Tribunal Arbitral du Sport
Court of Arbitration for Sport

By email

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Lausanne, 8 June 2018/AZ/mm

Re: CAS 2017/A/5301 Sara Errani v. International Tennis Federation (ITF)
CAS 2017/A/5302 Nado Italia v. Sara Errani & International Tennis Federation (ITF)

Dear Madam, dear Sirs,

Please find enclosed a copy of the Arbitral Award issued by the Court of Arbitration for Sport in the above-referenced matter.

The parties are kindly invited not to communicate the result of the procedure until after 11:00am CET on Monday, 11 June 2018 as the CAS intends to issue a media release at such time.

You will receive an original copy of the Award, signed by all members of the Panel, in due course.

In accordance with Article R59 of the Code of Sports-related Arbitration, the attached award is not confidential and can be published in its entirety by the CAS. If the parties consider that any of the information contained in the award should remain confidential, they should send a request, with grounds,

to the CAS by **15 June 2018** in order that such information could potentially be removed, to the extent that such removal does not affect the meaning or the comprehension of the decision.

Please be advised that I remain at the parties' disposal for any further information.

Yours faithfully,

Andrea ZIMMERMANN
Counsel to the CAS

Enc.
c.c.: Panel

CAS 2017/A/5301 Sara Errani v. ITF
CAS 2017/A/5302 Nado Italia v. Sara Errani & ITF

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Dr. Christoph Vedder, Professor of law in Munich, Germany
Arbitrators: Mr. Ken E. Lalo, Attorney-at-law in Gan-Yoshiyya, Israel
Mr. Jacopo Tognon, Attorney-at-law in Padova, Italy

in the arbitration CAS 2017/A/5301 between

Sara Errani, Massa Lombarda, Italy

Represented by Mr. Howard L. Jacobs and Ms. Lindsay S. Brandon, Attorneys-at-law, Law Offices of Howard L. Jacobs in Westlake Village, CA, USA

Appellant

and

International Tennis Federation, London, U

Represented by Mr. Jonathan Taylor, QC and Ms. Lauren Pagé, Attorneys-at-law, Bird & Bird, London, UK

Respondent

and in the arbitration CAS 2017/A/5302 between

Nado Italia, Rome, Italy

Represented by Mr. Alberto Cozella and Mr. Mario Vigna, Anti-Doping Prosecutor Office, ITF, in Rome. Italy

Appellant

and

Sara Errani, Massa Lombarda, Italy

Represented by Mr. Howard L. Jacobs and Ms. Lindsay S. Brandon, Attorneys-at-aw, Law Offices of Howard L. Jacobs in Westlake Village, CA, USA

Respondent 1

and

International Tennis Federation, London, UK

Represented by Mr. Jonathan Taylor, QC and Ms. Lauren Pagé. Attorneys-at-law, Bird & Bird in London, UK

Respondent 2

I. PARTIES

1. Sara Errani (hereinafter: "the Athlete") is a 30 year-old international-level professional tennis player of Italian nationality and a Career Grand Slam winner by winning the 2014 Wimbledon Women's Double title who reached a singles ranking of 5th in the world in 2013.

2. The International Tennis Federation (hereinafter: "the ITF") is the governing body of world tennis with its seat in London, UK.

3. The Nado Italia (hereinafter: "the Nado") is the National Anti-Doping Organisation according to the World Anti-Doping Code ("WADA Code") having its seat in Rome, Italy.

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced, and submitted at the hearing. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence, and as submitted at the hearing 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.

5. After living in the US and Spain the Athlete moved back to Italy in October 2016 and based herself at her parent's house at Massa Lombarda, Italy.

6. After appearances at the Australian Open in January and at the Fed Cup on 11 and 12 February 2017 the Athlete returned to her family home on 13 February 2017 to stay with her parents. On 16 February 2017 at 8:00 am, she underwent an out-of-competition doping control providing a urine sample. The doping control was conducted on behalf of the ITF.

7. The sample no. 3085685 was analysed at the WADA accredited laboratory in Montreal, Canada and revealed the presence of letrozole which is a prohibited substance listed in the 2017 WADA Prohibited List in section S4 "Hormones and Metabolic Modulators" under S4.1 "Aromatase inhibitors".

8. On 7 March 2017, the laboratory reported an Adverse Analytical Finding (hereinafter: "AAF") to the ITF.

9. On 18 April 2017, by a Formal Notice of Disciplinary Charge, the Athlete was notified by the ITF that she was charged with the commission of an Anti-Doping Rule Violation (hereinafter: "ADRV"). The Review Board had not identified a Therapeutic Use Exemption (hereinafter: "TUE") nor had it found any apparent departure from the

International Standard for Testing or from the International Standard for Laboratories which might have caused an AAF.

10. The Athlete admitted that letrozole was detected in her sample but denied that she intentionally ingested that substance.

11. The Athlete was not suspended nor did she accept a Voluntary Suspension.

12. The B sample was analysed on 25 April 2017 for confirmation. On 2 May 2017 the laboratory reported the results of the test to the ITF confirming the presence of letrozole in the Athlete's sample in a concentration of 65 ng/ml.

B. Proceedings before the Independent Tribunal

13. After the Athlete had requested a hearing on 21 April 2017, the ITF referred the matter to the Independent Tribunal (hereinafter: "the IT").

14. As the Athlete did not challenge the presence of letrozole, the dispute before the IT was about the sanction, exclusively.

15. The hearing before the IT took place on 19 June in London, U.K. with the Athlete, her counsels and her witnesses and expert-witness present.

16. The IT rendered its decision (hereinafter: "the IT decision") on 3 August 2017. With reference to the CAS decision in *Cilic v. ITF* (CAS 2013/A/3327 & 3335) the IT found:

> *"The Tribunal takes into account the circumstances involved in this case and that the Player has not only an unblemished record but has demonstrated, through her evidence which we accept, having otherwise been meticulous in taking precautions to ensure that she acted in compliance with the TADP. As a result of the findings that the Tribunal has made it concludes that the degree of fault is at the lowest end of the scale. The Period of ineligibility in this case will be 2 months."*

With regard to the disqualification of the results obtained by the Athlete the IT found:

> *"The Tribunal considers in line with the previous decisions of ITF v Koubek and ITF v Bogomolov that the matters should be looked at in the round so as to arrive at a result that meets the overall justice of the case. The Tribunal has come to the conclusion that fairness does not require a departure from the normal principle that the results should be disqualified for the period between 16 February 2017 and 7 June 2017. The ITF submitted this was the appropriate cut off point because on the 7 June 2017 the Player was again tested and the sample was returned negative. The Tribunal agrees this is the correct period for which the results shall be Disqualified in accordance with Article 10.8 of the TADP."*

17. The IT came to the following

> *"Conclusions*
>
> *41. The tribunal is concerned solely with sanction as the Player has already admitted the Anti-Doping Rule violation in this case. The decision of the*

Tribunal is unanimous. Taking into account all of the evidence and submissions made, the Tribunal is satisfied on the balance of probabilities, such that it is more likely than not, how the Prohibited Substance entered the Player's body. The degree of fault, whilst at the lower end of the scale, still constitutes fault which is reflected in the Period of Ineligibility of 2 months. This shall come into effect on 3 August 2017.

42. *The results of the Player shall be Disqualified in accordance with Article 10.8 for the period from 16 February 2017 to 7 June 2017."*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

18. With respect to the Award rendered by the IT on 3 August 2017 and notified to the Athlete on the same day, two appeals were filed with the Court of Arbitration for Sport ("CAS").

19. The Athlete, in the case CAS 2017/A/5301 (hereinafter: "the case 5301"), filed her Statement of Appeal on 23 August 2017 with the CAS Court Office. Mr. Jacopo Tognon was nominated as arbitrator. The Athlete requested to be granted an extension to file her Appeal Brief until 20 September 2017.

20. One day later, on 25 August 2017, the Nado filed its Statement of Appeal in the case CAS 2017/A/5302 (hereinafter: "the case 5302"). Mr. Ken E. Lalo was nominated as arbitrator.

21. By letter of 1 September 2017, in the case 5301, the CAS Court Office notified the Parties that the dispute was assigned to the Appeals Arbitration Division of the CAS. The Parties were invited to inform the CAS Court Office whether they agree to consolidate the present proceedings with the case 5302. Furthermore, in view of a possible consolidation of the two proceedings, the Parties were invited to inform the CAS Court Office whether they would agree to have a single Panel composed of Mr. Tognon, Mr. Lalo and a President appointed by the President of the Appeals Arbitration Division or her Deputy.

22. In reply, on the same day of 1 September 2017, the ITF notified its agreement with the consolidation of the two proceedings and Mr. Tognon and Mr. Lalo acting as arbitrators. Furthermore, the ITF had no objection to the extension of the time limit for the Athlete to file her Answer.

23. Also by letter of 1 September 2017, in the case 5302, the CAS Court Office notified the Parties that the dispute was assigned to the Appeal Arbitration Division of the CAS and the Parties were invited to inform the CAS Court Office whether they agree with the consolidation of the present proceedings with the case 5301. Furthermore, in view of a possible consolidation of the proceedings, the Parties were invited to notify whether they would agree to have a Panel composed of Mr. Tognon, Mr. Lalo and a President to be appointed by the President of the Appeal Arbitration Division or her Deputy.

24. By letter of 4 September, in the case 5302, the Nado notified its agreement to consolidate the two proceedings and with Mr. Tognon and Mr. Lalo acting as arbitrators.

In addition, the Nado requested to be granted, for the filing of its Appeal Brief, the same time limit as the Athlete for filing her Answer brief.

25. On 8 September 2017, the Athlete notified her agreement with the consolidation of the two proceedings and the extension of the time limit for the Nado to file its Appeal Brief until 20 September 2017.

26. By letter of 11 September 2017, the CAS Court Office, on behalf of the President of the Appeal Arbitration Division, notified the Parties to both proceedings that the proceedings 5301 and 5302 are consolidated and the Panel will be composed of Mr. Tognon, Mr. Lalo and a President to be appointed.

27. By letter of 11 September 2017, the Parties jointly proposed the following schedule for the further procedure:

> *"20 September 2017: Italian NADO Appeal Brief due in CAS 2017/A/5302*
>
> *10 October 2017: Errani consolidated answer brief (in CAS 2017/A/ 5302) and appeal brief (in CAS 2017/A/5301) due*
>
> *10 October 2017: deadline for filing of cross appeals in CAS 2017/A/ 5302*
>
> *30 October 2017: ITF consolidated answer brief due in CAS 2017/A/5301 and 45302; and deadline for filing any cross appeal on CAS 2017/A/5301*
>
> *6 November 2017: comments/observations of NADO Italia in CAS 2017/A/5301 due, if permitted by CAS*
>
> *6 November 2017: answer brief to cross appeals (if filed) due*
>
> *9 November 2017: CAS hearing."*

28. On 20 September 2017, the Nado filed its Appeal Brief in the case 5302.

29. By letter of 2 October 2017, the CAS Court Office informed the Parties that the Panel appointed to hear the consolidated cases is composed of Mr. Christoph Vedder, President, and Mr. Jacopo Tognon and Mr. Ken E. Lalo, arbitrators.

