any player at risk of testing positive.
- 8.8 The ATP requires its tournaments to provide a Tournament doctor who specializes in sports medicine pursuant to ATP Rules 4.03.A.1. Based on the testimony of Appellant and his coach as well as the Tournament doctor, the Tournament doctor is knowledgeable in the Prohibited Substances and the players are led to expect and have every reason to believe a prescription from a Tournament doctor will not result in the delivery of a medication containing a Prohibited Substance. The Player was exercising utmost caution by consulting the Tournament doctor with respect to his symptoms.
- 8.9 The question then is whether the Player had a duty to investigate the actual medication that he had received to ascertain whether it was indeed the medication prescribed by the Tournament doctor. Appellant relied blindly on the system set up to take care of him at the Tournament site, assuming that it was foolproof. This is clearly negligent.

The Player has a duty of utmost caution after visiting the Tournament doctor, when actually ingesting medications. It would have been normal for him to rely on the trustworthiness and knowledge of the Tournament doctor if the doctor had handed the medications to him but any professional athlete these days has to be wary when, as in this case, he receives medications which, he knows, have gone through several hands. Thus, ATP Rules M.5.a (which allows Player to establish *No Fault or Negligence*) is not applicable to the Appellant's case.

- 8.10 The Appellant's case is next reviewed under the provisions of ATP Rules M.5.b (which allows Player to establish *No Significant Fault or Negligence*).
- 8.11 This case is distinct from the WADC comment on *No Fault or Negligence* cited by the ATP with respect to contaminated supplements in the following critical aspects:
- 8.11.1 This medication was purchased from a source with no connection to Prohibited Substances; and
- 8.11.2 This was not a nutritional supplement purchased by the athlete on his own, but rather medication obtained with a Tournament doctor's prescription.
- 8.12 The comment to the WADC specifically remarks that these types of circumstances "could result in a reduced sanction based on *No Significant Fault or Negligence*."
- 8.13 In addition, there was no proof provided by ATP as to any intent to dope by the Appellant or any pattern of doping control results which might lead to a conclusion that he intended to dope. Though intent is not a required element of the WADC for the ATP to prove, it is certainly helpful for the Panel, as the fact finder, to examine whether there was a pattern of behavior other than that claimed by the Appellant, which was a simple reliance on the prescription he requested being filled, not expecting the type of mistake which happened. As stated in *Squizzato v/ FINA* (CAS 2005/A/830), "As the Appellant appears to have no intention whatsoever to gain an advantage towards her competitors, her negligence in forgetting to check the content of a medical cream can be considered as mild in comparison with an athlete that is using doping products in order to gain such advantage."
- 8.14 The Panel is mindful that the WADC on which the ATP Rules are based, by establishing the possibility for a competitor to establish exceptional circumstances, has opened the door for competitors to demonstrate truly exceptional circumstances which justify the reduction of the period of ineligibility. Comment to 10.5.2 of the WADC (which is the same provision as ATP Rules M.5.a. & b.) specifically states: "The trend in doping cases has been to recognize that there must be some opportunity in the course of the hearing process to consider the unique facts and circumstances of each particular case in imposing sanctions.... This approach is consistent with basic principles of human rights and provides a balance between those Anti-Doping Organizations that argue for a much narrower exception, or none at all, and those that would reduce a two year suspension based on a range of other factors even when the Athlete was admittedly at fault." In the present case, Appellant was definitely

negligent. Without Player's negligence, there would not be a Doping Offense. It is the degree of negligence which is at issue pursuant to the criteria established in the ATP Rules. The definition of *No Significant Fault or Negligence* requires the Panel to look at "the totality of the circumstances". The following factors weigh in the Appellant's favor:

