

**DECISION OF THE ATP TOUR ANTI-DOPING TRIBUNAL
ON THE APPEAL OF MARTIN RODRIGUEZ**

OPINION

This appeal by Martin Rodriguez {"Player"} was heard on 30 August 2003 in New York City, New York before an ATP Tour Anti-Doping Tribunal {"Tribunal"} consisting of Prof. Richard H. McLaren, Esq., Chair, Dr. Arturo Marti and Dr. Gary Wadler

Peter C. Lawler and Ryan M. Rodenberg, Esq. represented the Player.

The ATP Tour {hereafter the "Tour" or the "ATP"} was represented by Stephen D. Busey, Esq., John MacLennan, Esq., and Mark V. Young, Esq., ATP General Counsel and Executive Vice-President, along with Richard Ings, ATP Executive Vice-President of Rules and Competition.

BACKGROUND FACTS

1. The Player is a professional tennis player who has been a member of the ATP since October 1994, and a member of Division 1 since 1997.
2. The ATP Tour is a not-for-profit membership organization made up of men's professional tennis players and tournament organizations. The ATP sanctions tennis tournaments and provides league governance and support to its member tournaments and players. Pursuant to this role the ATP has adopted rules for the conduct of tournaments and players. The parties have stipulated that the ATP Tour 2002 Official Rulebook {the "Rules"} is applicable to this case.
3. On 8 February 2002 the Player signed a consent form required by the Rules for the 2002 season. By that form he agreed that he received a copy of the Rules. He further agreed that he had an opportunity to review the Rules and agreed to be bound by them and to play by the Rules.
4. The Tennis Anti-Doping Program {"Anti-Doping Rules"} set out within the

Rules beginning at p.86 is intended to maintain the integrity of professional tennis and protect the health and rights of all tennis players. The Program includes (i) doping tests in and out of competition, (ii) the imposition of penalties for Doping Offenses, and (iii) support and assistance to players when applicable. The player and tournament members of the ATP support the Program. The Player provided a urine sample pursuant to the Anti-Doping Rules at an ATP sanctioned tournament in Basel, Switzerland on 24 October 2002.

5. The urine sample provided was analyzed by the Laboratoire Suisse d'Analyse du Dopage {the "Lab"} located in Lausanne, Switzerland, an International Olympic Committee {"IOC"} accredited laboratory. The Lab reported to Mr. Sahlstrom of the International Doping Tests & Management {"IDTM"} who is the Anti-Doping Program Administrator {"APA"} for the ATP Anti-Doping program. The Lab analytical result contained in the Doping Control Report indicated that the "A" sample revealed a caffeine concentration of 12.8 µg/ml. Caffeine is listed as a Class III Prohibited Substance referred to in Appendix B of the Ant-Doping Rules. The Prohibited Substance also appeared in the "B" analysis with a concentration of 13.4 µg/ml.
6. Mr. Sahlstrom selected four Review Board {"RB"} members under Rule J 2. The RB was provided with the analytical package of the Lab obtained by IDTM without knowing the identity of the Player. Following their confidential review, the RB unanimously determined that the "A" sample was positive. The RB requested that the Medical Liaison, Dr Peter Hemmingsson, {hereafter the "ML"} contact the Player as provided for by Rule J 4 and request further information for the consideration of the RB.
7. Mr. Sahlstrom provided the contact information for the Player who was contacted by the ML. The information obtained by the ML was relayed to Mr. Sahlstrom who provided it to the RB. On review of the additional information the RB unanimously concluded that the medical information did not support the disqualification of the positive "A" specimen and the "B" specimen should be tested.
8. The Player did not attend nor did he select a representative to be present when the "B" sample was to be analyzed by the Lab. The Lab analysis was

carried out on the 25th and 26th March of 2003 in the presence Mr. Christian Girond appointed as the player's surrogate by the APA. Mr. Sahlstrom also observed the analysis of the "B" sample. The director of the Lab certified that the "B" specimen was positive for the presence of caffeine. IDTM submitted a confidential memorandum to the RB. After further review of this second confidential file the RB unanimously determined, that the analytical findings on the "B" specimen should not be disqualified as is provided for in Rule J 15.