30. By letter of the CAS Court Office dated 6 October 2017, the Parties were informed that the hearing was scheduled to take place on 9 November 2017 at the CAS Court Office in Lausanne.

31. The Athlete filed her "consolidated Appeal Brief" in the case 5301 and Answer in the case 5302 on 10 October 2017. An edited version was delivered on 14 October 2017.

32. The CAS Court Office, by letter of 13 October 2017, in accordance with the joint proposal schedule, invited the ITF to submit its consolidated Answer Brief in the cases 5301 and 5302 by 30 October 2017.

33. On 30 October 2017, ITF filed its consolidated Answer Brief in both case 5301 and case 5302.

34. The Order of Procedure was provided to the Parties on 7 November 2017 and, duly signed, returned by the ITF and the Nado on 7 November 2017 and on 9 November 2017, respectively. The Order of Procedure signed by the Athlete was handed out at the beginning of the hearing.

IV. SUBMISSIONS OF THE PARTIES

35. The Athlete accepted the results of the analysis and, hence, the commission of an ADRV. Rather, as Appellant in the case 5301, she challenges the disqualification of her competitive results determined by the IT decision. With respect to the length of the sanction, however, the IT decision is challenged by the Nado, as Appellant in the case 5302. The ITF, on behalf of which the IT Award was rendered, acts as Respondent in both cases while the Athlete, in the case 5302, defends the length of the sanction as imposed on her by the IT. As a result, in the consolidated proceedings the Athlete partly challenges and partly defends the IT decision while both the length of the sanction and the disqualification of results are challenged by the Nado and the Athlete, respectively. In essence, the IT decision is challenged before the Panel with respect to the sanction as well as the disqualification.

1. Submissions with respect to the sanction

a. Nado Italia

36. In support of its appeal with regard to the length of the sanction, which was determined by the IT to be a two-month period of ineligibility, the Nado, in essence, submitted that the Athlete did not meet her burden of proof with respect to (1) how the substance entered her body and (2) the degree of fault or negligence. The Nado is of the view that the IT erred in the application of the burden of proof incumbent on the Athlete which is the standard of "by a balance of probability".

37. As a point of departure the Nado accepts, as the ITF and the IT did too, that there is no sufficient proof that the Athlete took the substance intentionally. Therefore, the regular sanction would be a two-year period of ineligibility.

38. At the outset the Nado, with reference to scientific studies, submitted that the substance of letrozole is an aromatase inhibitor which can increase testosterone in premenopausal females by blocking the conversion of testosterone to estrogens. The increase of testosterone could be beneficial to females. According to studies, letrozole can increase the lean body mass and decrease the body fat. These pharmacological effects on female athletes led to the inclusion of letrozole in the Prohibited List. The Nado refers to other cases where athletes were tested positive for letrozole.

39. First, the Nado challenges the findings of the IT related to the proof of how the substance entered the Athlete's body. In response to the explanation provided by the Athlete, and accepted by the IT, the Nado challenges the probability of the "*food contamination hypothesis*". The Athlete had submitted that she must have ingested letrozole through a pill of her mother's anti-cancer medication "Femara" which fell into the meal the family ate on 14 or 15 February 2017. According to the Nado, the IT "*considered objective truth what are mere declarations of Mrs. Errani*" (the Athlete's mother).

40. The Nado identified a number of inconsistencies in the mother's explanation. If the mother wanted to hide that she took an anti-cancer medication it would be illogical to store the Femara package in plain view in the kitchen. As a pharmacist by profession, the mother must have been aware of the risks of Femara for her daughter, in particular when, on several occasions, pills of Femara already had dropped on the worktop in the kitchen. For the Nado, it is "*very unlikely*" that the mother behaved "*so unprofessionally*". The Nado further refers to the information delivered by Mr. Giorgio Errani, the Athlete's father, that they changed the place of the storage and the manner of taking Femara after the knowledge of the AAF.

41. Based on the expert evidence of Prof. Ayotte, the Head of the Montreal laboratory, the Nado further submitted that the presence of letrozole in a concentration of 65 ng/ml could be explained "*only if one assumes that she ingested one entire pill*". Since the tortellini and the broth were eaten by the four members of the family, the Nado stated, the food contamination theory would be plausible only if the Athlete ate a single tortellino containing an entire pill inside its stuffing. This "*uniqueness of events*", for the Nado, is "*unlikely*".

42. The Nado agrees with the IT in stating that the burden of proof is upon the Athlete to establish, by a balance of probability, how the substance got into her body. However, based on the investigation of the Athlete's version the Nado comes to the conclusion "*that the alleged chain of events regarding the pill is not more likely*".

43. Second, with respect to the degree of fault or negligence, the Nado contends that the IT did not consider the fact that, in compliance with Italian legislation, there is an express "*doping*" warning on the back of the Femara package. In addition, at the front of the Femara package, "*Letrozole*" is indicated as a component. Thereof, the Nado concludes that a pharmacist and an elite tennis player could not disregard the risk to have such product so close to their food.

44. Furthermore, the Nado submitted that the Athlete, even if she has a clean disciplinary record, cannot be considered having an "*unblemished record*", as the IT did, because she consulted Dr. del Moral in 2012. Indeed, Dr. del Moral was involved in doping practices of athletes, including Lance Armstrong.

45. Finally, the Nado concluded from the above that, apart from the explanations of the Athlete and her family members, "*there are not objective pieces of evidence and findings to support the ingestion of a pill of Femara through the food.*" According to the Nado, "*that a single pill flying into the filling of a single tortellino is very far from the "more likely than not" scenario*". Since the alleged chain of facts has many inconsistencies the Athlete did not meet her burden of proof to show how the substance entered her body.

46. As a consequence, according to the Nado, the standard period of ineligibility of two years must be applied.

47. Moreover, even assuming that the way of ingestion of letrozole was proven, which is denied by the Nado, it was submitted that the factual circumstances of the case show that the Athlete, as an experienced elite-level athlete, should be sanctioned with a period

of ineligibility falling into the category of "*considerable or, at least, normal degree of fault under the pinciples set forth in Cilic, paras. 69-70.*"

48. The Nado requested that the CAS:

> "*a. adjudge and declare that the decision of the Independent Tribunal in the Athlete's case is set aside;*
>
> *b. adjudge and declare that the Athlete Ms. Errani is sanctioned with a period of ineligibility of 2 (two) years or – in the alternative and if it accepts the No Significant Fault or Negligence is applicable – the other period that the Panel will deem appropriate under the standards of Cilic, starting on the date on which the Appealed Decision has entered into force or the different period that may deemed applicable;*
>
> *c. adjudge and declare the NADO Italia is entitled to receive from Ms. Errani a contribution towards its legal fees and other expenses incurred in connection with this arbitration.*"

b. The Athlete

49. With regard to the length of the sanction which is the matter in dispute in the case 5302, the Athlete, in her combined Appeal Brief and Answer Brief dated 10 October 2017, submitted that the IT properly found that she inadvertently ingested the Femara pill and displayed a light degree of fault or negligence, if any.

50. At the outset, the Athlete accepted that letrozole was detected in her body and referred to the fact that neither the ITF nor the Nado contended that she took letrozole intentionally.

51. The Athlete submitted that, after she learned about the AAF, she and her family did everything possible to detect the source of the substance. She claimed that she did not take a pill of Femara mistakenly and had all of her nutritional supplements tested by Professor Donata Favretto of the Veneto regional anti-doping laboratory with negative results. The only remaining possibility, she submitted, is that she inadvertently ingested her mother's Femara by eating food prepared by her mother after a Femara pill was mistakenly mixed into the food during food preparation.

52. It was concluded that the positive sample taken on 16 February 2017 more likely than not was caused by ingesting Femara via the food eaten with her family on 14 and/or 15 February 2017. An intentional ingestion could be ruled out because, according to the Athlete, letrozole was not performance-enhancing for female tennis players and the hair testing conducted on the Athlete's hair on 28 April 2017 did not reveal the presence of letrozole.

53. During the investigation conducted by the family it turned out that her mother's anti-cancer medication Femara contained letrozole. The Athlete's mother kept a box of Femara on the counter space in the kitchen near to the place where she cooked because she had to take one pill every day.

54. According to the testimonies of the Athlete's mother, Fulvia Errani, and father, Giorgio Errani, the following happened or must have happened.

55. After the return of the Athlete and her family from the Fed Cup tournament in Forli, Italy, Fulvia Errani, in the afternoon of 13 February and the morning of 14 February 2017, prepared two of the Athlete's favourite dishes: beef stock cooked with chicken and meat-filled tortellini which were intended to be consumed either together or separately on 14 February with left-overs for 15 February 2017.

56. Fulvia Errani believes that one of her Femara pills must have accidentally dropped into either the beef stock or the tortellini that she prepared, on 13 or 14 February. This is because, on at least one previous occasion, more than one pill had dispensed from the blister package when she tried to take out just one pill, and fallen onto the working surface in the kitchen. When Fulvia and Giorgio Errani replicated the argued events it was shown that the Femara pill did dissolve in the beef stock or when mixed in the tortellini filling.

57. With regard to the standard of proof, i.e. that the Athlete has to establish, by a balance of probability, how the substance entered her body, it was submitted on behalf of the Athlete that the CAS had recognized two different approaches. The first method which, according to the Athlete, was applied by the IT, requires that the explanation offered by an athlete *"is more likely to be correct than not, by providing specific, objective and persuasive evidence not only of the route of administration of the substance (e.g. oral ingestion) but also of the factual circumstances in which the administration occurred."* According to this this approach no alternative explanations had to be offered and compared.

58. For the second approach reference was made to the *Contador* decision (CAS 2011/A/2384). According to that decision, when the meat that was allegedly contaminated is no longer available for inspection and, therefore, the direct proof that the meat was contaminated is not possible, an athlete can discharge his/her burden of proof by establishing (1) that the contamination was possible and (2) that other sources from which the substance may have entered the body do not exist or are less likely. In this particular situation the party which contests the explanation offered must substantiate alternative routes through which the substance could have entered the body. Under these circumstances, it was submitted, the panel had to examine (1) whether the ingestion of contaminated meat was possible and (2) which of the various alternative scenarios is more likely to have occurred.

59. From the above, the Athlete concluded that, following the first approach, she had to establish, by a balance of probability, that the source of letrozole in her sample was more likely than not the inadvertent ingestion of the substance through the contamination of the food during its preparation. Alternatively, under the *Contador* approach, the Panel had to examine, first, whether the ingestion of letrozole through the meal prepared by Fulvia Errani was possible and, second, which of the suggested alternative scenarios was more likely to have happened.

60. The Athlete contended that she could meet her burden of proof under both approaches. However, she submitted that under the given circumstances the *Contador* approach should apply to her case. According to the Athlete, none of the two alternative scenarios

presented by the Nado – inadvertent ingestion of one of the mother's Femara pills or ingestion via other medications available on the Italian market which contained letrozole - are more likely to have occurred than the explanation offered by the Athlete.

