

**THE ATP TOUR ANTI-DOPING TRIBUNAL
APPEAL OF PEDRO BRAGA**

OPINION

This appeal by Pedro Braga {"Player"} was heard on 20 May 2004 via conference telephone call before an ATP Tour Anti-Doping Tribunal {"Tribunal"} consisting of Prof. Richard H. McLaren, Esq., Chair, Dr. Arturo Marti, technical scientific member and Dr. Gary Wadler, medical member.

Thomaz Sousa Lima Mattos de Paiva, Esq. represented the Player at the hearing accompanied by his assistant Eduardo Amerena. The ATP Tour {hereafter the "Tour" or the "ATP"} was represented by Stephen D. Busey, Esq., John MacLennan, Esq. Also present throughout the call were the Player, Mr. Richard Ings ATP Executive Vice-President Rules and Competition, Mark V. Young, Esq. General Counsel and Executive Vice-President for the ATP and the Chair's legal assistant Morgan Martin.

BACKGROUND FACTS

1. The Player is a professional tennis player from Brazil.
2. The ATP Tour is a not-for-profit membership organization composed of male professional tennis players and tournament organizations. The ATP sanctions tennis tournaments and provides league governance and support to its member tournaments and players. Pursuant to this role the ATP has adopted rules for the conduct of tournaments and players. The parties have stipulated that the ATP Tour 2003 Official Rulebook {the "Rules"} is applicable to this case.
3. In April 2003 the Player signed the standard consent form required by Rule B. 1. for the 2003 season. By that form he acknowledged that he had received a copy of the Rules. He further acknowledged that he had an opportunity to review the Rules and agreed to be bound by all the provisions therein and to play by the Rules.
4. The Tennis Anti-Doping Program {"Anti-Doping Rules"} are set out within

the Rules and are described at pages 86 through 116. The Anti-Doping Rules are designed 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.

5. The Player provided a urine sample on 7 September 2003 pursuant to the Anti-Doping Rules during the ATP sanctioned tournament the 2003 Brazilian Open in Savador de Bahia Brazil (the "Tournament").
6. The urine sample was shipped from Brazil to the Laboratoire de Controle du Dopage INRS-Institut Armand-Frappier, Pointe-Claire, Canada {"the Lab"}, an International Olympic Committee {"IOC"} accredited laboratory on 9 September 2003. The sample arrived at the Lab on 8 October 2003.
7. The Lab analyzed the urine sample. The Lab reported to Mr. Sahlstrom of the International Doping Tests & Management {"IDTM"} who is the Anti-Doping Program Administrator {"APA"} under the ATP Anti-Doping Rules. The Player's "A" specimen was tested at the Laboratory on 21 October 2003, using GC-MS analysis screenings. When the screening test showed the presence of stanozolol metabolites, a Class I prohibited substance, the Laboratory performed confirmation testing, which also showed the presence of metabolites of stanozolol.
8. Mr. Sahlstrom, representing the APA established a Review Board {"RB"} in accordance with the Anti-Doping Rules. The RB performed the reviews required by the Rules in respect of the "A" and "B" urine specimen analysis performed by the Lab. The RB unanimously determined in accordance with Rule J. 17 that the urine specimen should not be disqualified. The APA notified Mr. Ings that subject to Rule L dealing with Due Process the Player had committed a Doping Offense.
9. On behalf of the ATP Anti-Doping Program Mr. Ings notified the Player of the results of the RB findings. The Player elected to have a hearing before this Tribunal, as is his right by Rule L. 1. c.
10. This Anti-Doping Tribunal {the "Tribunal"} was established pursuant to the Rules. Counsel for both parties confirmed by signing Procedural Order No.

1 that they had no objection to the Tribunal's composition or its jurisdiction to hear, determine and issue a decision in this appeal.