9. Mr. Sahlstrom notified Richard Ings, Executive Vice-President of Rules and Competition of the ATP pursuant to Rule J 16 that the Player had committed a Doping Offense. By letter of 25 April 2003 the ATP advised the Player that he had committed a Doping Offense under Section C.1.a of the Anti-Doping Rules. He was advised that he would be suspended on the eleventh business day after receipt of the letter unless a request to have a hearing before an Anti-Doping Tribunal had been made. The Player made such a request and activated the process leading to this decision.
10. This Anti-Doping Tribunal {the "Tribunal"} was established pursuant to Rule L 2. Counsel for both parties confirmed in writing that they had no objection to the composition or the jurisdiction of the Tribunal to hear, determine and issue a decision in this appeal.
11. On 21 May 2003, the Chairman of the Tribunal issued Provisional Procedural Order No.1 detailing the process the case was to follow. It was noted in the Procedural Order that the parties were endeavouring to resolve their differences without the Tribunal holding a hearing and making a determination.
12. A suitable resolution was not found during the negotiations between the parties and a conference call was held to determine how the case would proceed. The call was held on 25 July 2003 at 9:30 a.m. EDT {"Eastern Daylight Time"} and the Chairman issued Procedural Order No. 2 on 30 July 2003 to which the parties have consented in writing.
13. By virtue of the attempts to settle and by subsequent agreement of the parties the hearing was held outside the 60 day guideline set out in Rule L 2. The hearing commenced at 9:00 a.m. EDT on 30 August 2003 at a hotel hearing

room in the W Hotel in New York City, New York. The hearing concluded at approximately 1:45 p.m.

14. Pursuant to Procedural Order No. 2 issued by the Chairman of the Tribunal, both sides were to agree to case stipulations by 29 July 2003. The Chairman granted an extension until 30 July 2003, counsel for the parties filed the stipulations on 31 July 2003.
15. The following are the agreed case stipulations:
 1. One serving of the espresso coffee served in the player lounge at the tournament could have contained up to 150 mgs of caffeine and likely contained a minimum of 125 mgs.
 2. It would not be impossible for a person weighing only 76 kgs to test positive for caffeine above 12 micrograms/mL by the ingestion of 450 mgs of caffeine 1-4 hours prior to his tennis match and the ingestion of between 1 and 1 1/2 cans of coke during the match.
 3. Because the prohibited substance in this case is caffeine, ATP Anti-Doping Rules E.4.(c)(ii) and (iii) should more appropriately be read as if the words "a prohibited amount of" were inserted before the words "the relevant" in both of the subsections.
 4. There is no issue with respect to the collection process.
 5. There is no issue with respect to the chain of custody.
 6. There is no issue as to the validity of the laboratory test results, provided however, that petitioner reserves the right to contest the methodology of the statistical analysis used in calculating the amount of the prohibited substance in the player's body.
 7. There is no issue as to the validity of the threshold established for caffeine in the Anti-Doping Program.
16. The Chairman granted another extension allowing counsel until 4 August 2003 to submit their pre-hearing briefs. Both parties filed their briefs on that date. The parties reply memorandums were filed on 20 August 2003 in accordance with the Procedural Orders.
17. The Player provided written statements from the Tournament Director of the Basel Tournament Roger Brennwald; and from ATP Tennis Players Richard Krajicek, Gaston Etlis, Fernando Gonzalez and Jose Acasuso. The Player also provided an expert witness report authored by Professor Vivian James,

Emeritus Professor of Chemical Pathology in the University of London, commenting on the laboratory report and advising on some aspects of the metabolism of caffeine. The ATP accepted all of the Player's witness statements without cross-examination but did examine the expert witness on his report. The Player gave evidence on his own behalf and was cross-examined by the ATP counsel and questioned by the Tribunal.

18. The tennis player witness statements provided by the Player were to "make known" the general position of caffeine consumption by some of the Player's colleagues. Each player provided a statement that indicated their disbelief that only "3 or 4 cups of coffee 2 to 3 hours before" being tested could result in a positive test. These statements were intended to bring to the forefront the alleged lack of teaching they received regarding the amount of caffeine that it would take to go over the limit.
19. The Tour provided a sworn affidavit from Dr. Martial Saugy, Director of the IOC Lab in Lausanne, Switzerland. The Player cross-examined the statement provided by Dr. Saugy as it conflicted in part with the statements provided by Professor James. Mr. Richard Ings was called to testify on behalf of the ATP and was cross-examined at the hearing.
20. The statements from the experts illuminated a difference of opinion between them as to the most suitable method for taking account of the error that is associated with any analytical measurement in a laboratory. The Lab in this matter and, at least one other IOC accredited laboratory, establish the measure of uncertainty by carrying out replicate measurements and calculating mathematically the mean result + or - 3 standard deviations {"SD"} which gives a certainty or probability of greater than 99%. Professor James opines that when the total number of measurements is small, as it is here at 3 measurements; then, the more appropriate method of calculating the SD for the set of measurements is to use the Student T test {"T test"}. If this were done the lowest concentration with a certainty of 99% in Sample A would result in a value of 11.9 micrograms per millilitre.
21. Upon inquiry of the Tribunal as to the IOC Laboratories that employed the T test, Dr James responded that to his knowledge the London laboratory (Drug Control Centre, King's College, London) used this method.
22. Professor James also took issue with the apparent lack of use of a quality

control sample in the quantification procedure. Dr Saugy responded that it is part of good lab practice to have proper quality control samples. Dr. Saugy advised that in practice, it is difficult to have a good quality control but they do everything they can to ensure quality control. Furthermore, as part of their accreditation process, every year the Lab must test for caffeine and must be within the correct range of values.

