

Delimiting the No Significant Fault rule: the Sharapova saga

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Introduction [\[arriba\]](#)

The Sharapova saga is an interesting case that approaches several legal issues in the anti-doping field.

In particular, it is an illustrative example to give thought to diverse procedural and substantive relevant matters. Among others, CAS [1] arbitral tribunals' power to hear appeals de novo, the assessment of the level of fault under the "no significant fault" rule [2] ("NSF"), the degree of the player's duty to personally acquaint with the anti-doping rules and the possibility to delegate this duty, specially in the case of high-level athletes.

The Sharapova saga formally started on 2 March 2016, when the ITF [3] informed tennis player Maria Sharapova that she had committed a contravention of the 2016 TADP. [4] The reason was that the samples collected after being defeated in the quarter-final of the Australian Open 2016 (January 2016) and in a subsequent out-of-competition control in Moscow (February 2016) had tested positive for Meldonium. This substance was included on the 2016 Prohibited List, published by the WADA [5], and was fully effective as of 1 January 2016.

Sharapova admitted the anti-doping rule violation, but she claimed to meet the criteria for NSF, as her degree of fault was small in the circumstances. Consequently, an independent tribunal appointed by the ITF was constituted (the "ITF Tribunal"). Dissatisfied with its decision, Sharapova appealed. Thus, in accordance with the Procedural Rules of the CAS, an arbitral tribunal was constituted to review the appeal (the "CAS Tribunal").

In this context, the purpose of this paper is to (I) initially analyze the athlete's degree of fault under the applicable rules, in order to address (II) the ITF Tribunal's decision and (III) the CAS Tribunal's decision.

I. The athlete's degree of fault: applicable standards [\[arriba\]](#)

In order to understand the approach of the decisions commented, it is worth pointing the applicable standards as to athlete's intention and its potential consequences when deciding an anti-doping rule violation case.

Under the different standards provided by the rules governing anti-doping violations in the tennis field [6], the consequences of a violation may substantially differ, depending on the athlete's degree of fault.

First, an intentional anti-doping rule violation would inevitably lead to a four-year ineligibility suspension. The term intentional is directly meant to identify those players who are "engaged in conduct that he/she knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk".[7]

Second, a two-year ineligibility suspension would apply when "Article 10.2.1 does not apply" (intentional anti-doping rule violation), without prejudice of potential reductions. This default two-year ineligibility suspension appears to be applicable in those cases in which there is no evidence of an intentional behavior.

Third, if the athlete proves NSF, the suspension could be reduced from a no period of ineligibility to a maximum of two years, based on the degree of fault. [8]

However, this reduction may not be less than one-half of the period of ineligibility otherwise applicable. [9] In order to benefit from this provision, the athlete must establish that his or her fault or negligence, when viewed in the totality of the circumstances, was not significant in relation to the anti-doping rule violation. [10]

Finally, if the athlete establishes that he/she bears no fault or negligence, then the otherwise applicable period of ineligibility shall be eliminated. [11]

In sum, the default sanction for anti-doping rule violation is two years of ineligibility, unless (i) the tribunal can prove that the violation was in fact intentional, and therefore would apply the default sanction of four years, or (ii) the player can prove NSF or no fault grounds to reduce or eliminate the sanction.

In the Sharapova saga, the main issue at stake was to decide whether the anti-doping rule violation could be considered within the scope of a NSF conduct or not.

II. ITF Tribunal's decision [\[arriba\]](#) [12]

A. Sharapova's approach to Meldonium

In 2005, young-player Sharapova was diagnosed with mineral metabolism disorder. In terms of sport performance, this diagnosis entailed a significant loss of energy. Her personal doctor from 2005 to 2012, Dr. Skalny, designed a regime aimed at balancing proper metabolism and functionality in Sharapova's body. Among other substances, the regime included Mildronate, one of the pharmaceutical brand names by which Meldonium was marketed. Mildronate was generally promoted as having a positive effect on energy metabolism and stamina, specially recommended for athletes.