11. On 25 March 2004, the Chairman of the Tribunal issued Procedural Order No. 1 detailing the process and procedure the case was to follow and by which it was to be heard. Procedural Order No. 2 was issued in furtherance of the first Order on 8 April 2004. The hearing was held within the 60-day guideline set out in Rule L. 2. The hearing commenced at 7:30 a.m. on 20 May 2004 by conference telephone as provided for in the Orders and concluded at approximately 9:45 a.m.
12. Pursuant to the Procedural Orders counsel for the Player provided a written statement from Jan Nobrega Cardoso a Professor of Analytical Chemistry at the Federal University of Rio de Janeiro in Brazil. The ATP accepted without cross-examination his statement. The Player gave evidence on his own behalf and was questioned by the Tribunal.
13. The Tour provided a sworn affidavit from Professor Christiane Ayotte, the Director of the Lab. Counsel for the Player did not accept without cross-examination the statement of Dr. Ayotte who was also questioned by the Tribunal.
14. In accordance with the Procedural Orders counsel for the parties agreed upon the following stipulations. As a consequence no evidence was required to be submitted in respect of the stipulated matters.
 1. There is no issue regarding the urine sample collection that took place on September 7, 2003 at the Brazilian Open at Salvador de Bahia Brazil.
 2. The sample analyzed by the laboratory is the sample submitted by Mr. Braga.

SUBMISSIONS of the PARTIES

Submissions by the Petitioner Player

15. The Player submits that due to the unsatisfactory conditions in which his sample was kept at Brazilian Customs, the integrity of the Lab analytical results were compromised. The sample was held up by Customs for 27 days during which it was stored at room temperature leading to an increase in the pH for the urine. There was in effect a microbiological degradation of the samples. It is submitted that the sample was not in a condition under which the Lab should have conducted an analysis.
16. It is alleged that the result of the improper storage led to the positive doping test. It is further asserted that this is the case because the metabolites of Stanozolol were detected in the A Sample and not Stanozolol itself. It was only when the B Sample was analyzed that the presence of Stanozolol was revealed.
17. The Player further asserts that there is a high risk of contamination in Brazil as a result of inappropriate use of specific instruments used to manufacture the products he was taking for nutritional benefits. The Player also notes that he has taken supplements offered by the ATP itself as well as those dispensed from a pharmacy in Brazil.
18. The Player asserts that he has never used any forbidden substance whatsoever. To the extent the Lab analysis, which is under the above challenges by these submissions, reveals a doping infraction it can only be an inadvertent one.
19. The Player pleads the Exceptional Circumstances provision of the Rules and asserts that there is either no significant fault or negligence thereby justifying the reduction or elimination of any periods of ineligibility. The Player submits that in his country he is known as an athlete always struggling against doping. It was also submitted that he has always complied with the rules and offered to make any conference or participate on any campaign against doping carried out by the ATP or other official bodies in his country.

Submissions by the Respondent ATP

20. The Player committed a Doping Offense under Rule C.1.a. by having a Prohibited Substance in his body during competition in violation of the 2003 ATP Anti-Doping Rules. Under Rule C. 3. a player is absolutely responsible for any Prohibited Substance found to be present within his body.
21. It was submitted that it was the sole responsibility of the Player to inform himself of the requirements of the Anti-Doping Program as is set out in Rule D. 4. He agreed to play by the Rules, and therefore is responsible for not adhering to them.
22. It was further submitted that stanozolol is not a substance that can be affected by the process of degradation that might occur when a substance is 27 days in transit and not refrigerated during that period. In support of such submissions there was the witness statement of Dr. Ayotte and various scientific articles. The variance in the pH of the sample at the time it was obtained and the recording of the pH in the Lab is due either to the imprecise measuring by dipstick used at the time of obtaining the sample; or, possibly because of the aging of the sample. This does not indicate that the chemical composition changed; nor that contamination occurred.
23. It was submitted that lack of intent to ingest a prohibited substance is not a defense to a Doping Offense because of the principle within the Anti-Doping Rules of strict liability.
24. The Player is unable to establish Exceptional Circumstances and the principle of proportionality ought not to apply to reduce the period of ineligibility. Therefore, Rule M.1.a. mandates a period of ineligibility of two years for a first offense because of the presence of the anabolic agent stanozolol or its metabolites. In this case there is no difference between the applicable sanctions contained in the 2003 and 2004 Anti-Doping Rules. Therefore, the principle of *lex mitior*¹ does not apply.

¹ For a discussion of the principle see Lewis, A. & Taylor, J. *Sport: Law and Practice*: Butterworths (2003). See also *AC v. FINA CAS 1996/A/149*.

25. THE RELEVANT ANTI-DOPING RULES

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 Ranking, 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 M² 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*

² Excluding the penalties set out in section M3a of the Program

result of those Exceptional Circumstances the penalties as set out in section M² 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 Ranking 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*

² Excluding the penalties set out in section M3a of the Program

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

1. Class I Prohibited Substances and Doping Methods

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 I Prohibited Substance or Doping Method, shall be suspended from participation in any and all ATP sanctioned or recognized tournaments or events for a two (2) year period.