23. The Player testified that it was difficult for him to recollect precisely what went on at the tournament in October 2002 when it only became important for him to recall after he was advised by the APA of the positive in February 2003 some four months later. There was a complimentary coffee machine in the player waiting area provided by the tournament organisers Davidoff Swiss Indoors 2002. While he was awaiting his match he thought he could have had 3 to 4 cups of a particular brand of espresso coffee. He constructs this answer based on his usual patterns of behaviour in which he would never have more than 4 cups of coffee. He also testified that he had one or two Cokes during the match that were obtained on the request of the Player to the umpire. On extensive questioning from the Tribunal the Player denied taking any supplements whatsoever and was not taking medications or over the counter pharmacy products which might have had caffeine in them. His only explanation for the finding of the Lab is the coffee and the Coke.
24. The Player's analytical findings for caffeine in other tournaments in 2002 were 2.9 µg/ml (micrograms per millilitre) at Acapulco and 3.3 µg/ml at Long Island. The caffeine readings from the 46 sample results from the Swiss tournament at which the Player's reading was above 12 µg/ml were: 31 below 1 µg/ml; 8 between 1 and 2 µg/ml; 2 between 2 and 3 µg/ml; 2 between 3 and 4 µg/ml; 1 between 4 and 5 µg/ml; and 1 between 6 and 7 µg/ml {Exhibit #11}. The evidence from the Montreal IOC accredited laboratory from the 1,953 tests for tennis since 1994 revealed that 99.1% of the samples had a caffeine level <7; 99.9% had a caffeine level <9 and no sample recorded a level > 12. {Exhibit #10}. The comparable statistics from the Montreal laboratory for all of the 18,122 tests from sports other than tennis revealed that 99.2% of the samples had a caffeine level of <7; 99.8% had a caffeine level of <9 and 0.1% were >12. Therefore, a positive caffeine level is very rare indeed in the experience of the Montreal laboratory.
25. Mr. Ings testified that he had a conversation with the Player following the Review Board decision that a Doping Offense had occurred. He testifies that

during that conversation the Player told him that he was bored awaiting his turn on the courts and had more than his usual number of coffees. Mr. Ings also recalls that he said there was an attractive female handing out the coffees. On recall of the Player, he denied these statements. On cross-examination of Mr. Ings his testimony remained unshaken.

26. Mr. Ings was also cross-examined on the educational efforts of the ATP towards players who might be drinking coffee. The questioning revealed that the players are informed about caffeine being on the restricted list by the Rulebook which the Player acknowledged receiving and understanding and the wallet card which summarises the Restricted List of Class 3 substances along with the other classes of substances.
27. A letter dated 21 August 2003 to Tournament Directors from Mr. Ings was introduced as Hearing Exhibit #2. That letter is intended to provide guidelines to tournament directors for ATP sanctioned tournaments. The guidelines review the supplying of nutritional and dietary supplements; water and electrolyte drinks. The relevant part for this proceeding reads:

...

- (4) Tournaments are reminded that caffeine is a restricted substance under the Tennis Anti-Doping Program due to its properties as a stimulant. UNDER NO CIRCUMSTANCES should beverages containing caffeine or guarana be supplied to players in the player lounge, locker room or on-court (competition and practice courts). Beverages that contain caffeine include but are not limited to Coca-Cola, Pepsi-Cola, Red Bull, Jolt, Nexcite, Sobe flavours, coffee and tea.

These beverages contain levels of caffeine or guarana that may result in a positive test depending on the amount consumed, when it was consumed and the metabolism of the player.

Note that both Coca-Cola and Pepsi-Cola produce caffeine free versions of their products that are perfectly acceptable to supply to players. ...

SUBMISSIONS of the PARTIES

Submissions by the Petitioner Player

28. The Player alleges that the statistical methodology used in the analysis of the Player's urine yielded a miscalculation in the margin of error. The use of an alternative and widely accepted statistical methodology would have produced a result with a corresponding margin of error that would have warranted a finding of a concentration level below the threshold.
29. The Player submits that due to the "dissemination of actual misinformation and misleading comments by the ATP Tour, Inc." and "ATP's active involvement in distribution of caffeine-containing products to the Petitioner at the tournament in question" the ATP should be estopped from enforcing its rules by the doctrine of estoppel as set forth in the *Ulihrach* decision dated 7 July 2003¹.
30. The existence of Exceptional Circumstances as per Rule E 4.c. is found in this case as the Player identified with specificity how the caffeine came to be present in his body. He had no idea he had ingested such an amount of the substance resulting in a Doping Offense. The consumption of the coffee was reasonable conduct. He had not gained an advantage from his conduct and the publication of his name in Argentina will cause him irreparable harm. The Player's counsel argued that these facts support a finding of no Doping Offense; or, in the alternative, some ameliorative measure the Tribunal considers appropriate.