Meanwhile, Sharapova's team urged to make clear that all substances recommended necessarily comply with the WADA Code and the prohibited list in force. In 2006, a Moscow laboratory accredited by WADA reported that the pharmaceutical preparations prescribed, including Mildronate, did not contain any substances included on the 2006 Prohibited List.

While Mildronate raised no concerns as to anti-doping rules, the results in Sharapova's health were considered a success. So, Dr. Skalny recommended its periodical taking.

In 2012, Sharapova informed Dr. Skalny that she was not going to continue working with him. However, without any medical advice, she unilaterally decided to continue to use Mildronate.

Between 2012 and 2015, Sharapova was not under the supervision of any expert in the field. She was merely under the general care of a family doctor and relied on the medical practitioners provided by the WTA [13], from whom she would only seek medical advice when she suffered injury or became sick in competition. Over those three years, Sharapova never disclosed the fact that she was taking Mildronate. She explained that none of the professionals had asked what medication she was taking.

Among her own team, it was not known to her coach, her trainer, her physio, nor her nutritionist. Only her father and her manager (part of one of the largest sport management companies in the world) were aware of Sharapova's periodical use of Mildronate.

Additionally, the only documents which evidenced the use of Mildronate were exclusively documents issued by Dr. Skalny between 2006 and 2010. There were no

later documents related to the use of Mildronate. Sharapova also failed to disclose the use of Mildronate on the doping control forms required. She admitted this omission, but explained she misunderstood the wording of the form.

B. The prohibition of Meldonium

On 29 September 2014, WADA published on its website the 2015 Prohibited List, in which Meldonium was not included. However, it also published a notice on the 2015 Monitoring Programme, informing that a number of substances had been placed under study. Meldonium was included in the 2015 Monitoring Programme.

Furthermore, WADA published a specific statement on Meldonium, in which it emphasized on its potential cardiac effects, and announced its inclusion to the monitoring programme in order to evaluate the abuse of this substance.

The ITF published these same documents on its website.

Finally, Meldonium was included 2016 Prohibited List. In addition, a short statement explaining that Meldonium (Mildronate) was added because of evidence of its use by athletes with the intention of enhancing performance was also published.

C. The decision

The ITF Tribunal decided a two-year period of ineligibility.

It found untenable the fact that Sharapova failed to disclose her regular use of Mildronate to WTA authorities, doctors and to her own team.

Under the tribunal's analysis, Sharapova must have known that, after 2012, taking a medication that was no longer prescribed by a doctor was of considerable significance. Hence, the regular use of Meldonium was a deliberate decision, not a mistake.

Further, the ITF Tribunal explained that Sharapova could have genuinely believed that Mildronate had some general beneficial effect on her health. Still, the manner in which the medication was taken, its concealment from the anti-doping authorities, her failure to disclose it even to her own team and the lack of any medical justification inevitably lead to the conclusion that she took Mildronate for the purpose of enhancing her performance.

Thus, once Sharapova's deliberate decision was determined, the ITF Tribunal further addressed the matter of whether the contravention was intentional or not.

It opined that it is clear from the wording of Article 10.2.3 of TADP that whether conduct is intentional is to be judged on the actual knowledge of the player, not on the basis of what she ought to have known or understood.

So, ITF Tribunal accepted that the player did not engage in conduct that she knew constituted an anti-doping rule violation. It stated that Sharapova understood that the prohibited list might from time to time be amended, but she did not know or believe that it had been changed to make Mildronate a prohibited substance. If Sharapova had certainly known that Meldonium was in fact included, she knew she would inevitably be tested at the Australian Open 2016.

Whilst, Sharapova could not prove that she exercised any degree of diligence, let alone utmost caution, to ensure that the use of Mildronate did not constitute an anti-doping rule violation.

In sum, the ITF Tribunal concluded that Sharapova did not intend to cheat, but failed to meet the standard of utmost caution, excluding the reduction based on NSF.

III. The CAS Tribunal's decision [\[arriba\]](#) [14]

Dissatisfied with the ITF Tribunal's decision, Sharapova appealed before the CAS. The CAS Tribunal was comprised of Mr. Luigi Fumagalli (president), Mr. Jeffrey G. Benz and Mr. David W. Rivkin.