...

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.

• • •

- c. *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.*

3. *A player who is found through the procedures set forth in this program to have committed a Doping Offense pursuant to an in-competition test (regardless of whether an Anti-Doping Tribunal may have reduced or eliminated the suspension as provided in section E4c) will (1) forfeit all Race/Entry Ranking points earned at the tournament or event where the player provided the positive specimen or refused to submit to a doping test or comply with any provision of the program, and (2) forfeit and return to the ATP all prize money without deduction of tax earned at the tournament or event where the player provided the positive specimen or refused to submit to a doping test or comply with any provision of the Program. The player shall also forfeit, subject to section E4c, all Race/Entry Ranking points and will forfeit and return to the ATP all prize money without deduction of tax earned at subsequent ATP sanctioned or recognized events in which the player competed following the tournament at which the player provided the positive specimen or refused to submit to a doping test, or comply with any provision of the program, until the commencement of a suspension, if any, imposed by the ATP.*

• • •

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 I: Anabolic Agents (Anabolic androgenic steroids and other anabolic agents) and Related Substances (as defined in Section (D) 1 of the Program).
Diuretics and Related Substances (as defined in Section (D) 1 of the Program). ...*

REASONS

26. The agreed upon stipulations indicate that there is no dispute about the manner and method of taking the urine sample. It is further agreed that the sample analyzed by the Lab was that of the Player. Therefore, there are no issues in respect of the collection or analysis of the sample.
27. Stanozolol is a purely synthetic steroid that is not produced naturally in the human body and cannot be present naturally in human urine samples. Therefore, it is entirely an exogenous substance that can only be in the body and found subsequently in a urine sample by some form of administration of the substance that has introduced it into the human body. These points are well established by the scientific literature provided by Dr. Ayotte in her statement.
28. The Tribunal finds based upon the testimony of Dr. Ayotte that there could be no possible affect on the existence of the stanozolol in the specimen during the 27 days it was detained in Brazilian customs that would have created the analytical results obtained by the Lab. Therefore, the delay in

the shipment of the sample to the Lab and its lack of refrigeration is not an explanation of the analytical results.

29. The Player asserts that nutritional and commercial products pose a risk for athletes. He obtained medical prescriptions for such supplement products and the Brazilian pharmacy filling the prescriptions may have inadvertently contaminated the products dispensed. The evidence before the Tribunal is that stanozolol is not a commercially available product for self-administration. It is a medication that requires a prescription from a physician. The testimony of Dr. Ayotte is to the effect that in her years of experience no nutritional supplement has been contaminated with stanozolol. The extensive experience of the Tribunal members is to the same effect. However, irrespective of the experience of Dr. Ayotte or the Tribunal there is no evidence produced of any nutritional substance that the Player took that might have contained the Prohibited Substance. Therefore, the Tribunal rejects the submissions of the Player in respect of possible contamination of a nutritional supplement with stanozolol.
30. A doping control officer is required to measure the pH and the specific gravity of the specimen when collecting a sample. The purpose of such action is only to determine if it might be desirable to obtain an additional sample at the time of collection. The difference in the pH at the time of taking the sample and at the Lab is explained by the fact the Lab is able to use a very precise scientific instrument to measure the pH. Whereas at the site where the sample is taken a visual view of a dipstick is used resulting in a mere approximation of the pH. As the testimony of Dr. Ayotte and the scientific literature referred to in her statement suggests there may have been some contribution to the variance in the pH readings because of aging through the delay at Brazilian customs. However even if that were the case, the variation of pH values does not constitute a definitive sign of microbial degradation. Regardless, the Stanozolol was ultimately found to be present. Stanozolol being a purely exogenous steroid cannot be formed by microbial degradation unlike some endogenous steroids. Dr. Ayotte in her statement and her testimony before the Tribunal affirms that metabolites of stanozolol in a urine sample are uniquely and entirely caused by the administration of stanozolol. Therefore, the Tribunal finds that the pH variation is of no consequence in determining if a Doping Offense has occurred.
31. The Player's counsel submits that the sample is unsuitable for analysis by the Lab when it is delayed to such an extent as it was here. It was submitted that the delay ought to be considered as a break in the chain of custody when coupled with, and considered with, the pH variation and the microbial

degradation that could possibly have taken place. The testimony and the scientific literature referred to in the statement of Dr. Ayotte have satisfied the Tribunal that the samples were not improper for analysis. They met the requirements for the acceptance of a sample for analysis as set out in the IOC Medical Commission document circulated in August 1998, *Analytical criteria for reporting low levels of anabolic steroids* which has since been replaced as of 1 January 2004 by the WADA International Standard for Laboratories and its technical documents. Therefore, the Tribunal finds that the chain of custody was intact. It has already found that the pH values are of no consequence in identifying the detected Prohibited Substance; and found that the substance in the sample cannot undergo microbial degradation. Therefore, based upon all of the foregoing findings the sample was proper for analysis by the Lab and the submissions of the Player in this regard are rejected.

