Arbitration CAS 2004/A/ 690 H. v. Association of Tennis Professionals (ATP), award of 24 March 2005

Panel: Mr Stephan Netzle (Switzerland), President; Mr Càndido Paz-Ares (Spain); Mr Yves Fortier QC (Canada)

Tennis
Doping (cocaine)
Use of a natural product (coca tea and coca leaves) for medical purpose
Significant negligence
Sanction

1. **According to Rule S1. of Appendix Three of the ATP Rules, cocaine is considered a prohibited substance. When the presence of cocaine and metabolites in the athlete's body is not disputed, the athlete committed a doping offence in the sense of Rule C.1.a of the ATP Rules, if he did not establish a granted therapeutic use exemption.**

2. **A professional athlete must be considered to be highly sensitive and alert to issues of doping. The principle of strict liability means that an athlete is responsible for whatever substance is in his body, without having regard to the reasons for such presence and the degree of any respective fault of the athlete. Every athlete must therefore be concerned about substances he or she is ingesting, in particular if this is done for a medicinal purpose. The athlete who did not comply with his duty of care acts negligently and cannot be considered as bearing no fault or negligence in the sense of Rule M.5.a of the ATP Rules or no significant negligence pursuant to Rule M.5.b of the ATP Rules.**

3. **Under the applicable anti-doping regulations, it is not the duty of the ATP to warn athletes against the use of certain substances. While it is certainly desirable that the ATP and any IF should make every effort to educate athletes about doping, it is principally the sole duty of the individual athlete to ensure that no prohibited substances enter his body. It is therefore irrelevant whether the ATP has warned athletes against the use of natural products. The list of prohibited substances is not intended to include each and every possible ingredient or base product – whether natural or synthetic – to a substance that is prohibited.**

The Appellant is a professional tennis player domiciled in Barcelona, Spain.

The Respondent is a non-profit membership organization whose members are individual male professional tennis players as well as certain tennis tournaments. The Respondent's headquarters are located in Ponte Vedra Beach, Florida/USA.

The factual grounds for this arbitral proceedings originated at the ATP sanctioned tournament "BellSouth Open" held in Vina del Mar in Chile in February 2004. The Appellant participated in this tournament.

On 9 February 2004, a urine sample was taken from the Appellant. The urine sample was shipped from Chile to the Laboratoire de Controle de Dopage IRNS-Institut Armand-Frappier in Montréal, Canada.

On 27 February 2004, the laboratory issued its analytical report which found the presence of "cocaine and metabolites". On 27 April 2004, the laboratory carried out a confirmation test on the B-specimen, which also showed the presence of "cocaine and metabolites".

Upon report from the laboratory, the Anti-Doping Program Administrator under the Tennis Anti-Doping Program 2004 (the "ATP Rules") established the Review Board provided in the ATP Rules. The Review Board executed the reviews in respect of the A- and B-urine specimens.

The Appellant did not contest the findings of the laboratory but submitted that the consumption was destined to avoid the symptoms of altitude sickness and that he did not know that he was eating coca leaves.

The Anti-Doping Tribunal (the Tribunal) found that (a) the lab analysis and the quantification of its analytical results were correct and undisputed; (b) the presence of a prohibited substance in the urine specimen of the Appellant was clear; (c) the applicable anti-doping rule of the ATP Rules was one of strict liability; (d) the Appellant had therefore to be disqualified of the result at the tournament in Chile; (e) there were no grounds to admit that there was "No Significant Fault Or Negligence" on the part of the Appellant in the sense of Rule M.5.b of the applicable ATP anti-doping rules; (f) therefore, a two year period of ineligibility was to be applied, taking effect from the date of the decision; (g) in addition, all other competitive results obtained since the date of collection of the sample on 9 February 2004 shall be disqualified.