Submissions by the Respondent ATP

31. The position of the Tour was that the Player had committed a Doping Offense by having a Prohibited Substance in his body during competition in violation of the ATP Anti-Doping Rules.
32. The Tour refutes the Player's claim that the use of the Student T Test would have resulted in no Doping Offense. The Tour cited *Poll v. FINA*, CAS 2002/A/399 in which the CAS panel concluded that even though the measurement of uncertainty was not reported and calculated properly, there were provisions in ISO 17025 that allowed the test results to remain valid. Additionally, the Tour submitted that WADA's laboratory standards taking effect in 2004 have determined that a confidence level of 95% is sufficient in dealing with threshold substances, which is attainable by using 2 Standard

¹ Published Ulihrach Decision located at <http://www.atptennis.com/en/common/TrackIt.asp?file=/en/antidoping/decision.pdf>

Deviations. Using the numbers calculated by Professor James, the 95% confidence level equals 12.2 µg/ml, still above the 12.0 µg/ml threshold.

33. The Tour submits that an order of estoppel is not proper for this case. T the Tour was not responsible for the administration of the contaminated product as it was in the *Ulihrach* case. It was the Basel tournament that provided the coffee to the players. This evidence is provided by the Player from Roger Brennwald.
34. The Tour submits that the Player has not satisfied the requirements of the Exceptional Circumstances in the Rules. They state that the provision of Exceptional Circumstances is not applicable to a Class III substance. The strict liability penalties given to the Player, independent of whether or not Exceptional Circumstances are proven, include a notification from the ML regarding the risks of caffeine along with the forfeiture of points and moneys earned at the tournament. In the alternative even if the Exceptional Circumstances were proven applicable, the Player has not proven with specificity, but rather suggested, the source of the caffeine in his specimen and has not demonstrated that his conduct was reasonable.
35. It is for those reasons that the Tour submits that the Tribunal should find the player guilty of a doping offense and assess the penalties mandated by the Program.

RELEVANT ANTI-DOPING RULES

36. The relevant Anti-Doping Rules of the Program read:

A. General Statement of Policy

1. The purpose of the Tennis Anti-Doping Program (“the Program”) is to maintain the integrity of tennis and protect the health and rights of all tennis players.

The scope of the Program includes:

- a. Doping tests in and out of competition;
- b. The imposition of penalties for Doping Offenses;
- c. Providing support and assistance to players when applicable.

...

B. Covered Players and Events

1. Any player who enters or participates in an event organized, sanctioned or recognized by the ATP, or who is an ATP member or is listed in the Singles or Doubles ATP Entry System, shall comply with and be bound by the provisions of this Program. Further, for each calendar year all such players shall, as a condition to entering or participating in any event organized or sanctioned by the ATP, deliver to the ATP a signed consent in the form set out in Appendix A.

...

C. Doping Offenses

Doping is forbidden and constitutes a Doping Offense under this program. Doping occurs when:

1.
 - a. A Prohibited Substance is found to be present within a player's body; or
- ...
3. A player is absolutely responsible for any Prohibited Substance found to be present

within his body. Accordingly, it is not necessary that intent or fault on the player's part be shown in order for a Doping Offense to be established under paragraphs 1 and 2 of this section C, nor is the player's lack of intent or lack of fault a defense to a Doping Offense.

...

D. Prohibited Substances and Doping Methods

...

4. It is the sole responsibility of each player (or, where applicable, that player's legal guardian) to acquaint himself with all of the provisions of the Program; and further, it is each player's sole responsibility to notify his personal physicians, coaches and other relevant personnel of the provisions of the Program.

...

E. Organization of the Program

...