61. In conclusion, according to the Athlete, the following happened more likely than the alternative scenarios put forward by the Nado and more likely than not, at all. Fulvia Errani kept the Femara box in the kitchen in order to remember to take a pill every day. It was kept in a corner of the kitchen which was reserved for the Athlete's parents and to which the Athlete had no reason to go. On 13 and/or 14 February 2017, Fulvia Errani started to prepare beef stock and tortellini to be eaten by the family. Fulvia Errani remembered that previously, at least once, more than one pill came out of the blister package when she was trying to take out just one pill and that a pill has been lost, at least temporarily, in the kitchen. Experiments undertaken by the family at a later stage showed that a Femara pill dissolved in the beef stock as well as in the meat mixture for the filling of the tortellini. The Athlete tested all of her nutrition supplements for letrozole, with negative results.

62. Furthermore, the Athlete submitted that she did not take letrozole intentionally. In order to produce a performance-enhancing effect letrozole would have to be taken regularly, not merely a single pill. The concentration found in the sample was consistent with the ingestion of one pill. A regular use of letrozole would have been detected in the Athlete's hair which was tested on 28 April 2017. The Athlete's blood was tested at a hospital on 18 April 2017, i.e. before she was notified of the AAF, and on 28 April 2017, i.e. after the notification, for a complete panel of biochemical indicators resulting in a normal profile.

63. This scenario, the Athlete submitted, is not only, under the *Contador* approach, possible and occurred more likely than the alternative scenarios offered by the Nado, but also, under the approach followed by the IT, occurred more likely than not. The Athlete concluded that she, by a balance of probability, established how letrozole entered her body.

64. In reply to the Nado's submissions, the Athlete contends that Professor Ayotte, in her expert-witness testimony before the IT had stated that the Athlete must have ingested an entire pill in order to reach the concentration found in her sample. It is further submitted that the Athlete never noticed the Femara box before the incident because she kept her belongings exclusively in a separate studio in the house and had no reason to look at what her mother kept in the kitchen. She got knowledge of Femara only after her mother informed her about that medication following the notification of the AAF. The Athlete referred to Fulvia Errani's testimony that latter never realized that the storage of Femara in the kitchen could be a threat to her daughter under the anti-doping rules. The Athlete further submitted that the Nado did not provide any evidence to contradict the IT's finding that "*there is no evidence that letrozole would enhance the performance of an elite-level tennis player*". Lastly, the Athlete submitted that the fact that Fulvia Errani had changed the manner in which she kept Femara does not evidence that the former mode was negligent.

65. With respect to the degree of fault or negligence, the Athlete submitted that the IT applied the *Cilic* standard properly when it determined the "*light*" category of fault and

rejected the Nado's submission that the events display a moderate or considerable degree of fault.

66. In support of the classification in the category of a light degree of fault the Athlete stated that, before the incident, she had never seen the box of Femara and she did not even know that her mother was taking Femara. Therefore, she did not see the doping warning on the back of the box as well as the indication that Femara contains letrozole. The CAS decision referenced to by the Nado related to a situation where medication was used by the athlete in question herself.

67. With respect to the contact with Dr. del Moral the Athlete submitted that she was never charged with an ADRV in relation to Dr. del Moral.

68. Finally, the Athlete referred to the *Cilic* standard which distinguishes three degrees of fault: significant, normal, and light, and suggested to take "*the objective and the subjective level of fault*" into consideration. The objective element relates to "*what standard of care could have been expected from a reasonable person in the athlete's situation*" while the subjective element describes "*what could have been expected from that particular athlete, in the light of his particular capacities.*"

69. With respect to the objective criterion the Athlete submitted that she read the labels of all products she used and checked their components. All products were reliably sourced and did not contain prohibited substances. She had communicated to her mother that she was not to use any prohibited substances. She had visited her parents several times during the time when her mother took aromatase inhibitors such as letrozole without incident. She carried the ITF's anti-doping wallet card with her at all times showing her level of diligence regarding anti-doping obligations. Her subjective factors are "*largely neutral*". In conclusion, the Athlete submitted that her fault, under the *Cilic* standard, was in the "*light*" category and the sanction would be within the range assigned by the IT.

70. Based on the above the Athlete, in relation to the case 5302, requested the CAS to rule as follows:

> "*1. That the appeal of NADO Italia shall be dismissed.*
>
> *2. That Appellant NADO Italia shall bear all costs of the proceedings including a contribution toward Respondent Ms. Errani's legal costs.*"

c. ITF

71. The ITF is the Respondent in the case 5301, defending the disqualification of the results obtained by the Athlete as determined by the IT, as well as in the case 5302, defending the sanction imposed on the Athlete by the IT.

72. At the outset, with respect to the length of the sanction, the ITF declared that, before the IT, it had submitted that the Athlete had not met her burden of proving that it was more likely than not that her mother had inadvertently contaminated her food with letrozole. Nevertheless, the ITF has not appealed the decision of the IT

> *"because there was a very full and fair hearing before an independent and highly competent hearing panel ... during which the parties were able to present all of their evidence, test the other side's evidence through cross-examination, and make all legal and other submissions they saw fit, and the Independent Tribunal then made findings of fact based on its assessment of the credibility of the evidence offered, and applied the rules set out in the TADP to those facts to come to its conclusion. In such circumstances, out of respect for the integrity and independence of that process, the ITF would be unlikely to appeal a decision unless the Independent Tribunal made findings of fact that were wholly unsupported (or clearly contradicted) by the evidence, or applied the TADP rules to those facts incorrectly, or exercised the discretion given to it under the TADP rules in a wholly unreasonable/irrational manner."*

73. With respect to the length of the sanction, the ITF submitted that, since neither the Nado nor itself claimed an intentional use of letrozole, the point of departure is a presumptive regular ban of two years as the IT correctly determined. The ITF further agreed with the IT's position that the Athlete must prove that the source of letrozole she asserted "*is more likely than not to be correct and that it is not enough to show merely that it is the most likely of all the different hypotheses as to source identified by any party.*" Concerning the degree of fault, the ITF agreed with the IT's findings (1) that the Athlete's mother was at fault for keeping Femara close to the food preparation area and failing to take any precautions against inadvertent contamination, knowing that Femara is "*dangerous for her daughter*", (b) that that her mother's behaviour is imputable to the Athlete because she entrusted her mother with preparing her food, and (c) that the Athlete is also personally at fault for not taking any precaution against the risk of contamination despite the fact that her mother's medication was in plain sight at the kitchen counter. Nevertheless, the ITF "*does not contend that a two month ban was irrational, based on the evidence presented*" before the IT.

74. However, in its Answer, dated 30 October 2017, the ITF noticed that the fact that the Famara box carried a doping warning on its back was not disclosed before the IT.

75. The ITF submitted that the IT defined and applied the standard of proof "by a balance of probability" correctly. With reference to abundant CAS jurisprudence the ITF stated that the Athlete had to offer persuasive evidence that her explanation for the presence of letrozole "*is more likely than not to be correct*", that "*the occurrence of the circumstances on which the Athlete relies is more probable than their non-occurrence*". That means that "*there is a 51% chance that the scenario she advances is what occurred*".

76. The ITF strictly rejected the Athlete's approach, according to which it is sufficient to establish that her explanation of the source of letrozole is the most likely of the hypotheses presented, i.e. more likely than other explanations. By reference to CAS case law, the ITF submitted that the *Contador* approach is a peculiarity under Swiss law and was not supported by later CAS jurisprudence.

77. Concerning the Athlete's explanation the ITF emphasized that the Athlete in her submission to the IT submitted that she did know that her mother was taking Femara but she was not aware that Femara contained letrozole. However, in her oral evidence

before the IT and in this appeal she submitted that she did not know that her mother was using Femara until she was notified of the AAF and started searching for the source.

78. The ITF stressed another discrepancy. Before the IT, Fulvia Errani had witnessed that it happened more than once that more than a single pill came out of the blister package and fell onto the kitchen counter. That led the IT to conclude that the mother had dropped Femara pills on a number of previous occasions in close proximity to where the food was prepared. In the present proceedings, however, Fulvia Errani stated that she cannot conclude with certainty that a second pill fell out on more than one occasion prior to the events which gave rise to the present case.

79. The ITF concluded that the Athlete and her family just speculate that a pill may have fallen into the broth or onto the filling of the tortellini and then dissolved. They further speculated that the Athlete ate a sufficient amount of the contaminated meal to cause the AAF.

80. The ITF, as the IT did, questioned the Athlete's assertion that the contaminated meal hypothesis is consistent with the scientific evidence. Professor Favretto, the Athlete's expert, declared that the concentration of 65 ng/ml found in the Athlete's sample was consistent with the ingestion of "*as little as a quarter of one 2.5 mg letrozole tablet*" as part of a meal eaten on 14 and/or 15 February 2017. With reference to Professor Ayotte, according to the ITF, there is no reliable scientific evidence which would allow to deduce the dosage and time of the administration of letrozole. Professor Ayotte had only stated that the Athlete must have ingested letrozole at some time after her negative doping control on 14 September 2016 and prior to the one conducted on 16 February 2017.

81. Although the ITF did not appeal the IT's decision (see above) it submitted that the following evidence, including new evidence before this Panel, makes the Athlete's explanation "*less likely*":

- If Fulvia Errani lost a pill only on one previous occasion it is less likely that it happened this time again.

- Fulvia Errani maintained that her usual practice was to take her Femara pill before breakfast and before she started meal preparation. If she dropped a pill under such circumstance it "*appears highly implausible, if not impossible*" that such pill found its way into the meal ingredients.

- Fulvia Errani testified that she worked at the pharmacy on the morning of 13 February and during the afternoon of 14 February 2017 and, therefore, the preparation of the meal must have taken place on 13 February in the afternoon and/or on 14 February in the morning. Assuming that Fulvia Errani took her pill in the afternoon because she had forgotten to take it before breakfast, the pill would have had to drop into the broth of the beef stock or into the tortellini filling in the afternoon of 13 February 2017. In the broth the pill would have dissolved with the effect that the Athlete would have ingested only a negligible amount of letrozole. If the pill would have fallen into the tortellini mixture the part of the mixture with the pill would have to have been filled into one tortellini and the Athlete would have

had to have eaten that particular tortellino without noticing it. The ITF submits that the video experiment shows that the pill does not dissolve in the mixture.

82. The ITF concluded that:

> "*even if the contaminated meal hypothesis is possible ... it is hardly more likely than not to have happened. To the contrary, a series of unlike factors would need to have occurred in combination in order for the contaminated meal hypothesis to be correct.*"

83. Nevertheless, although for the ITF it is not relevant whether the contaminated meal hypothesis is more likely than other scenarios proposed, the ITF submitted that the intentional use of letrozole cannot be ruled out. The fact that no tennis player has previously tested positive for letrozole does not mean that they have not used it or that it has no performance-enhancing effect. According to the ITF, using letrozole to inhibit the conversion of endogenous testosterone into estrogene increases the body lean mass in the same way as administering exogenous testosterone would increase lean body mass. Professor Favretto stated before the IT that she cannot rule out that the concentration found could have been caused by chronic use that stopped around one week prior to the doping control.

84. The ITF submitted that the test conducted on the Athlete's hair on 28 April 2017 by Professor Favretto was not conclusive because her laboratory was not WADA-accredited, her analysis did not relate to a greater population, and her studies have not been published in peer-reviewed journals.

85. Also, the tests for letrozole conducted by Professor Favretto on the Athlete's nutritional supplements which did not reveal that substance, for the ITF, lacked evidentiary weight because no evidence was provided as to the chain of custody, the analytical methods used and the documentation or the fitness for purpose of the methods, and the detection limits of the methods.