- 8.14.1 Appellant was at a Tournament sanctioned by the Respondent, where as a star player, he had every expectation that his visit to the Tournament doctor, a specialist on Prohibited Substances, supplied and sanctioned by the Tournament, which resulted in a prescription filled by Tournament staff, again supplied and sanctioned by the Tournament, would be the safest possible way for him to obtain medical treatment for his condition.
 - 8.14.2 There was no use of this or any other Prohibited Substance in any competition other than the one in respect of which the specimen was obtained.
 - 8.14.3 The reason for Player's ingestion of the substance was clearly medical.
 - 8.14.4 A mistake in the delivery of the medication was made not by Appellant or anyone working for him, but rather by the Tournament employees. The evidence that Mr Carvallo actually requested that Rofucal be delivered to him on the same day at the same receptionist desk where Player's prescription was delivered to Player shows that Player's ingestion of the Rofucal was a mistake not caused by his actions or those of any people within his control or sphere of influence.
- 8.15 Taking into account these factors, the Panel believes that the present case is substantially different from the typical doping case and qualifies as "exceptional". Appellant has established that he bears *No Significant Fault or Negligence*, allowing for the period of *Ineligibility* to be reduced by no less than one-half of the minimum period of *Ineligibility* otherwise applicable (ATP Rules M.5.b.), which in this instance is two years.
- 8.16 This finding is not meant to absolve all competitors from a duty of care when they are in their sports venue environment and being cared for by their sport's medical personnel. The current applicable rules do allow for examination of the "totality of the circumstances" and in circumstances such as those which the Panel has found in the present case, the Player, though negligent, was entitled to rely on the expertise of independent expert medical personnel provided by his sport's sanctioned Tournament. His duty to exercise "utmost caution" was met when he did so. Each case will be different but in this case, examining and evaluating the facts in their totality, including the fact that Mr Carvallo actually requested that Rofucal be delivered to him on the same day and at the same receptionist desk, and this prescription was picked up by the Appellant, rather than his own prescription, a reasonable (i.e. *insignificantly negligent*) mistake was made.

- 8.17 The Panel has considered the provisions of Delaware law, applicable as required by the ATP Rules, cited by Appellant, and Appellant's arguments with respect to the facts of this case. The majority of the Panel, in applying the ATP Rules, has rejected the Appellant's contentions that Delaware law invalidates such Rules.
- 8.17.1 The case law with respect to the proportionality doctrine cited by Appellant refers either to criminal cases or to an attorney disciplinary sanction. There are no criminal sanctions involved based on the ATP Rules, so that Delaware criminal law standards are not applicable. Because the Panel has found that Player was negligent, and the circumstances surrounding his violation of the ATP Rules were considered, the Panel disagrees with the contention of Appellant with respect to a lack of proportionality and determines that its decision does meet the justice of the overall case.
- 8.17.2 The Panel finds that the sanctions under the ATP Rules are not forfeitures declared by contract, as Appellant claims. They do allow the Tribunal to take into account whether Appellant had any fault or negligence with respect to the presence of the substance and the specific circumstances.
- 8.17.3 With respect to the applicability of the Sherman Antitrust Act, the ATP Rules of the Respondent do not represent a contract, combination or conspiracy that restrains trade. Specifically, the Respondent in adopting and in implementing such Rules reasonably exercised its right to regulate the conduct of its member players. There has been no showing that the ATP Rules' purpose was to exclude Player from the market. Thus, the Panel finds that there is no violation of the Sherman Antitrust Act by Respondent.
- 8.18 The Panel has further considered the Appellant's arguments on EU law and the majority of the Panel has rejected them. Assuming that EU law would be applicable to the present case, as alleged by the Appellant, although such application has not been specifically agreed by the parties, the Panel is of the view that the present decision does not violate EU law. Indeed, the ATP Rules give enough latitude to allow for a sanction proportionate to the fault or negligence committed to be imposed on the Player. The Panel did exercise such latitude by establishing that the Appellant bears *No Significant Fault or Negligence*, allowing for the period of ineligibility to be reduced. Respondent adopted the ATP Rules in furtherance of a legitimate objective taking into account the difficulty of determining the intent of any player and the effect on his performance when taking a particular substance. Such Rules are reasonably aimed to foster the proper organization of professional tennis. The Panel reiterates its finding that Player was negligent in ingesting a banned substance and it is this culpability which reasonably generates the penalties imposed.