- 4.c. Upon the finding of a Doping Offense by the Anti-Doping Tribunal, the Anti-Doping Tribunal may reduce the penalties as set out in section M (Excluding the penalties set out in section M3a of the Program) and sections N3 and N4 of the Program (but not overturn its finding of a Doping Offense) only if the player establishes by a preponderance of the evidence that Exceptional Circumstances exist and that as a result of those Exceptional Circumstances the penalties as set out in section M and sections N3 and N4 in the program should be reduced. However, in all cases where a Doping Offense arises out of in-competition testing, the player shall forfeit prize money and Race/Entry System points earned at the event

at which the Doping Offense was committed. For the purposes of this paragraph, “Exceptional Circumstances” shall mean circumstances where:

- (i) The player establishes with specificity the source of the Prohibited Substance(s) or the Doping Method(s) in question and how the Prohibited Substance(s) came to be present in his body or the Doping Method(s) in question was used; and
- (ii) The player establishes by reference to the specific circumstances of the ingestion or administration of the relevant substance or use of the Doping Method in question that he did not know that he had ingested or been administered the relevant substance or used the Doping Method in question; and
- (iii) In taking steps to avoid and in not knowing that he was ingesting the relevant substance or having it administered to him or using a Doping Method, the player’s conduct was reasonable.

This section E4c shall apply only to the Doping Offenses set out in sections C1a, C1b and C2a of the Program.

M. Penalties

...

...

3. Class III Prohibited Substances
 - a. First Doping Offense

A player who is found through the procedures set forth in this Program to have committed a Doping Offense involving a Class III Prohibited Substance, subject to minimum levels set by the Program, shall be notified by the ATP and advised by the ML of the medical effects and risks of such usage.

...

N. Suspension and Forfeitures

...

1. Suspensions shall commence and forfeiture penalties shall become payable to the ATP as follows:

...

- b. In the case of a hearing before an Anti-Doping Tribunal, on the day after the Anti-Doping Tribunal's finding that a Doping Offense has been committed; or

...

2. a. All Doping offenses will be publicly announced by the ATP. In its sole discretion, the ATP may defer a public announcement until the conclusion of any proceeding brought before the Court of Arbitration for Sport pursuant to section U3 of this program.

- b. Subject to the confidentiality provisions in section S, in cases where the Anti-Doping Tribunal upholds the finding of a violation, the

ATP in its sole discretion may publish parts of the proceedings, findings and penalties of the Anti-Doping Tribunal.

...

Appendix B

Prohibited Substances and Doping Methods

For the purposes of this Program, the Prohibited Substances and Doping Methods are categorized under the following Classes. (See Addendum for examples of Prohibited Substances and Doping Methods).

...

Class III: The following compounds are subject to certain restrictions (see Addendum for specific restrictions):
Caffeine

...

Addendum – Class III Substances

Caffeine: Levels greater than 12 mcg/mL.

...

ISSUES

1. Was the statistical methodology of the Lab appropriate?
2. Should estoppels be applied?
3. Has a Doping Offense been established?
4. Is there any justification for special consideration?
5. Conclusion

REASONS

1. Was the statistical methodology of the Lab appropriate?

37. Professor James asserts that an estimate of the true value as calculated by the Lab but based upon three measurement results would be 12.8 µg/ml. + or – 0.23 SD . Using his corrected method of calculation, which the Tribunal accepts, the Lab result should be considered within the range of

12.8 µg/ml. to 12.1 µg/ml. {micrograms per millilitre of urine}. Therefore, the result at the lower end of the range is just over the threshold of 12 µg/ml.

38. Professor James opines that the Lab report does not make any allowance for the analytical measurement error in the Lab analysis to represent an estimate of the true values. He would not use 3SD from the mean calculation of the Lab to determine a concentration that is then taken as the lowest concentration likely to be present in the sample
39. Instead, Professor James opines that a different statistical technique is required to compensate for the small number of measurements. He asserts that the appropriate method to use for the small number of measurements, being three in his submission, is to use the Student's T test {"T test"}. If this were done the lowest concentration with a certainty of 99% in sample A would be 11.9 µg/ml. That is below the threshold and thus could be considered to not be a Doping Offense.
40. Dr. Saugy responds that most of the IOC laboratories doing anti-doping testing deploy the methodology used in this case in reporting the uncertainty in concentration with cases involving caffeine.
41. The Tribunal finds that there is a legitimate difference of expert opinion on the most suitable method for taking account of the error that is associated with any analytical measurement by a laboratory. The T test, while a legitimate alternate approach to determining uncertainty, is not the one, which at least some of the IOC accredited labs are using. Nor, is it the one with wide spread acceptance in the anti-doping community. See the *Poll v. FINA CAS 2002/A/399* where a challenge to a nandralone laboratory analytical result involving a threshold was rejected. The CAS, in that case, relied upon the IOC accreditation process and defined the statistical uncertainty issue in terms of inquiring as to whether the laboratory used the methodology associated with its accreditation. It was not for CAS to determine that an alternate method ought to have been, or could have been applied. That is for the accreditation body to determine. The same conclusion must apply to the deliberations of this Tribunal. It is not for this Tribunal to determine what alternate methodology could be used. It is the function of the Tribunal to ensure that the Lab has acted within its accreditation and its calculations have been applied correctly in accordance

with its overall accreditation. There is no evidence the Lab has not acted within its accreditation. What has been established is that there is a difference of expert opinion on the subject of taking account of laboratory analytical measurement error. Therefore, the Tribunal cannot conclude that the lowest concentration on the methodology of the Lab is below the threshold of 12 μ g/ml. The difference of opinion by experts and Lab directors will have to be resolved by those individuals and the accreditation bodies.