86. With respect to the degree of fault, the ITF referred to the applicable "*legal principles*". According to the jurisprudence of the CAS, for "*no fault*" the athletes had to prove that they used "*utmost caution*" to avoid ingesting a prohibited substance intentionally or inadvertently while to establish "*no significant fault or negligence*" athletes had to prove that the departure from the standard of utmost caution was not significant. "*Utmost caution*", for the ITF, required that the athlete "*made every conceivable effort to avoid taking a prohibited substance*". From the case law, the ITF concluded that "*even in cases of inadvertent use of a Prohibited Substance, the principle of the Athlete's personal responsibility will usually result in a conclusion that there has been some degree of fault or negligence.*" Based on the CAS jurisprudence including, in particular, the *Puerta* decision, the ITF submitted that "*an athlete must take particular care to control the environment in which his/her food and drink is prepared, and be particularly cognizant of any risk of inadvertent contamination.*"

87. Also referring to the CAS jurisprudence, the ITF submitted that the fault of any member of the athlete's entourage, including close family and friends, is imputed to the athlete when assessing fault.

88. Although, before the IT, the Athlete had claimed for no fault or negligence, the ITF submitted that the present Panel is prevented from finding no fault or negligence because such finding would be *ultra petita* since the Athlete did not appeal the IT's decision with regard to its determination of no significant fault or negligence,

89. According to the ITF, both the Athlete and her mother were at fault and the latter's fault must be imputed to the Athlete because she entrusted her mother to prepare the food. The ITF submitted that

- Fulvia Errani, as a pharmacist, "*surely knew*" that she needed to avoid any risk of exposing her daughter to Femara; Giorgio Errani witnessed that Fulvia Errani knew that Femara was "*dangerous*" and, therefore, took some precautions;

- Fulvia Errani should have been aware of the need to keep Femara away from her daughter because of the clear doping warning on the back of the Femara box; the ITF emphasized that, before the IT, the doping warning on the back of the box was not disclosed;

- nevertheless, Fulvia Errani kept the Femara box on the kitchen counter right next to where she used to prepare the family meals;

- she did so although she knew that, previously, at least on one, if not more, occasions, pills fell out of the blister package;

- Fulvia Errani could have easily taken precautions to ensure that there was no risk of contamination of meals as she did after the AAF became known.

90. The ITF submitted that the Athlete is also personally at fault.

- In her submission and oral evidence before the IT, the Athlete had submitted that she was aware that her mother took Femara, but she did not know that Femara contained letrozole. If that is true, the ITF submitted, she knew it because the Femara box was in plain sight on the kitchen counter. However, the ITF noticed, the Athlete declared before the present Panel that she was not aware that her mother used Femara.

- Davide Errani, the Ahlete's brother and manager, also changed his evidence in this respect. While he had testified before the IT that he was aware that Fulvia Errani "*would keep her letrozole in the kitchen next to the area where she would prepare food*" he now stated that he was unaware of his mother using Femara before the notification of the AAF.

- With reference to pictures delivered by the Athlete, the ITF stated that the Femara box was in plain sight on the kitchen counter in a small kitchen in close proximity to the place where the meals were prepared. For the ITF, the explanation which was newly advanced before the present Panel, i.e. that a corner of the kitchen "*was reserved for Ms. Errani's parents and to which Ms. Errani had no reasons to go to*" does not affect the fact that the Femara box was clearly visible.

- The ITF stated that the Athlete never asked her mother about the medication on the kitchen counter nor did she ask her mother to take precautions that there was no risk of contamination.

- In conclusion the ITF submitted that the Athlete saw or should have seen the Femara box in the corner of the kitchen and, therefore, the risk of food contamination should have been obvious to her. She was able to control the risk but failed to do anything.

91. Based on the above, the ITF claimed that the IT was correct in rejecting the plea for "no fault or negligence" but to find fault or negligence on behalf of the Athlete.

92. With regard to the degree of fault or negligence, the ITF referred to the relevant CAS case law according to which the Athlete had to establish that the fault she bears for the inadvertent ingestion of letrozole, i.e. the extent of her departure from her duty of "utmost caution" is not significant. In particular, the ITF relied on the *Cilic* decision which distinguished: significant or considerable, normal and light degrees of fault. In order to determine which category applies the objective and the subjective elements should be considered. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element refers to what could have been expected from the athlete in question in the light of his or her personal capacities.

93. As the *Cilic* decision was made under Article 10.4 of the 2009 WADA Code, the ITF submitted, it must be interpreted in a manner consistent with Article 10.5.1 (a) of the 2015 WADA Code which is materially different from its predecessor. Whereas under Article 10.4 of the 2009 edition a reduction was permitted even if the athlete's fault was significant, under Article 10.5.1 (a) TADP no reduction is permitted unless the Athlete establishes that she bears no significant fault or negligence. Under the 2015 WADA Code a reduction can be considered only for a "*normal*" or "*light*" degree of fault, with the result that no part of the 0 to 24 month spectrum is reserved for a "significant" degree of fault. Therefore, the ITF suggested, the potential ranges for normal and light degree of fault span the entire spectrum of 0 to 24 month with "light" cases from 0 to 12 month and "normal" cases from above 12 months up to 24 months.

94. In conclusion, with regard to the degree of fault, the ITF submitted that it "*argued* [before the IT] *that the Player's fault was at least on the "normal" range, and based on the facts set out above it sees no reason to change its stance. However, it has not appealed against the Independent Tribunal's finding that the Player bore No Significant Fault or Negligence for her violation and that a two month ban was appropriate. Therefore the ITF says nothing further at that point ....*"

95. Therefore, also with respect to the disqualification of the results (see below), the ITF request the CAS

> "*to dismiss the appeals of the Player and NADO Italia and leave undisturbed the Decision of the Independent Tribunal, without costs.*"

2. Submissions with respect to the disqualification of results

96. The IT disqualified the results the Athlete obtained from 16 February 2017 to 7 June 2017, the date when the Athlete was tested negative.

a. The Athlete

97. Relying on Article 10.8 TADP the Athlete, as Appellant in the case 5301, in her Appeal Brief dated 10 October 2017, claimed that "*fairness requires otherwise*" than to disqualify her results. As Article 10.8 TADP refers to "*the period of ineligibility*" and no period would have been imposed on her in case of no fault or negligence, she submitted that the Panel "*would be perfectly justified to find that this is a case of no fault or negligence.*" The Athlete claimed that the fact that she did not challenge the IT's finding that she had an insignificant amount of fault with regard to the ingestion of letrozole did not mean that she accepted that she was at fault.

98. In support of "no fault or negligence" the Athlete asserted that she "*could not have known that her food was contaminated with letrozole*" and did not even know that her mother was using Femara, what Femara was or that it contained letrozole and had never seen the Femara box. Given that she did not know of its presence in the house, the Athlete could not have been expected to take precaution to ensure that letrozole did not enter the food that her mother prepared.

99. Even if she was at no significant fault or negligence the Athlete submitted that "*fairness requires*" not to disqualify her results. With reference to tennis-related first-instance cases the Athlete relied on that "*the overall justice of the case*" must be considered and that the disqualification "*may be inappropriate in circumstances where the doping offense has not created any unfairness to other players.*" She has further referred to the *Glaesner* decision of the CAS (CAS 2013/A/2374) and other CAS jurisprudence, according to which "*fairness*" includes situations where the "*results ... were not likely to have been affected*" by the ADRV.

100. In support, the Athlete submitted that the inadvertent ingestion of letrozole was not intended to enhance performance nor did it do so and she did not use letrozole on a regular basis. Her next doping test was negative and none of her subsequent results have been affected by the ingestion of letrozole. Therefore, the Athlete found, no unfairness to other players occurred. The next match took place on 8 March 2017, 20 days after her positive test. Under these circumstances, the Athlete concluded that it would be unfair to disqualify any of her results as none of them would have been affected by her ADRV.

101. Alternatively, the Athlete requested that no results obtained after 28 April 2017 should be disqualified. According to her, the IT, by limiting the period of disqualification until 7 June 2017, the date of her first and negative doping control after 16 February 2017, implicitly recognized that it would be unfair to disqualify results after it was shown that letrozole was no longer present.

102. The Athlete's urine sample collected on 28 April 2017 and analysed by Professor Favretto was negative. Therefore, no results obtained after 28 April should be disqualified.

103. The Athlete requested the CAS to rule:

"- *that the appeal of Ms. Errani is admissible,*

- *that the decision of the Independent Tribunal with respect to the issue of the results disqualification is set aside,*

- *that none Ms. Errani's results after 16 February 2017 shall be disqualified; or in the alternative, that the period of results disqualification be limited to the period from 16 February 2017 to 28 April 2017,*

- *that Respondents shall bear all costs of the proceedings including a contribution toward's Appellant's legal costs."*

b. ITF

104. In its capacity as Respondent in the case 5301 the ITF, at the outset, refers to Article 10.8 TADP, according to which the disqualification of results is the norm and the non-disqualification the exemption "*to be applied only where the Player proves that fairness so requires*." The ITF submitted that the Athlete did not identify grounds to disturb the IT's decision in this regard.

105. According to the ITF, Article 10.8 TADP does not provide that the absence of fault is a ground not to disqualify subsequent results. Moreover, in any event the Athlete was prevented from advancing "no fault" because she did not challenge the IT's decision in that regard.

106. The ITF acknowledged that fairness requires that the "*overall justice of the case*" would be considered. The ITF emphasized that the notification of the Athlete's AAF expressly stated that, though the Athlete was free to compete, the ITF, should the charge be upheld, would disqualify the results obtained by her during this period. She was given the opportunity to accept a voluntary provisional suspension to be credited against any period of ineligibility imposed but she refused. That was the Athlete's decision and she must accept the consequences. Moreover, at that moment of time she had no explanation for how letrozole had entered her body.

107. If there would be clear evidence that the Athlete's subsequent performances were not affected by her ADRV, the ITF would accept that fact within the assessment of "fairness". However, the ITF submitted, the Athlete cannot prove that her results prior to 7 June 2017, the date of her first negative doping test after 16 February 2017, were not tainted. The only reliable urine test that showed that letrozole was not in her body was the doping control conducted on 7 June 2017. The urine sample taken by Professor Favretto on 28 April 2017 was not collected in accordance with the procedures required by the TADP and not analyzed by a WADA accredited laboratory and using a method validated by the WADA.