9 Sanction

- 9.1 Based on the provisions of ATP Rules M.5.b., the Panel must determine the actual period of ineligibility to be imposed on Appellant. As stated in H. Knauss v/FIS (CAS 2005/A/847), "In the Panel's opinion the requirements to be met by the qualifying element *"no significant fault or negligence"* must not be set excessively high (see also

CAS 2004/A/624 *IAAF v/ ÖLV & Lichtenegger* [7.7.2004] marg. no. 81 *et seq.*; by contrast much stricter CAS 2003/A/484 *Vencill v/ USADA* [18.11.2003] marg. no. 61 *et seq.*). This follows from the language of the provision, the systematics of the rule and the doctrine of proportionality (see also CAS 2004/A/624 *IAAF v/ ÖLV & Lichtenegger* [7.7.2004] marg. no. 82 *seq.*). Once the scope of application of Art. 10.5.2 FIS-Rules [the same provision as ATP Rules M.5.b.] has been opened, the period of ineligibility can range between one and two years. In deciding how this wide range is to be applied in a particular case, one must closely examine and evaluate the athlete's level of fault or negligence. The element of fault or negligence is therefore ultimately 'doubly relevant'. Firstly it is relevant in deciding whether Article 10.5.2 FIS-Rules [the same provision as ATP Rules M.5.b.] applies at all and, secondly, whether, in the specific case, the term of the appropriate sanction should be set somewhere between one and two years. However, the higher the threshold is set for applying the rule, the less opportunity remains for differentiating meaningfully and fairly within the (rather wide) range of the sanction. But the low end of the threshold for the element "*no significant fault*" must also not be set too low; for otherwise the period of ineligibility of two years laid down in Article 10.2 FIS-Rules would form the exception rather than the general rule (see also CAS 2003/A/484 *Vencill v/USADA* [18.11.2003] mar. no. 47). It is this tension between the two limits which is precisely what the WADC wishes to reduce. In this regard the (official) comments on the WADC expressly read as follows: '*Article 10.5 is meant to have an impact only, in cases where the circumstances are truly exceptional and not in the vast majority of cases.*'"

- 9.2 Analyzing Appellant's level of fault or negligence thus is the determinative factor in the reduction of the period of ineligibility. The following factors weigh against the Player in determining his level of fault or negligence:
 - 9.2.1 He did not list the medications on the doping control form he completed during the Tournament.
 - 9.2.2 He took the medication he received with no review whatsoever of the contents of the box, even though he knew that the medication had been through several hands before being delivered to him.
 - 9.2.3 At the hearing held before the Tribunal, Player was unable to recall whether he took pills or liquid but he now recognizes Rofucal as the medication he took.
 - 9.2.4 He is an experienced professional tennis player, active on the Player Council and aware of the risks inherent in the ingestion of unknown substances.
- 9.3 The Appellant assumed mistakenly that he was taking medications prescribed by a Tournament doctor. He did not feel the need to examine the medications he was taking or to read the label on the box. He was comfortable that he was taking medications which did not contain a Prohibited Substance based on his reasonable expectation that the prescription from the Tournament doctor had been filled correctly. However, what is determinative of the level of fault or negligence is not only what the Player actually knew or expected but also what he could have suspected. Under the circumstances, he

could have at least made the effort to double check the prescription he was given against the medication he received or at least paid attention to the medications he was taking and read the label.