42. In support of the position of the Tribunal, it should be noted that despite the difference of opinion as to the appropriate statistical quantification the methodology used by Professor James would at the 2 SD level or 95% confidence level cause a result over the applicable threshold¹. Furthermore, even applying the methodology of Professor James the result is that there is a very minuscule probability that the result is below the threshold. In that event the B sample may have a role to play in the overall determination of the Tribunal.
43. The argument of the Petitioner that there is no Doping Offense because of the methodology of Professor James is based upon an assumption that the B sample is merely to confirm the A sample as containing the substance identified in the Lab report. It is undisputed that the B sample does have that role to play in a doping case. However, in cases in which there is a threshold over which the result must be for a positive analytical finding the B sample has a further role. The B sample must confirm that the result was over the threshold. If it was not, there would be no reportable doping infraction even though the B would confirm that the substance identified in the A analysis is present in the B analysis.
44. In this case the B sample is considerably higher than the A sample reading being 13.4 μ g/ml. Therefore, even applying Professor James different quantification method there would still be a result over the threshold for the B sample unlike the small probability to the contrary with the A sample. Where there is a difference in professional opinion about the methodology and there is a very miniscule probability that the A sample is below the

¹ The World Anti-Doping Agency {"WADA"} in its laboratory standards as published at the time of writing that are to take effect in 2004 have determined that a confidence level of 95% is sufficient in dealing with threshold substances despite the fact that the 99% confidence level is currently in use by IOC accredited labs. Even that 99% confidence calculation would result in a threshold calculation of 12.2 μ g/ml.

threshold the B sample in being over the threshold regardless of the application of either competing methodology justifies the conclusion that there is a reportable doping infraction despite differences of opinion on methodology for quantification.

45. Finally, the Tribunal notes that there is one difference of opinion as to the appropriate quantification of the sample. The Lab involved in this case does a quantification that may be arguably not as appropriate as the method opined by Professor James. Nevertheless, it is a method within its accreditation and supported in its use by other IOC accredited labs. It cannot be held to be a wrong quantification but merely one, which is within an arguable scientific difference of opinion as to its applicability. Therefore, the Tribunal concludes that there is no error in the Lab qualification of the positive result. It is further concluded that for the reasons given there is an appropriate quantification for the result that does validate the conclusion that the Lab result is in excess of the threshold.

46. For all of the foregoing reasons the Lab quantification of the results is accepted in this case as establishing a prima facie case of a positive analytical result over the threshold as prescribe in the ATP Anti-Doping Rules as they were in 2002.

2. Should Estoppel be Applied?

47. It is asserted on the Player's behalf that estoppel as discussed in the ATP Tribunal decision dated 7 July 2003 should be applied to this case. The basis for this assertion is said to be "the dissemination [to the players] of actual misinformation and misleading comments by the ATP Tour and/or ITF officials, anti-doping personnel, and others in the tennis community". It is also asserted that the ATP was active in distributing products containing caffeine to the Petitioner at the tournament in question.

48. There is absolutely not a single chard of evidence before the Tribunal of any misinformation or misleading comments by the ITF or its officials. There is equally no misinformation brought forward in this proceeding by the Petitioner that any ATP official or the ATP had produced misleading or

improperly informed information in writing to its member players. Furthermore, the ATP does not recommend or suggest a number of cups of coffee that could be consumed and still be below the threshold for very good reasons. There is no evidence established by this proceeding to make findings of fact that the ATP distributed misleading information to ATP players. It is also asserted that the ATP committed errors of omission in not better educating or warning athletes of the problems of caffeine. There was an attempt to establish misleading comments by the ATP through the cross-examination of Mr. Ings. However, the Tribunal is not satisfied that the allegation is proved. Therefore, the Tribunal rejects the submissions.