108. The ITF, also in the case 5302 (see above), requested for relief

"*to dismiss the appeals of the Player and NADO Italia and leave undisturbed the Decision of the Independent Tribunal, without costs.*"

V. The Hearing

109. The hearing took place on 9 November 2017 at the CAS Court Office in Lausanne. Present were, in addition to the Panel and Mr. Daniele Bocucci, Counsel to the CAS

- on behalf of the Athlete:
  a. the Athlete herself
  b. Mr. Howard L. Jacobs, Counsel to the Athlete
  c. Ms. Lisa Jones, Counsel to the Athlete
  d. Mr. Mike Morgan, Counsel to the Athlete
  e. Ms. Valentina Aragona, Associate
  f. Ms. Laura Roccati, Interpreter
  g. Mrs. Fulvia Errani, Witness
  h. Mr. Giorgio Errani, Witness
  i. Mr. Davide Errani, Witness
  j. Professor Donata Favretto, Expert witness
  k. Dr. Rossella Snenghi, witness, by phone
- on behalf of the ITF:
  l. Mr. Stuart Miller, Senior Executive Director, Integrity and Development, ITF
  m. Mr. Jonathan Taylor, QC, External Counsel to the ITF
  n. Ms. Lauren Pagé, External Counsel to the ITF
  o. Professor Christiane Ayotte, Expert witness, via Skype
- on behalf of the Nado:
  p. Mr. Mario Vigna, Deputy Chief Prosecutor, Nado Italia
  q. Mr. Michele Signorini, Director, Nado Italia
  r. Professor Francesco Botré, Expert

110. After the opening of the hearing by the President and the establishment of the attendance, the witnesses and experts present were invited to leave the court room until they were called in again in order to give their testimony.

111. The President asked the Parties whether they had observations with regard to the proceedings so far, in particular concerning the jurisdiction of the CAS, the composition of the Panel, and the admissibility as well as the applicable law. The Parties declared not to have any objection.

112. At the outset of the hearing, the President stated that, as the Athlete admitted the presence of letrozole in her body, the issues remaining in dispute in the consolidated arbitrations were: the length of the sanction which depends, first, on how letrozole entered the Athlete's system and, second, the degree of fault or negligence shown by the Athlete in case 5302 as well as the disqualification of the Athlete's results in case 5301.

113. Furthermore, the President instructed the Parties that the Panel accepted the time-table for the hearing jointly proposed by the Parties with some changes, which were agreed to by the Parties, and invited them to strictly adhere to the dense schedule.

114. In his Opening Statement, Counsel for the Athlete stated that the decision of the IT was correct except for the disqualification of the Athlete's results. With reference to the evidence before the IT and before the Panel, it was submitted that the Femara medication present in the kitchen was the source of the AAF and that the Athlete ingested Femara inadvertently through the meal prepared by her mother. This scenario, according to the Athlete, was more likely than not.

115. With respect to the length of the sanction which depends on the degree of negligence of eating the meal, is was submitted that the Panel should respect the finding of the IT.

116. The Counsel for the Athlete further submitted that the IT was wrong in determining the period of the disqualification of the results obtained by the Athlete. The Athlete relied on the *fairness*-exception and submitted that a single and inadvertent taking of letrozole had no performance-enhancing effect. Therefore, according to the Athlete, no results should be disqualified at all or, at least, no result obtained after 28 April 2017.

117. The Nado, at the outset of its Opening Statement, asserted that it was not allowed to intervene before the IT and, therefore, is not bound by the determinations of that tribunal. The Nado referred to the high responsibility of athletes for food contamination, in general, and submitted that the Athlete did not discharge her burden of proof with regard to the source of letrozole, in particular. There were contradictions in the witness statements and the IT did not properly evaluate the evidence. In particular, the Nado referred to the witness statement by the Athlete's mother that a second Femara pill fell out of the blister box on a number of occasions. This version was changed before the present Panel. The Nado stated that it must not provide a more likely version than the one presented by the Athlete.

118. In its Opening Statement, the ITF referred to the integrity of the procedure before the IT, which was a fair proceeding, and claimed that, therefore, the IT decision must be upheld unless the IT reached a totally wrong finding. That, according to the ITF, was not the case. With respect to the standard of proof by a balance of probabilities, the ITF adhered to the CAS case law according to which the occurrence of a scenario must be more likely than its non-occurrence.

119. At the beginning of the evidentiary proceedings, the Counsel for the Athlete examined the Athlete herself after she was sworn in. During the examination which was conducted in English, the Athlete was occasionally assisted by an interpreter who was brought by her. Upon request by the Panel, the interpreter declared to be independent. At the outset, the Athlete confirmed her written statement. Then she stated that, after a long stay in the US, she returned to her parents' home in October 2016, underwent a treatment for meningitis in November 2016 and suffered from fever in January and February 2017. A mononucleosis was diagnosed and treated with homeopathic medication. From 6 to 13 February 2017 she competed in the Federations Cup at Forli, Italy and saw her doctor before and after that event. She submitted that she made sure that the medication prescribed to her did not contain prohibited substances.

120. In her parents' house she moved into a separate studio and kept all of her belongings including her medication in a separate space dedicated for her. She submitted that she was not aware of her mother taking Femara and that Femara contained letrozole nor did she take one of the Femara pills.

121. On 16 February 2017, during the doping control, she declared her medications in the DCF. The products she was taking were analyzed by Professor Favretto after her AAF became known and did not reveal any prohibited substance. The Athlete further submitted that she learned from her brother that the source of the prohibited substance letrozole could be the Femara box kept in the kitchen.

122. After her positive test, the Athlete submitted, she played in the tournaments of Istanbul, Madrid, Rome, Mallorca, Wimbledon, and Washington. On 7 June 2017 she underwent the first doping control after the one on 16 February 2017. After the period of ineligibility imposed on her by the IT decision elapsed on 2 October 2017 she returned to competition. Her ranking fell from 17 or 19 before the test to 146 at present. According to the Athlete, she lost about 400 points and was not qualified for the Australian Open 2018.

123. Then the Athlete was examined by the Nado about the risk of food contamination. She declared that, although having been aware of that risk, she did not follow a particular diet but, during competitions, exclusively ate at restaurants advised by the organisers. She further stated that the medication she took in January and February 2017 was prescribed by the doctors of her National Federation and confirmed that her blood test evidenced that she had mononucleosis.

124. The Athlete further stated that she did not check the kitchen when she returned from the U.S. According to her, it was her mother's part of the house and she would not have taken anything from that space.

125. She confirmed that she lost 190 points from 16 February to 28 April 2017 and additional 220 points from 28 April to 7 June 2017.

126. Next, Mrs. Fulvia Errani, the Athlete's mother, was sworn in and examined by the Athlete's Counsel. Her testimony was translated by the interpreter brought on behalf of the Athlete. Mrs. Errani, first, confirmed her written statement. In particular, she confirmed that, prior to 13 February 2017, a Femara pill fell out of the blister box and got lost in the kitchen, on one occasion. She further confirmed that she noticed the

doping warning on the back of the Femara box and, therefore, knew that that medication was "*dangerous*" for her daughter. Nevertheless, she kept the box at its regular place because it was her private corner and her daughter never touched her belongings.

127. After the AAF had become known, the Femara medication, for Mrs. Errani, was the only logical explanation.

128. During the cross-examination by the Nado, the situation in the kitchen was scrutinized on the basis of the pictures included in Mrs. Errani's written statement. Those pictures were taken when the family tried to examine whether and how Femara could be the source of the AAF. In that context, Mrs. Errani stated that she checked every day that she actually took a Femara pill.

129. In the cross-examination by the Nado, Mrs. Errani testified that, now, she did "*not know for sure*" that a second pill fell out on some occasions. She further stated that, on the relevant days, she prepared four to five liters of broth but does not recall the weight of the pasta.

130. Then Mr. Giorgio Errani, the Athlete's father, was sworn in and heard third, in English. Upon request by the Counsel to the Athlete he confirmed his written statement.

131. In the cross-examination by the Nado, Mr. Errani confirmed that the pictures were taken after the AAF became known.

132. In reply to a question by the ITF, Mr. Errani stated that nobody touches the stuff in the kitchen because "*it is the place of my wife*."

133. Mr. Davide Errani, the brother and manager of the Athlete, was sworn in and heard as the last of the Athlete's witnesses, in English. He confirmed his written statement.

134. Confronted by the Nado with discrepancies between his statements before the IT and before the present Panel, Mr. Davide Errani stated that he was not aware of his mother's medication because he did not live in his parent's house and, in particular, did not care about what was in the kitchen.

135. In reply to a question by the ITF, Mr. Davide Errani explained that only after the AAF had become known he found the Femara box in the kitchen.

136. At the end of the examination of the Athlete and the witnesses presented on her behalf, the Panel invited the Parties to address the following issues in the examination of the expert-witnesses and experts:

- experience with testing for letrozole,
- the results of the testing on 28 April 2017,
- the reliability of the data received from the hair testing,
- can the AAF be explained by the consumption of less than half a pill of letrozole,
- conclusions from the data of the analysis of the Athlete's sample, and

- potential performance-enhancing effects of letrozole for women.

137. During the examination of the expert-witnesses and the experts were present and sworn in:

- Professor Donata Favretto, Head of the laboratory for forensic toxicology and anti-doping, University of Padova, Italy, expert-witness on behalf of the Athlete

- Professor Christiane Ayotte, Head of the WADA-accredited laboratory in Montreal, Canada, expert-witness on behalf of the ITF, via Skype

- Professor Francesco Botré, Scientific Director of the WADA-accredited Italian Anti-Doping laboratory in Rome, Italy, expert on behalf of the Nado Italia.

138. With respect to the issue of her experience of testing for letrozole, Professor Ayotte reported the analysis of more than 10 letrozole urine-samples of females, 8 of which resulted in AAFs (including two blind tests) which were referred to in her statement. According to Professor Ayotte, there is no threshold for letrozole, at present. Professor Ayotte stated not to have experience of hair testing for letrozole. Professor Botré added that the concentration is only measured when a threshold exists and that the excretion time of the metabolites of letrozole varies considerably. Professor Favretto declared to have no general experience of hair testing for letrozole.

139. Concerning the issue of performance-enhancing effects of letrozole, Dr. Rosella Snenghi, forensic medical examiner, forensic toxicologist, University hospital, Padova, Italy, was heard on behalf of the Athlete via phone. Dr. Snenghi was sworn in and declared that she had no specific expertise in letrozole but general doping-related expertise. Dr. Snenghi stated that letrozole "could" have a performance-enhancing effect for females by reducing the fat mass and, together with training, increasing the muscular mass. For that effect, however, an "*ongoing*" application was needed. According to Dr. Snenghi, no relevant studies are available.

140. Professor Botré stated that performance-enhancement is not crucial for the inclusion of letrozole on the Prohibited List and even a very little enhancing effect could be sufficient to win a competition. Professor Fevretto declared that she had examined the antropometric parameters of the Athlete which were in the general range and did not indicate an administration of letrozole. According to Professor Favretto, no anabolic effects were found on the Athlete. It was the first time, on 28 April 2017, that she examined the Athlete and had no knowledge of previous data.

141. Subsequently, the data collected at the Athlete's examination on 28 April 2017 by Professor Favretto and submitted in her statement were discussed. While Professor Favretto concluded that, at that very day, no letrozole and/or metabolites were present, Professor Botré came to the view that the data presented would not allow to conclude that letrozole was not present. Professor Ayotte concurred in stating that the data was not collected and analysed under controlled conditions which were necessary for doping control and, therefore, did not prove that letrozole was not present.

142. With regard to the results of the hair test, Professor Favretto described how the testing was carried out and stated that no sequence of the Athlete's hair showed letrozole.

According to Professor Favretto, a single dose of 2.5 mg of letrozole, i.e. a single pill, could be sufficient for a positive test. Professor Ayotte did not support Professor Favretto's conclusions because of the lack of controlled circumstances. For Professor Botré the hair test which took place under uncontrolled conditions was not reliable but, nevertheless, he stated that he had confidence in Professor Favretto's test.