Sharapova primarily pleaded that the ITF Tribunal made improper assumptions in rendering its decision, failed to accurately assess the evidence submitted and rendered a sanction that was inconsistent with recent sanctions. She requested for the sanction to be eliminated or, in the alternative, reduced on NSF grounds.

It should first be recalled that CAS regulations provide for a de novo review. This means that the CAS Tribunal was fully empowered to review the facts and the evidence of the case at hand. [15]

In this context, the CAS Tribunal raised two key interrogations: (i) What is Sharapova's level of fault? and (ii) if a degree of fault was to be found, what is the proper sanction?

i. What was Sharapova's level of fault?

Initially, the CAS Tribunal recognized that a period of ineligibility can be reduced based on NSF grounds only in cases where circumstances justify a deviation from the duty of exercising an utmost caution when dealing with anti-doping rule violations. This should be identified as the applicable standard by which the CAS Tribunal further measured the facts of this case.

Moreover, it underlined that prior cases offer valuable guidance, but nevertheless cases are very fact specific and there is no existing doctrine of binding precedent in CAS jurisprudence.

When evaluating Sharapova's behavior, the CAS Tribunal stressed that a claim of NSF is consistent with the existence of some degree of fault. As a result, a deviation from the duty of exercising the utmost caution does not imply per se that the athlete's negligence was indeed significant.

This reasoning was exemplified by fact that athletes can always read the label of the pharmaceutical products, carry searches to ascertain ingredients, crosscheck the prohibited lists published or consult with the relevant sporting or anti-doping organizations. However, an athlete cannot reasonably be expected to follow all such steps in each and every circumstance. According to the CAS Tribunal, to find otherwise would render the NSF ground meaningless.

In this respect, the CAS Tribunal particularly highlighted that Sharapova chose to delegate activities aimed at ensuring anti-doping rule violation compliance to one of the largest sport management companies in the world. This fact was overlooked by the ITF Tribunal. As a clear example of the exercise of the CAS appellate tribunals' power to fully review the facts of the case, this circumstance was "reviewed" and considered decisive by the CAS Tribunal.

Without prejudice of the player's personal duty to ensure that no prohibited substance enters his/her body [16] and to be familiar with the most current edition of the prohibited list in force [17], the CAS Tribunal found reasonable that a high-level athlete could rely on her manager, especially if that manager was supposed to be an expert in the field. Moreover, Sharapova's manager recognized he knew

about the use of Meldonium since 2013 and he assumed his fault as an “administrative misstep” in the Australian Open 2016.

Additionally, the CAS Tribunal also emphasized that no specific warning had been issued by the relevant organizations as to the change in the status of Meldonium (the ingredient of Mildronate). It concluded that anti-doping organizations should take reasonable steps to provide notice to athletes of significant changes to the prohibited lists.

In sum, the CAS Tribunal outlined the main facts by which, considered as a whole, lead to the conclusion of deciding that the standards to apply NSF had been met, as Sharapova: (i) used Mildronate for ten years to protect her heart and under doctor’s recommendation, (ii) before ever using Mildronate, received written confirmations by the Moscow laboratory accredited by WADA, (iii) delegated the compliance with anti-doping rules to a manager working for one of the largest sport management companies in the world, and (iv) was not duly warned of the changes of anti-doping rules, whereas WADA acted negligently when adding Meldonium to the 2016 Prohibited List.

Thus, the CAS Tribunal found Sharapova’s fault to be not significant

ii. What is the proper sanction?

Once Sharapova’s fault was found to be not significant, the CAS Tribunal had to decide the applicable sanction.

To that end, it stressed that the measure of the sanction to be imposed strictly depends on the degree of fault, also bearing that the applicable rules allowed a maximum reduction of the ineligibility period to one year. [18]

Even though Sharapova’s plead of NSF grounds was upheld, the CAS Tribunal still found some degree of fault in her behavior. It recognized a deviation from the duty of exercising the utmost caution. Specifically, Sharapova did not undertake any procedure whatsoever to supervise and control the actions performed by her manager.