49. The argument for the Player on the estoppel issue rests on the premise that coffee was made available to the players at the Basel tournament. However, the analytical positive under consideration is the only one from the tournament. The Lab analyzed all the specimens taken at the tournament. It reports that of the 46 samples tested, 31 were below 1 µg/ml.; 39 were below 2 µg/ml.; 41 were below 3 µg/ml. and 43 were below 4 µg/ml. The next highest reading after the Player's was below 7 µg/ml. {ATP Exhibit #11}. While caffeine was made available it did not result in anyone being over the threshold other than the Player. Therefore, the factual premise does not support the allegation that the available coffee necessarily caused the analytical positive. Furthermore, the Player's ingestion at other tournaments where he was tested, to the extent such results could be obtained, revealed a reading at Acapulco tournament in 2002 of 2.9 µg/ml. and at Long Island of 3.3 µg/ml. There is no pattern of positive results of other players as there was in *Ulihrach* and most importantly there is no direct responsibility of the ATP in providing the coffee. Therefore, there is no pattern of behaviour on the part of the ATP nor any representation by it that would suggest the positive lab analytical result might be contributed to or caused by the ATP or its employees or agents in the conduct of their duties. The case is, therefore, very different and is distinguished from the *Ulihrach* decisions in which estoppel was applied.
50. The factual ground for the application of estoppel has not been established. There is no pattern that results in a number of players being over the threshold limit. There is merely the result for the Player. Indeed, this is the very first case the ATP has ever had where a player has tested over the limit. Furthermore, in order to ground an estoppel it would be necessary to establish that the ATP was the supplier of the product. The evidence of the

Player witness Mr. Brennwald, the Tournament Director of the Basel tournament for the past 33 years indicates that it is the tournament that supplied the coffee brand known as “Lavazza”. It is very precisely articulated in the *Ulihrach*, decision that it must be the ATP who provided the product that results in the analytical positive. This cannot be established in this case.

51. The Tribunal finds that the ground for the use of the doctrine of estoppel as it was articulated in the *Ulihrach*, decision is not present in this case. Therefore, the doctrine cannot be applied. There is no relief in this case, therefore, from the strict liability regime established and applied in the previous ATP cases and found in Rule C. 3.

3. Has a Doping Offence been established?

52. This Tribunal has found that the analytical results from the Lab indicate that both the A and B samples are over the threshold for caffeine. The Player has been unable to challenge those results through this proceeding. The agreed stipulations mean that there are no other challenges to the process that led to the Lab report. Therefore, a Doping Offense within Rule C.1.a. has occurred in that a Prohibited Substance has been found to be present in the Player’s body.
53. By Rule C.3 the Player is “absolutely responsible for any Prohibited Substance found to be present within his body”. Prior Anti-Doping Tribunals of the ATP have found this rule to be one of strict liability². The Player has been unable to rebut the presumption of strict liability by the evidence presented. The Tribunal has found the doctrine of estoppel to be inapplicable to this case. Therefore, the Tribunal declares that a Doping Offense has occurred.

4. Is there any justification for special consideration?

54. Professor James indicates there is relatively little information available relating to the urine concentration of caffeine, which results from ingesting a known amount of caffeine. He cites only one published study³ and adds

² See the decisions of *Chella*; *Coria* and the first decision in *Ulihrach* dated 23 April 2003.

³ Van der Merwe et al., Caffeine in Sport, Influence of Endurance Exercise on the Urinary Caffeine Concentration. *International Journal of Sports medicine* 1992, 13, 74-76) In that study trained athletes consumed 450 mg of caffeine and produced urinary concentrations of between 4.2 and 11.9 micrograms per millilitre. Exercise did not

that the one unpublished study of which he is aware produced a result over the threshold.

55. The ATP states this is the first caffeine case it has ever encountered in its testing program over the last 10 years. The ATP provide from the IOC accredited laboratory in Montreal, Canada that since 1994 it has conducted 1,953 tests for tennis and no sample had a caffeine level greater than 12 µg/ml. Furthermore, for all sports other than tennis the Montreal lab during the same time period did 18,122 tests for sports organisations other than tennis and only 1/10 of 1 % exceeded 12 µg/ml. {ATP Exhibit#10}
56. The Tribunal must conclude, and indeed has no jurisdiction to alter in any event, that the threshold for caffeine is an appropriate one. Therefore, there are no special circumstances in connection with the cut off level.
57. The exceptional circumstances Rule E. 4.c. has no application in this proceeding being that caffeine is a Class III substance. While it is unfortunate that the Player tested positive and that the result is so very close to the threshold this fact of itself is not a reason to find in favour of the athlete.
58. The Player in this case has highlighted the issues associated with caffeine. Indeed, the Tribunal is mindful of the fact that the continuing listing of the substance on the forthcoming WADA 2004 Prohibited List International Standard {"Prohibited List"} is very much an open question at the time of writing this decision. The Tribunal is also aware of the principle of *lex mitior*⁴ that would give the Player the benefit of any revisions in the sanction including its complete elimination as a sanction. However, the principle can not be applied when the existence or the non inclusion of caffeine on the restricted list of the forth coming Prohibited List of WADA has not yet been confirmed and would in any event take effect only from January of 2004 and not at the time of writing this decision. The Tribunal must conclude that while caffeine is a controversial substance the function of the Tribunal is to apply the ATP Anti-Doping Rules of 2002. The fact is that those rules restricted the use of caffeine and the Player agreed to play tennis by the Rules. The Tribunal must interpret and apply what the parties

appear to influence the result.