143. Under the assumption that a pill of letrozole fell into the broth or the tortellini filling, the thermal stability and the solubility of letrozole, when it fell into the broth or the meat-filling, was discussed. Professor Botré stated that for him no conclusion was possible. Professor Ayotte declared that letrozole is not soluble in water and considered it "*very unlikely*" that on pill or even one quarter of a pill was ingested by one person.

144. In conclusion, from the available data, Professor Botré summarized that (1) there was no chronic use of letrozole rather than either one, two or three intakes, (2) the concentration of letrozole decreases with the temperature, (3) no conclusion was possible on how much letrozole the Athlete had taken because the metabolism of letrozole varies very much, and (4) he could not comment on the hair-testing.

145. Professor Ayotte concluded that, for her, it was only certain that letrozole was ingested between the last negative doping control prior to the one at stake, and 16 February 2017. Professor Ayotte considered herself unable to make a statement on how much and how long letrozole was ingested. The concentration of 65 ng/ml found in the Athlete's sample could be consistent with three days of taking letrozole.

146. In his final oral pleading, the Counsel for the Athlete, first, in defence of the length of the sanction determined by the IT, submitted that the inadvertent ingestion of letrozole with the meal was more likely than not. The consideration of the balance of probability includes the likelihood of other possibilities. The Counsel for the Athlete asserted that the Athlete did not mistakenly take a Femara pill. She came home after the Federations Cup and lived at a separate place in the house. The boxes of medications were different.

147. According to the Athlete, none of the testimonies undermined the scenario of food contamination. A Femara pill could have caused the AAF. The Athlete must not have ingested an entire pill. The hair test was negative. It occurred more than one time that pills fell out of the package. The doping warning on the back of the Femara box was irrelevant because the Athlete did not know about Femara being kept at the house. According to the Counsel for the Athlete, the IT did not establish the facts wrongly. It was further submitted that the IT, with reference to the CAS case law, correctly found a light degree of fault or negligence and determined a two-month sanction.

148. With respect to the disqualification of the Athlete's results the Counsel for the Athlete claimed that the fairness-clause must be applied. The ingestion of letrozole by the Athlete did not lead to an enhancement of her performance and, therefore, no results should be disqualified.

149. The Athlete's requests for relief were:

- to dismiss the appeal against the decision of the IT with respect to the determination of the period of ineligibility;

- to set aside the decision of the IT with respect to the disqualification of the Athlete's results;

- to be granted a contribution to her legal costs.

150. In his oral pleadings, the Counsel for the Nado submitted that the Athlete's connection with Dr. de Morale must be considered for the appropriate sanction. The standard of proof by a balance of probability was to be interpreted according to the *Cilic* doctrine. Letrozole had an anabolic effect by reducing the fat body mass. The Counsel for the Nado pointed to the discrepancies in the witness statements which, compared to the proceedings before the IT, changed. With respect to the source of letrozole in the Athlete's system, the Nado submitted that it had no burden to establish other alternative sources, and merely proposed different possibilities. Under the assumption that the meal prepared by the Athlete's mother indeed was the source of the AAF, it was emphasised that the Athlete lived at the house for already some months, that the prohibited substance was in the kitchen and that the Athlete, as a matter of principle, should avoid any food contamination. Under this high level of responsibility the Athlete was obliged to control the kitchen and her meals similarly to the control which needs to be applied in a restaurant. For the Nado, the Athlete displayed a normal degree of fault or negligence.

151. Therefore, the Nado requested the Panel

- to impose upon the Athlete a period of ineligibility of two years or, at least, longer than two months.

152. The ITF, at the outset of its final pleading, argued that the decision of the IT must be respected but acknowledged that different evidence was presented before the Panel. However, the ITF defended the IT decision with respect to the sanction. The scenario advanced by the Athlete was more likely than not. Mrs. Errani was aware of the risk related to her Femara medication and the Athlete did not care about the fact that the Femara in the kitchen was a risk of contamination.

153. The ITF accepted the "*new evidence*" concerning the disqualification of the results. According to the ITF, both Professor Ayotte and Professor Botré did not rule out that letrozole was still present when the Athlete was tested on 28 April 2017 by Professor Favretto and, therefore, the Athlete was not able to prove that the fairness-exception could be applied. Her results must be disqualified.

154. The ITF requested the Panel to rule

- that the appealed decision is upheld in its entirety.

155. After the final pleadings, the Athlete was granted the opportunity to make a personal statement. In particular she declared that she did not take a Femara pill deliberately or by mistake and asserted that her professional life was at stake.

156. In the event a period of ineligibility of more than two months would be imposed on the Athlete, the Parties were granted the opportunity to comment on the commencement of such sanction. The Counsel for the Athlete identified three options: the date of the doping control, 3 August 2017, being the date of the IT decision, or a date to be

determined between 3 August 2017 and the date of the new sanction. In any event, the Counsel for the Athlete requested to avoid a "*second sanction scenario*". The Nado had no specific comment but pleaded for lenience and that "*no second period*" should be determined. The ITF submitted that even an increased sanction is one single sanction.

157. The Parties confirmed that, during the hearing, they had the full and fair opportunity to make their case.

158. The President announced that the Panel would deliberate the facts and the law and render a written reasoned award in due time and closed the hearing.

VI. Jurisdiction

159. 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."*

160. In case 5301 as well as in case 5302 the appeal is against a decision of the IT. The IT is the body responsible, according to Article 8.1.2 TADP, to hear doping-related disputes arising within the jurisdiction of the ITF. The IT decision, therefore, constitutes a "*decision of a federation*".

161. Pursuant to Article 12.2.1 TADP, *inter alia* a decision that an ADRV "*has been committed* "and a decision "*imposing consequences"* for an ADRV may be appealed directly to the CAS.

162. Furthermore, according to Article 12.2.1 a) and c) TADP, "*the Participant who is the subject of the decision being appealed*" and "*the NADO(s) of the country of residence of the Participant or of a country where the Participant is a national or a licence-holder*" have the right to appeal. Based on that rule, the Athlete, in case 5301, and the Nado, in case 5302, were entitled to appeal the IT decision.

163. Therefore, the CAS has jurisdiction to hear the consolidated cases. The Panel's jurisdiction was not contested.

VII. Admissibility

164. Article R49 of the Code provides as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed*

against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late."

165. By virtue of Article 12.5.1 TADP, which are the rules applicable to the present arbitration (see below), the deadline for filing an appeal by either the Athlete or the Nado "*shall be 21 days from the date of receipt of the decision in question.*"

166. The Athlete received the IT decision on 3 August 2017 and filed her Statement of Appeal on 24 August 2017 while the Nado received the IT decision on 7 August 2017 and filed its Statement of Appeal on 25 August 2017. Therefore, in both cases, the appeals against the decision of the IT rendered on 3 August 2017 were lodged within the time limit of twenty-one days. The admissibility of the appeals was not challenged by the Parties.

VIII. APPLICABLE LAW

167. 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."

168. Pursuant to par. 1.11 of the *Introduction* to the TADP 2017,

"*Any player who enters or participates in a Covered Event or who has an ATP or WTA ranking ... in the 2017 calendar year ... in automatically bound by and required to comply with all the provisions of this Programme ...*"

The Fed Cup, in which the Athlete competed just before the doping control is a Covered Event according to par. 1.10 of the *Introduction*. Furthermore, the Athlete was ranked by the WTA in 2017.

169. According to par. 1.6.1 of the *Introduction*, the TADP 2017 applies to all cases where the alleged ADRV occurred after its entry into force, i.e. 1 January 2017.

170. The TADP 2017, therefore, constitutes the applicable rule of law for the dispute before the Panel. The application of those rules, which had been applied by the IT in its decision, was not contested by the Parties.

IX. MERITS

171. The IT, in its appealed decision rendered on 3 August 2017, relied on the evidence provided before it. However, in these appeal proceedings, according to Article R57 of the Code, the Panel has the power to review the facts and the law *de novo*.

1. ADRV: the presence of a prohibited substance, Article 2.1 TADP

172. Letrozole was found in the Athlete's A and B samples collected on 16 February 2017. Letrozole is a prohibited substance listed in the 2017 WADA Prohibited List under S4.1 ("*Hormone and Metabolite Modulators*").

173. The occurrence of an ADRV was admitted by the Athlete. However, in case 5301, the Athlete challenges the disqualification of her results and, in case 5302, the Nado contests the length of the period of ineligibility of two months imposed on the Athlete by the IT.

2. The period of ineligibility, Articles 10.2 and 10.4 through 10.6 TADP

a. The regular sanction, Article 10.2 TADP

174. For an ADRV in the form of the presence of a prohibited substance according to Article 2.1 TADP, Article 10.2.1 (b) TADP provides, if the substance is a specified substance, for a period of ineligibility of four years if the ADRV was intentional. Pursuant to Article 3.4.1 TADP, letrozole is a specified substance.

175. Neither before the IT nor in the present proceedings did the ITF, as the relevant Anti-Doping Organisation, establish or even claim that the Athlete administered letrozole intentionally.

176. Therefore, according to Article 10.2.2 TADP, as a point of departure, the regular sanction to be applied would be a period of two years of ineligibility, subject to a potential elimination or reduction in accordance with Articles 10.4, 10.5, and 10.6 TADP.

b. Elimination of the sanction for no fault or negligence, Article 10.4 TADP

177. Although the Athlete had claimed before the IT that she did not bear any fault or negligence, which was rejected by the IT, such argument was not submitted in support of her appeal before the Panel nor raised by any other Party.

178. Hence, although the Athlete claimed in these proceedings that she did not bear any fault or negligence and did not appeal for that reason because the period of ineligibility would have already elapsed, the consideration of Article 10.4 TADP by the Panel would be *extra petita* in the sense of Article 190.2 c of the Swiss Federal Code on Public International Law.

c. Reduction of the sanction for no significant fault or negligence, Art. 10.5 TADP

179. Pursuant to Article 10.5.1 TADP, where an ADRV involves a specified substance and an athlete can establish that he or she bore no significant fault or negligence, the period of ineligibility shall be between no period, at a minimum, and two years of ineligibility, at a maximum.

180. According to Article 8.6.2 TADP, the applicable standard of proof for the Athlete to establish no significant fault or negligence is "*by a balance of probability*".

aa. Source of the prohibited substance

181. As set forth in the *Definitions* attached to the TADP, the first condition to be met for establishing no significant fault or negligence is "*that the Athlete must ... establish how the Prohibited Substance entered his or her system*".

182. Therefore, under the applicable provisions of the TADP, the Athlete had to establish by a balance of probability that she ingested letrozole, which was contained in the Femara medication of her mother, through the meal prepared by her mother. As to the understanding of what exactly means "*by a balance of probability*", the Panel adheres to the general approach established by CAS panels in consistent case law. In accordance with the established jurisprudence of the CAS (see, for example, CAS 2014/A/3615, para. 52; CAS 2012/A/2759, paras. 11.31–11.32), the occurrence of the scenario suggested by the Athlete must be more likely than its non-occurrence and not the most likely among competing scenarios.