32. The Player's assertion that the A sample showed only the presence of stanozolol metabolites and not stanozolol is not correct when the Lab Report and all the evidence before the Tribunal is reviewed. The A sample was not analyzed with all of the sensitive analytical techniques the Lab could have used because of the high values of the metabolites present. In contrast, the analysis of the B sample four months later did use the previously unused sensitive analytical techniques. It is for this reason that
33. the stanozolol is only reported in the B sample. Therefore, the Tribunal dismisses the argument of the Player that this is further evidence of microbial degradation.
34. The Lab analysis and quantification of its analytical results is undisputed except as noted above. Those issues having been rejected by this Tribunal, the Tribunal finds that the Player's urine sample contained a Prohibited Substance, stanozolol. Therefore, a Doping Offense has been established and occurred under Anti-Doping Rule C. 1.a. It is so found by this Tribunal.
35. The Player committed a Doping Offense pursuant to an in-competition test. Under Rule N. 3. of the Anti-Doping Rules of the Tour and under the principles of strict liability that unquestionably apply, the Player must forfeit both his Race/Entry Ranking points and prize money from the

tournament where he provided the positive specimen. It is so found by this Tribunal.

36. The Anti-Doping Rules provide for Exceptional Circumstances in Rule E. 4.c. Exceptional Circumstances are defined to be present under three conditions. In this case the Player has not established with satisfactory evidence, or indeed any evidence, that the three criteria have been met. This is in contrast to the case of the *ATP v. Coria* decision the Player cites. The source of the stanozolol is unknown and not explained by the testimony of the Player as required by E. 4.c.(i). Whether the Player did not know he had ingested the Prohibited Substance is a matter of assertion and speculation not evidence. Therefore, E. 4.c.(ii) is not established. Finally, there is no evidence that the Player's conduct was reasonable in taking steps to avoid or in not knowing that he was ingesting the stanozolol as required by E. 4.c.(iii). Thus, the Exceptional Circumstances Rule has no role to play in the assessment by the Tribunal of the period of ineligibility to be established under the Anti-Doping Rules. It is held that Rule E. 4.c. is of no application in this case.
37. The foregoing finding on the lack of application of Rule E. 4.c. means there is no possibility of any difference in the sanction between the Anti-Doping Rules 2004 and those applicable to this case being the Rules of 2003.

Therefore, the principle of *lex mittor* does not apply to this case the way it did in the case of the *ATP v. Oliver* a decision of an ATP Anti-Doping Tribunal dated 5 February 2004.

38. Under Rule M. 1. a. of the Anti-Doping Rules a finding of a Doping Offense involving a Class 1 Prohibited Substance results in a two-year suspension. It is so found and applied by this Tribunal.

DECISION

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

1. A First Doping Offense has occurred under Rule C 1. a. The Doping Offense involved the use of a Class I Prohibited Substance.
2. Under Rule N. 3. it is ordered that the Race/Entry Ranking points and prize money earned at the “2003 Brazilian Open” tournament in Savador de Bahia, Brazil in 2003 be forfeited. The prize money is to be returned to the ATP without deduction for tax and is payable under Rule N. 1. b. on the day following the date herein.
3. Further, under Rule N. 3. it is ordered that the Race/Entry Ranking points or prize monies won at ATP sanctioned or recognized events subsequent to the “2003 Brazilian Open” until the commencement of the suspension provided by this decision are to be forfeited. The prize money is to be returned to the ATP without deduction for tax and is payable under Rule N. 1. b. on the day following the date herein.
4. Under Rule M. 1. a. it is ordered that a period of suspension for twenty-four months is to be served during which participation in any and all ATP sanctioned or recognized tournaments or events is prohibited. In accordance with Rule N. 1. b. this suspension shall commence on the day following the date herein.

DATED THIS DAY of MAY 2004. 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, M.D.
Manhasset, N.Y. USA

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