⁴ See the Advisory Opinion of CAS for the UCI in 94/128. This advisory opinion was applied in a CAS case involving FINA 1996/A/149.

agreed to between them. It cannot take account of future events, which may alter the whole subject of caffeine in sport in 2004.

59. The final plea of the Player is one of compassion and saving him from public embarrassment in his own country of Argentina. The Tribunal is very aware of the harsh and unflattering light which the media places upon sports doping cases even one such as this which is in the overall scheme of things a very minimal infraction of the Anti-Doping Rules of the ATP. Nevertheless, the Tribunal cannot subscribe to the proposition that a public announcement of a Doping Offense may be avoided because the infraction is minimal or the embarrassment is intense. The best the Tribunal can offer is that the Player committed a violation of the rules in an area where there is controversy. The Tribunal does recognise that many players may not have the knowledge this case has brought to the fore in terms of coffee consumption and the possibility that it may cause a positive caffeine reading. Having heard the testimony and seen the Player, the Tribunal is confident that there was no deliberate offence; and that, the Player has learned from this experience. All players would be wise to take note of this decision and its implications for the consumption of a product like coffee.

CONCLUSION

60. Based upon all of the foregoing the Tribunal has no alternative but to enforce the Rules as they existed at the time of the sample and the testing thereof. On that basis there was a Doping Offense. It is so found.

DECISION

The Tribunal makes the following orders based upon the foregoing grounds and discussion in the above opinion.

1. A Doping Offense has occurred under Rule C 1. a. This Decision being a First Doping Offense involving the use of a Class III Prohibited Substance it is ordered under Rule M. 3. that the Player “be notified by the ATP and advised by the ML of the medical effects and risks of such usage”.

2. It is further ordered under Rule E 4 c that the prize money obtained from the “ATP 2002 Davidoff Swiss Tournament” in Basel, Switzerland be forfeited and is to be repaid immediately to the ATP under Rule N 1. b. It is further ordered that the Race/Entry System points earned at the same competition be struck out.

DATED THIS 18th DAY of SEPTEMBER 2003. SIGNED in COUNTERPARTS.

Prof. Richard H. McLaren, C.Arb
(Chairman)
Barrister and Solicitor

SIGNED AT: London, Ontario, CANADA

Dr. Arturo Martí
Rio Piedras, PUERTO RICO

Dr. Gary Wadler
Manhasset, NEW YORK

DECISION

The Tribunal makes the following orders based upon the foregoing grounds and discussion in the above opinion.

1. A Doping Offense has occurred under Rule C 1. a. This Decision being a First Doping Offense involving the use of a Class III Prohibited Substance it is ordered under Rule M. 3. that the Player “be notified by the ATP and advised by the ML of the medical effects and risks of such usage”.

2. It is further ordered under Rule E 4 c that the prize money obtained from the “ATP 2002 Davidoff Swiss Tournament” in Basel, Switzerland be forfeited and is to be repaid immediately to the ATP under Rule N 1. b. It is further ordered that the Race/Entry System points earned at the same competition be struck out.

DATED THIS DAY of SEPTEMBER 2003. SIGNED in COUNTERPARTS.

Prof. Richard H. McLaren, C.Arb
(Chairman)
Barrister and Solicitor
London, Ontario, CANADA

Dr. Arturo Martí
Rio Piedras, PUERTO RICO

Dr. Gary Wadler
SIGNED AT Manhasset, NEW YORK

DECISION

The Tribunal makes the following orders based upon the foregoing grounds and discussion in the above opinion.

1. A Doping Offense has occurred under Rule C 1. a. This Decision being a First Doping Offense involving the use of a Class III Prohibited Substance it is ordered under Rule M. 3. that the Player “be notified by the ATP and advised by the ML of the medical effects and risks of such usage”.

2. It is further ordered under Rule E 4 c that the prize money obtained from the “ATP 2002 Davidoff Swiss Tournament” in Basel, Switzerland be forfeited and is to be repaid immediately to the ATP under Rule N 1. b. It is further ordered that the Race/Entry System points earned at the same competition be struck out.

DATED THIS DAY of SEPTEMBER 2003. SIGNED in COUNTERPARTS.

Prof. Richard H. McLaren, C.Arb
(Chairman)
Barrister and Solicitor
London, Ontario, CANADA

Dr. Arturo Martí
SIGNED AT Rio Piedras, PUERTO RICO

Dr. Gary Wadler
Manhasset, NEW YORK