183. Under the approach followed by the Panel, it is not pivotal whether or not the food contamination scenario is more likely than other scenarios which were or may be advanced as alternatives, such as in the present dispute an inadvertent intake of a Femara pill by the Athlete or even a deliberate administration of letrozole. The Panel does not need to decide which is the most likely between two or more competing scenarios but rather the Athlete must prove that the chain of events presented by her did happen more likely than not. Of course, the Athlete is allowed to address other scenarios put forward in an effort to support her position. However, neither the ITF as the relevant Anti-Doping Organization nor, in this appeal, the Nado have the burden of proving the prevailing likelihood of a different scenario or are obliged to put forward any other competing scenarios.

184. Based on the written and oral evidence and expert-evidence provided before it the Panel accepts, but just slightly, as the IT did, that the occurrence of the food contamination scenario is more likely than its non-occurrence.

185. Against the background that on, at least, one previous occasion a Femara pill fell out of the box and of the day-to-day routine of her mother taking her medication, the storage of the Femara box in the immediate proximity to the place where the meals were prepared and relying particularly on the testimony of Mrs. Fulvia Errani, which the Panel found most credible, it is deemed more likely than not that a pill of Femara found its way into the broth or the tortellini filling and that the Athlete ingested an amount of letrozole sufficient to cause the AAF.

186. The concentration of letrozole found in the Athlete's samples is not non-compatible with the single intake of the amount of letrozole corresponding to one or less than one pill of Femara. The expert evidence given by Professors Ayotte, Botré and Favretto concur in that, due to the large variation in individual excretion time of letrozole and the lack of reliable scientific studies, the explanation of a single pill of Femara mixed in the food and the inadvertent ingestion of an amount of letrozole equal to one or less than a pill cannot be ruled out but is an acceptable explanation.

bb. Degree of fault, Article 10.5.1 (a) TADP

187. In order to be entitled to a reduction or elimination of the sanction for no significant fault or negligence, pursuant to the *Definition* attached to the TADP, the Athlete must establish that 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 ADRV. No Fault or Negligence is defined as a situation where an athlete

> "*did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution*",

that he/she committed an ADRV.

(1) The *Cilic* principles accommodated

188. Those elements are to be understood and applied in accordance with the established CAS case law as determined, in particular, in the *Cilic* decision (CAS 2013/A/3327 Cilic v. ITF, CAS 2013/A/3335 ITF v Cilic). As determined in *Cilic*, an "*objective*" and a "*subjective level of fault*" must be taken into consideration. The objective level of fault or negligence points to

> "*what standard of care could have been expected from a reasonable person in the athlete's situation*"

and the subjective level consists in

> "*what could have been expected from that particular athlete, in the light of his particular capacities.*"

The point of departure for the level of care to be expected from athletes is their high responsibility to take care that no prohibited substance enters their system as it is set forth in Article 2.2.2 TADP:

> "*It is each Player's personal duty to ensure that no Prohibited Substance enters his/her body. A Player is responsible for any Prohibited Substance or any Metabolites or Markers found to be present in his/her Sample.*"

189. In the *Cilic* award of 2014, which was rendered under a version of Article 10.4 TADP which corresponded to Article 10.4 of the 2009 WADA Code, three degrees of fault or negligence were distinguished: "*significant*", "*normal*" and "*light*" degree of fault or negligence and the range of the period of ineligibility distributed accordingly. However, the 2015 version of the WADA Code, in its Article 10.5.1.1, which replaced its predecessor Article 10.4, and, following that, Article 10.5.1 (a) TADP 2017 significantly differs from the previous scheme for the consideration of the specificities of the individual cases. The *Cilic* doctrine, therefore, has to be adapted to the sanctions system of the 2015 WADA Code and, thus, the 2017 TADP.

190. In the *Cilic* proceedings the panel was invited by the ITF to develop "*principles*" for the exercise of its discretion under Article 10.4 of the then TADP and the panel derived "*principles of general application*" (*Cilic,* par. 67 et seq.). According to Article 10.4 TADP, applicable at that time, the reduction within the limits between 0 and 2 years of ineligibility depended on the degree of fault or negligence. Hence, as a principle, the panel distinguished "*significant*", "*normal*", and "*light*" degrees of fault and allocated a time span to each of those categories: 16 – 24 months for a significant degree with a "*standard*" significant fault leading to 20 months, 8 – 16 months for a normal degree with a "*standard*" normal degree leading to 12 months, and 0 – 8 months for a light degree of fault with a "*standard*" light degree leading to a period of 4 months.

191. In order to find into which category of fault a particular case might fall, the panel suggested as "*helpful to consider both the objective and subjective level of fault*" (see above) and that the objective element should be "*foremost in determining*" in determining the category of fault (see below).

192. Those principles, however, were found under a system of sanctions which was different from the one applicable under the 2015 WADA Code and the implementing anti-doping rules of the ITF. Under the 2009 WADA Code

- the regular sanction for an ADRV in the form of the presence of a prohibited substance was a period of ineligibility of two years, according to Article 10.2 WADA Code;

- where an athlete can establish how a specified substance entered his or her body and that such substance was not intended to enhance the performance, according to Article 10.4 WADA Code, the sanction was between 0 and 2 years and the extent of reduction depended on the degree of fault;

- Article 10.4 WADA Code was applicable to all degrees of fault, including a significant degree of fault and, therefore, the time span of 24 months was to be allocated amongst the three categories, as the panel in *Cilic* decided;

- Article 10.5 WADA Code, providing for the consideration of no fault (elimination) or no significant fault or negligence (reduction to no less than one-half of the otherwise applicable sanction), did not apply if a specified substance was involved.

193. Under the 2015 WADA Code, however, the sanctions regime has been changed considerably:

- the regular sanction for an ADRV in the form of the presence of a prohibited substance, according to Article 10.2.1 2015 WADA Code, amounts to 4 years if a specified substance is involved and the ADO has established that the ADRV was intended;

- if the ADRV was not intentional, pursuant to Article 10.2.2 WADA Code 2015 the regular sanction for the presence of a specified substance shall be two years, as in the present case;

- at that stage, concerning the regular sanction, the legal situations under both the 2009 and the 2015 edition of the WADA Code coincide;

- the sanctions regime, however, differs in respect to the potential reduction of the sanction: whereas, under Article 10.4 2009 WADA Code, in the event of a specified substance, in the absence of intent, a reduction was possible for any kind of fault including significant fault or negligence, now, under the 2015 WADA Code, with respect to a specified substance, according to Article 10.5.1.1, a reduction can only be considered if an athlete can establish that he or she bore no significant fault or negligence;

- as a consequence, a reduction can no longer be granted for the category of significant fault but only for a normal or light degree of fault or negligence.

194. Therefore, the *Cilic* principles are to be accommodated accordingly. The time span of 24 months which is still available now covers only two instead of three categories of fault:

- normal degree of fault: over 12 months and up to 24 months with a standard normal degree leading to an 18-month period of ineligibility; and

- light degree of fault: 0 – 12 months with a standard light degree leading to a 6-month period of ineligibility.

195. The other guiding principles identified in *Cilic* in order to determine the degree of fault in an individual case continue to be applicable. The objective elements of the level of fault identified in *Cilic* (par. 75) which, according to that panel, have "*foremost*" relevance, however, relate to the intake of an unknown product by the athlete in question, exclusively and have no meaning for the case before the Panel.

196. The subjective elements of the level of fault identified in *Cilic* (par. 76) are of supportive weight:

- the athlete's youth and/or experience

- language or environmental problems encountered by the athlete

- the extent of anti-doping education received by the athlete

- other "*personal impairments*" such as having taken a product over a long period of time without incident, previously having checked the product's ingredients

- suffering from a high degree of stress

- the awareness of the athlete being reduced by a careless but understandable mistake

and may be partly applicable to the Athlete involved in the present proceedings.

(2) The application of the re-defined *Cilic* principles

197. For establishing that an athlete bore no significant fault or negligence, according to the *Definition* attached to the TADP, "*the totality of the circumstances*" must be considered "*taking into account the criteria for no fault or negligence*". For no fault, an athlete must exercise "*utmost caution*", i.e. he or she must take every conceivable effort that no prohibited substance enters his/her body. In order to determine the degree of fault or negligence displayed by the Athlete, the Panel, having accepted and based on the Athlete's explanation that she inadvertently ingested letrozole through the meal cooked by her mother, examined how significant her departure from that level of care was.

198. The Athlete's responsibility includes that she is responsible for the behaviour of her entourage, be it her coaches, medical staff etc. or, in the present case, the members of her family living in the same house and, in particular, her mother who was preparing the food which was consumed by the whole family, including the Athlete, on 13 and/or 14 February 2017.

199. The degree of fault exercised by the Athlete's mother is to be imputed to the Athlete herself because she entrusted her mother to prepare the meal she ate. The Femara box was stored in the kitchen close to the space where meals were prepared; that situation was changed by her after she concluded that the Femara medication most likely was the source of the AAF. The Athlete's mother was a pharmacist and knew or must have known that Femara contained letrozole. She was aware or must have been aware of the doping warning on the back of the Femara box. She knew that her daughter was a high profile tennis player and, therefore, was under a strict obligation to avoid ingesting any prohibited substance. Previously, at least once, when she took her daily medication, a Femara pill had fallen out of the blister package. Femara pills do not quickly, if at all, dissolve in the broth or the tortellini filling and could have been removed.

200. Also personally the Athlete bore a degree of fault or negligence. According to the Athlete's statement made before the Panel, which corresponds with her oral statement before the IT, she did not know that her mother was suffering from cancer and took Femara. Nevertheless, although she had a separate apartment in the house, she could and should have known that the Femara box was stored in the kitchen close to the spot where her mother was cooking because the kitchen and dining room, in a family house, are places common to the family. The pictures presented as evidence show that the Femara box was in plain sight. The Athlete, after having lived for years abroad had moved to her parents' house without establishing or suggesting even basic controls to ensure a safe and clean environment for a professional athlete. Similarly to suggesting what the Athlete needed or wanted to eat to ensure her condition, weight etc. she had to suggest basic actions to avoid contamination even if she did not know about the existence of the Femara box.

(i) Objective elements of fault

201. In order to determine the degree of fault, i.e. that extent to which the Athlete did deviate from the responsibility to exercise utmost caution, the objective elements of the level of fault, "*the standard of care that would have been expected from a reasonable person in the Athlete's situation*" (see above par. 187), are to be identified. The Athlete was under the obligation to control her environment. In the same way the Athlete had to control her daily training program, her diet, the supplements she takes, and her environment

away from home, she was also obliged to control the environment at home. Athletes must exercise the same level of care at home in a family environment as at outside places like restaurants. The Athlete was expected to tell her mother to ensure to buy clean food at reliable places, to guard the food from contamination. She should have seen the kitchen with all the boxes of pills lying on the working surface. At home, it was much easier to control her environment than in public places such as restaurants.

202. The Athlete, in order to comply with her personal responsibility as an experienced athlete in anti-doping matters, should have checked the kitchen and the cooking facilities. Had she done so, she would have checked the Femara box and seen the doping warning on its back. Similar to a food contamination situation, the Athlete could not just confer the responsibility of preparing the meals to her mother. She herself had to ensure that the meals were not contaminated. Even considering that the Athlete lived in a separate room or apartment in her parent's house, the Panel does not accept as an excuse that she did not even see the kitchen because that was her mother's place.

203. Under the objective elements of fault, the Athlete did not meet the required level of care and displayed a normal degree of fault or negligence.