However, it mainly emphasized that Sharapova started to use Mildronate based on doctor’s recommendation. Also, that she was not clearly informed by WADA or ITF of the relevant change in the anti-doping rules, and therefore she took the substance with the good faith belief that it was compliant with the anti-doping obligations.

Thus, the CAS Tribunal found that Sharapova’s behavior could not be categorized as compliant with the utmost caution standards, but it was less than a significant fault behavior.

Consequently, given Sharapova’s degree of fault, it determined that a sanction of 15 months was appropriate, instead of the 24-month sanction decided by the ITF Tribunal.

iii. Concluding remarks

As noted, the Sharapova saga raised interesting matters in the anti-doping field.

The ITF Tribunal and the CAS Tribunal disagreed on how to address and balance the relevant circumstances of the case. This is a remarkable example of how the actual appellate system enables a full review of the facts and a de novo decision. In particular, the assessment of the key issues played a decisive role when evaluating the NSF and deciding the proper sanction.

Anti-doping cases usually entail complex facts. Besides, evidence is frequently hard to obtain, and most of it truly lies in the athlete's deep conscience. Anti-doping cases generally deal with highly subjective convictions and full fact findings are unlikely to be revealed. Based in this reality, the so-called "probability test" line of case-law emerged, as several CAS arbitral tribunals have developed: "the balance of probability standard means that the indicted athlete bears the burden of persuading the judging body that the occurrence of the circumstances on which he relies is more probable than their non-occurrence or more probable than other possible explanations of the doping offence". [19] However, given the unpredictability of this line of case-law, the Sharapova saga may help future CAS tribunals to enlighten the interpretation of relevant circumstances when dealing with this kind of cases.

In this regard, it is important for the factual analysis not to deviate from the key purpose of anti-doping regulations: to determine whether a prohibited substance is genuinely intended to be used for therapeutic purposes or if it is intended to enhance sport performance. [20]

Accordingly, this case could be interpreted as an acknowledgment of the common practices and acceptable standards in high-level athletes. In particular, commonly frequent practices, such as delegating the compliance with applicable anti-doping rules to specialized agencies and managers, have been expressly admitted as valid and reasonable.

Finally, even though the circumstances surrounding every case are unique, the Sharapova saga helps to clear the way for the actual practices of high-level athletes in the anti-doping field and, hence, to construe NSF in the present times.

Notas [\[arriba\]](#)

[1] Court of Arbitration for Sport.

[2] No Significant Fault or Negligence, by means of article 10.5.2 of the Tennis Anti-Doping Programme (TADP), administered by the International Tennis Federation (ITF).

[3] The International Tennis Federation.

[4] The Tennis Anti-Doping Programme.

[5] World Anti-Doping Agency.

[6] Article 10 of the TADP and Article 10 of the WADA Code

[7] Article 10.2.3 of the TAPD.

[8] Article 5 of the TAPD.

[9] Article 10.5.2 of the TAPD.

[10] Appendix One (Definitions) of the TADP; Nafziger - Ross, Handbook on International Sports Law, Edward Elgar Publishing, 2011, p. 149; Duval - Viret, M. et al. The World Anti-Doping Code 2015, The International Sports Law Journal, July 2016, Volume 16, Issue 1, p. 110.

[11] Articles 10.4 of the TAPD.

[12] ITF Tribunal was comprised of Charles Flint QC, Dr. Barry O'Driscoll and Dr. Jose A. Pascual. The award was issued on 6 June 2016.

[13] Women's Tennis Association

[14] Award N° 2016/A/4643, issued on 30 September 2016.

[15] Rule R57 of the Procedural Rules of the CAS.

[16] Article 2.1.1 of the TAPD.

[17] Article 3.1.2 in fine of the TAPD

[18] Article 10.5.2 TAPD.

[19] Among others, CAS 2014/A/3820; CAS 2012/A/2763 CAS 2009/A/2012; CAS 2008/A/1494; CAS 2007/A/1370; CAS 2007/A/1376; CAS 2004/A/602; TAS 2007/A/1411.

[20] Articles 4.2.1, 4.3.1.1, 4.3.3 of the WADA Code 2015

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