- 9.4 Given no guidance in determining the reduction by the ATP Rules, the Panel looks to past CAS cases where *No Significant Fault or Negligence* was found and the period of ineligibility reduced based on medical prescriptions being the cause of the Doping Offense (see WADA v/ Lund (CAS OG 06/001, Squizzato v/ FINA (CAS 2005/A/830) and Vlasov v/ATP (CAS 2005/A/873)). In each of these cases, the CAS panels reduced the periods of ineligibility by the maximum allowable under the same provisions as applicable to Player. The only difference between these cases and the circumstances surrounding Player's Doping Offense are the factors listed above as weighing against the Player. In accordance with ATP Rules P.1., the CAS hearing takes "the form of a rehearing de novo of the issues raised by the case and the CAS Panel shall be able to substitute its decisions for the decision of the Anti-Doping Tribunal." In this regard, the Panel is cognizant that the Tribunal which originally found no exceptional circumstances was not presented with the evidence that Mr Carvallo had requested a prescription for Rofucal on the same day through the same Tournament staff and received a different prescription nor did the Tribunal hear from all the witnesses who saw the Player enter the doctor's office and exit the office with a prescription, or who sent the Tournament car to pick up the prescription. Weighing all of the factors in favor of and against the Appellant identified above, the previous CAS decisions with respect to medical prescriptions and the totality of the circumstances, the Panel is unable to give the Player the maximum reduction in the period of ineligibility. Thus, the Panel determines that Player's period of ineligibility will be reduced by nine months, from two years to fifteen months.
- 9.5 ATP Rules M.8.c.i. provide that "the period of Ineligibility shall start on the date that the decision is issued, provided that any period during which the Player demonstrates he has voluntarily foregone Participation in Competitions shall be credited against the total Period of Ineligibility to be served..."
- 9.6 In this case, the Player established that he had voluntarily foregone participation in tennis from 11 June 2005. Therefore, the fifteen months period of Ineligibility is to commence on 11 June 2005 and to end on 10 September 2006.
- 9.7 In accordance with ATP Rules L.1., Appellant's results obtained at the Tournament shall be disqualified, including forfeiture of any medals, titles, computer ranking points and prize money (without deduction for tax). The Tribunal required that the Appellant return the Prize money within 7 days of the date of its decision, and, without contrary information, this Panel assumes that such money has been returned to the ATP.
- 9.8 ATP Rules M.7. provide that "In addition to the automatic Disqualification pursuant to Article L. of the results in the Competition that produced the positive Sample, all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition) or other Doping Offense occurred through to

the date of commencement of any Ineligibility period shall, unless fairness requires otherwise, be Disqualified with all of the resulting consequences, including forfeiture of any medals, titles, computer ranking points and Prize money (without deduction for tax).” The Tribunal found that since Appellant provided a sample at Roland Garros which was negative, fairness dictated that the results at Roland Garros should not be disqualified but the other results achieved by Appellant between the date of the Tournament and the date Appellant voluntarily ceased to compete should be disqualified and the Appellant was required to return to the ATP \$276,070 for both Singles and Doubles competitions and the ATP already collected prize money otherwise due to the Appellant in the amount of \$40,125.

- 9.9 Since the Panel has found that Appellant bears *No Significant Fault or Negligence*, the Panel deems that fairness dictates that other than with respect to the Tournament, none of Appellant’s results shall be disqualified.

10 Costs

- 10.1 Code art. R65.3 provides:

“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.”

- 10.2 The Panel has considered that neither party was wholly successful in these proceedings, and under the circumstances, it is reasonable to order that each party shall bear its own costs.

* * * * *

ON THESE GROUNDS

The Court of Arbitration for Sport ruling de novo decides:

1. The appeal filed by Mr Guillermo Cañas on 29 August 2005 is partially upheld.
2. Mr Guillermo Cañas has committed a Doping Offense during the “Abierto Mexicano de Tenis” held in Acapulco, Mexico on 21 February 2005 and his results from the competition shall be disqualified. Any prize money collected at such Tournament not previously returned to ATP Tour shall be returned to ATP Tour within 7 days of the date of this award.
3. Mr Cañas shall be ineligible to compete on the ATP Tour for the fifteen months period beginning from 11 June 2005.
4. To the extent that ATP Tour has collected prize money for competitions in which Appellant competed after the Tournament, those amounts shall be returned to Appellant by ATP Tour within 7 days of the date of this award.
5. The award is pronounced without costs, except for the Court Office fee of CHF 500.- already paid by the Appellant and to be retained by the CAS.
6. Each party shall bear its own costs.

Done in Lausanne, 23 May 2007

THE COURT OF ARBITRATION FOR SPORT

President of the Panel

Maidie E. Oliveau

Arbitrators

Christopher Campbell

L. Yves Fortier