(ii) Subjective elements of fault

204. However, in addition to the objective elements of fault which are of foremost relevance, the Panel also considered the subjective elements identified in the *Cilic* decision (see para. 187 above) and finds that most of those elements do not apply to the Athlete. She was experienced, had enjoyed an anti-doping education and took care about her food when travelling. At home, she encountered no language or other cultural barriers. She was not under a high degree of stress. However, the Panel accepts that her awareness was reduced "*by a careless but understandable mistake*".

205. The Panel takes into consideration the particular situation of the family dinner on 13 and/or 14 February 2017. After the entire family returned from the Fed Cup where the Athlete had competed, her mother prepared her favourite dish which she has liked since her childhood. The Athlete was not aware that her mother suffered from cancer and took Femara. But she knew that her mother was a pharmacist and the latter was aware that her daughter was a high-ranking tennis player under a strict anti-doping obligation. In this situation, the Athlete could be sure that her mother would do everything to protect her daughter against prohibited substances and food contamination. She was relaxed and did not expect that she may be confronted with contaminated food. The Panel acknowledges that the Athlete was in a position to feel safe and accepts that the subjective element of "*a careless but understandable mistake*" on the occasion of the family dinner on 13 and/or 14 February 2017 lowers the degree of fault or negligence exercised by the Athlete.

206. Having thoroughly considered the partly new and modified evidence, the Panel comes to the conclusion that the Athlete's personal departure from the objective and subjective standards of care, expected to be exercised by her, together with her mother's fault which is imputed to her, amounts to a light degree of fault, however in its upper range.

207. In application of the re-adjusted *Cilic* principles the Panel determines that a period of ineligibility of 10 months is to be imposed upon the Athlete.

3. Commencement of the period of ineligibility, Article 10.10.3 TADP

208. According to Article 10.10.3 TADP, the period on ineligibility shall start on the date of the decision with, pursuant to Article 10.10.3 (a) TADP, the period of a provisional suspension credited against the total period to be served. However, the Athlete was not provisionally suspended nor did she accept a voluntary provisional suspension.

209. However, Article 10.10.3 (a) 4th sentence TADP provides that

> *"if a period of ineligibility is served pursuant to a decision that is subsequently appealed, then the Participant shall receive credit for such period of ineligibility served against any period of ineligibility that may ultimately be imposed on appeal."*

Taking into account that the Athlete already served a two-month period of ineligibility from 3 August through 2 October 2017, she actually would have to serve an effective additional period of ineligibility of eight months from the date of this decision.

210. Article 10.10. 3 (b) TADP provides that it is in the discretion of the Panel to back-date the commencement of the period of ineligibility until the date of the sample collection where an athlete had promptly admitted the ADRV *"after being confronted with it by the ITF"*. After the Athlete received the notice of charge by the ITF on 18 April 2017, she admitted the AAF as already stated in the IT decision.

211. Article 10.10. 3 (b) TADP provides that the Panel's discretion to back-date the commencement of the period is limited to the effect that the athlete in question

> *"must actually serve at least one-half of the period of ineligibility, i.e. the commencement date of that period of ineligibility cannot be back-dated such that he/she actually serves less than one-half of that period."*

According to that provision, if applied, the Athlete would have to effectively serve at least five months of the ten-month period of ineligibility. As she already had served a two-month period she would have to serve a further three-month period after the pronouncement of this decision with the commencement of the sanction being backdated by five months.

212. However, the Panel does not find it appropriate to exercise its discretion to backdate the commencement of the additional period of ineligibility. Article 10.10. 3 (b) TADP provides a reward for promptly admitting the ADVR. The Panel, having compared the competing scenarios, is doubtful whether the backdating of the commencement of the further period of ineligibility is less harmful to the Athlete than not backdating. The Athlete who was not provisionally suspended and no longer ineligible to compete was free to compete as of 3 October 2017, and won prizes and advanced in the ranking which would have been disqualified for the period of backdating. Compared to those losses which are certain, it is uncertain how successful the Athlete may be in any future tournaments.

4. Disqualification of the Athlete's competitive results, Article 10.8 TADP

213. According to Article 10.8 TADP

> "*all ... competitive results of the Player obtained from the date of the Sample in question was collected ... through the start on any Provisional Suspension or Ineligibility period shall be Disqualified (with all of the resulting consequences, including forfeiture of any medals, titles, ranking points and Prize Money), unless the Independent Tribunal determines that fairness requires otherwise.*"

214. According to the general rule of that provision, as the Athlete was neither provisionally suspended nor accepted a voluntary suspension, her results must be disqualified from 16 February 2017 until 2 August 2017, the date of the beginning of her period of ineligibility imposed by the IT.

215. However, the Athlete, under the fairness-exception (disqualification under the general rules unless "fairness requires otherwise"), requested to lift the disqualification determined by the IT altogether or, at least, from 28 April 2017. According to the Athlete, there was no unfairness towards the competing athletes because the single inadvertent ingestion of letrozole had no performance-enhancing effect. In support, the Athlete submitted that letrozole had no performance-enhancing effect at all and that the hair test conducted on 28 April 2017 by Professor Favretto had shown that no letrozole was present any longer. According to the Athlete, fairness required that her results should not be disqualified because she gained no performance-enhancing effect and had no unfair benefits, at least from 28 April 2017.

216. In the appealed decision, the IT limited the duration of the disqualification of results until 7 June 2017, the date of the Athlete's first negative doping control, and hereby acknowledged that the fairness exception applied to a situation where, during a phase of non-suspension, performance-enhancing effects were no longer present. The Panel accepts this general approach of the IT, as the Parties did in the present proceedings.

217. However, it is the burden of the Athlete to prove that letrozole had no performance-enhancing effect at all or that letrozole was no longer present in her system from 28 April 2017 onwards.

218. Having weighted the evidence provided before it, the Panel concludes that the Athlete was unable to establish, by a balance of probability, (1) that letrozole has no performance-enhancing effect at all or (2) that the test conducted on 28 April 2017 evidenced that no letrozole was present.

219. Both Professor Ayotte and Professor Botré, in their capacity as experts, stated that letrozole, combined with training, has a performance-enhancing effect on pre-menopause women. By a conversion of endogenous testosterone into estrogene, letrozole decreases the fat body mass and increases the lean body mass. Even a small dose can create a small advantage over other competitors. Therefore, according to the experts, letrozole was added to the Prohibited List with no threshold. Dr. Snenghi concurred in stating that letrozole, under an "*ongoing*" administration, "*could*" have performance-enhancing effects.

220. Professor Favretto, as expert-witness, stated that the hair test and other tests conducted by her revealed that no letrozole remained in the Athlete's system when she was tested on 28 April 2017.

221. However, as experts in the field of doping-related matters, Professor Ayotte and Professor Botré, although not putting the data received by Professor Favretto in question, concur in that the tests and analyses conducted by Professor Favretto did not take place under controlled conditions and did not meet the requirements, procedures and protocols set forth by the WADA. It was even not certain that the samples were hers. Furthermore, Professor Botré stated that the excretion time of letrozole and its metabolites considerably vary amongst human beings and, therefore, he could not draw any conclusion on when and how much letrozole was taken from the concentration found in the Athlete's sample on 16 February 2017. Professor Ayotte referred to the lack of reliable scientific studies and declared herself unable to make a statement on how much and how long letrozole was ingested. Therefore, according to the experts, the hair-test and other tests conducted on 28 April 2017 do not provide reliable evidence that letrozole was no longer present in the Athlete's system.

222. The non-appearance of letrozole, however, was reliably confirmed by the doping control the Athlete underwent on 7 June 2017.

223. Since the evidence presented cannot establish that letrozole has no performance-enhancing effect, at all, or was no longer present in the Athlete's system on 28 April 2017, the Panel, in fairness to the other players who were competing against the Athlete during the time she was neither suspended nor ineligible, i.e., from 16 February 2017 onwards, finds that, as the IT had determined, the results obtained by the Athlete from16 February 2017 to 6 June 2017 are to be disqualified. In the notice of charge, dated 18 April 2017, the Athlete was warned that, by not accepting a voluntary suspension, she took the risk of a disqualification of results.

5. Conclusions

224. Based on the submissions and the evidence before it, which was partly new or modified compared to the hearing before the IT, the Panel comes to the following conclusions. The Panel notes that the proceedings before it is *de novo*. The Panel further takes note that the Nado was entitled to be involved in the Athlete's case only and as late as through the appeal to the CAS in the case 5302 before this Panel and is, therefore, not bound by the IT decision.

225. The Athlete committed an ADRV on 16 February 2017.

226. The Panel accepts that the Athlete established, by a balance of probability, but only just, that the source of letrozole found in her sample was the Femara medication of her mother that found its way into the family meal prepared by her mother and eaten by the entire family, including the Athlete, on 13 and/or 14 February 2017.

227. The Panel finds that the Athlete bore no significant fault or negligence and assesses her degree of fault in the light category, however in its upper range.

228. Therefore, the Panel determines that a period of ineligibility of 10 months is to be imposed on the Athlete.

229. The competitive results the Athlete obtained from 16 February 2017 through 6 June 2017, including forfeiture of all medals, titles, ranking points and prize money are disqualified.

X. COSTS

230. In an appeals arbitration, Article R65.2 of the Code provides that the proceedings "*shall be free*" which means that the arbitration costs as set out in Article 65.2 sec.1 second sentence of the Code are borne by the CAS.

231. As a general rule, according to Article 65.3 of the Code,

> "*(e)ach party shall pay for the costs of its own witnesses, experts and interpreters.*"

However, pursuant to the second sentence of Article 65.3 of the Code

> *"In the arbitral award, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings ... When granting such contribution, the Panel shall take into account the complexity of the proceedings and the outcome of the proceedings, as well as the conduct and the financial resources of the parties."*

232. In view of the outcome of the consolidated proceedings, the Panel decides that the Athlete shall contribute to the Nado's legal costs and expenses incurred in connection with the present proceedings an amount of CHF 4,000 (four thousand Swiss Francs).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Ms Sara Errani on 24 August 2017 in the case CAS 2017/A/5301 is dismissed.

2. The appeal filed by the Nado Italia on 25 August 2017 in the case CAS 2017/A/5302 is upheld.

3. The decision of the Independent Tribunal of 3 August 2017 is partly upheld.

4. Ms Sara Errani is sanctioned with a 10-month period of ineligibility, starting from the date of the present Award. The period of ineligibility of two months from 3 August 2017 through 2 October 2017 served by Ms Errani shall be credited against the total period of 10 months.

5. All competitive results obtained by Ms Errani between 16 February 2017 and 6 June 2017 are disqualified, with all resulting consequences including forfeiture of all medals, titles, ranking points and prize money.

6. The award is pronounced without costs, except for the Court Office fees of CHF 1000 (one thousand Swiss Francs) paid by Ms Sara Errani and the Nado Italia, respectively, which is retained by the CAS.

7. Ms. Sara Errani is ordered to pay to the Nado Italia a total amount of CHF 4000 (four thousand Swiss Francs) as contribution towards the legal fees and expenses incurred in connection with these arbitration proceedings.

8. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 8 June 2018

THE COURT OF ARBITRATION FOR SPORT

Christoph Vedder
President of the Panel