On 23 July 2004, the chairman of the Tribunal notified the Appellant by courier of the decision of the Tribunal (the "Decision"), the operative part of which reads as follows:

> *"1. A First Doping Offense has occurred under Rule C 1. a. The Doping Offense involved the use of a S1 Prohibited Substance found in Appendix Three.*
>
> *2. Under Rule L. 1. it is ordered that the Player's results obtained at the "Bellsouth Open" be Disqualified. As a result it is ordered that the medals, titles, computer ranking points and prize money earned at the "Bellsouth Open" tournament in Vina del Mar, Chile in 2004 be forfeited. The prize money is to be returned to the ATP without deduction for tax and is payable under Rule M. 8.*

3. *Under Rule M. 2., there being no Exceptional Circumstances existing under Rule M. 5., a period of ineligibility of two years is imposed for a First Offense. The commencement of the period of ineligibility is to be in accordance with Rule M. 8.*

4. *Further, under Rule M. 7. it is ordered that from the 9th of February 2004, the date of collection of the Sample, until the commencement of Ineligibility under paragraph 3 above all other competitive results be Disqualified. As a result it is ordered that medals, titles, computer ranking points and prize money be forfeited. The prize money is to be returned to the ATP without deduction for tax and is payable under Rule M. 8.*

5. *Under Rule M. 9. it is ordered that during the period of Ineligibility the Player cannot participate in any capacity in an Event or activity authorized or organized by the ATP. Furthermore, the Player shall not be given accreditation for, or otherwise granted access to any Event to which the ATP controls access".*

On 13 August 2004, the Appellant submitted his Statement of Appeal to the CAS.

Following the resolution of procedural issues, the Appellant filed his Appeal Brief on 18 October 2004. The Appellant submitted the following requests for relief:

"[A]ll costs entailed in the present procedure are to be borne by the ATP and

Principally

1. *To rescind the Decision rendered by the ATP Tour Anti-Doping Tribunal on July 23 2004;*
2. *To decide that the player bears no Fault or Negligence regarding this case and that there shall be no period of Ineligibility with regard to the Rules of the ATP.*

Subsidiarily [to 1. and 2.]

3. *To rescind the Decision rendered by the ATP Tour Anti-Doping Tribunal on July 23 2004;*
4. *To decide that the player bears no Significant Fault or Negligence regarding this case and that the period of Ineligibility should be of one year with regard to the Rules of the ATP, the period of Ineligibility commencing on February 9, 2004, date of Sample collection".*

On 11 November 2004, the Respondent filed its Answer Brief. The Respondent concluded that *"[T]he findings and conclusion of the Tribunal below should not be disturbed".*

On 20 December 2004, the President of the Panel confirmed that the case would be decided on the sole basis of written submissions.

LAW

Jurisdiction of CAS

1. The jurisdiction of CAS *in casu* results from Rules A.2.d and O.2 of the ATP Tennis Anti-Doping Program 2004 and its Rule O.5, according to which *"the deadline for filing and appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party"*.

2. The Appellant has consented to the arbitration pursuant to the ATP Rules by signing the standard consent form of 6 February 2004, as provided for in Appendix Two of the ATP Rules.

3. The Parties have agreed to the jurisdiction of the CAS by submitting their Declaration of Appeal and Appeal Brief, and Answer Brief respectively, pursuant to the arbitral rules of the ATP Rules providing for the competence of CAS.

4. The Parties have signed and returned the Order of Procedure dated 15 November 2004.

Applicable Rules

5. The applicable rules are the rules of the Tennis Anti-Doping Program 2004, effective as of 1 January 2004 (the "ATP Rules").

6. According to R58 of the Code of Sports–related Arbitration (the "Code"), the Panel must decide the dispute according to the applicable regulations and the rules of law chosen by the parties.

7. Pursuant to Rule S.3 of the ATP Rules, the Parties have chosen that the laws of the State of Delaware are applicable to the ATP Rules. The Appellant has consented to this choice of law by signing the standard consent form of 6 February 2004, as provided for in Appendix Two of the ATP Rules.

Main issues

8. The Panel's decision on the merits of the present Appeal depends on the answers to the following questions:

   (1) Which of the points 1-5 of the operative part of the Decision is attacked by the Appellant's petition *"to rescind the Decision […]"*?

   (2) Did the Appellant know or suspect or could he have reasonably known or suspected, with the exercise of the utmost caution, that the tea he was drinking and the leaves he

was chewing were of a coca plant and that this could result in the presence of cocaine in his body?

(3) Was the negligence of the Appellant significant in relation to his doping offence?

(4) If yes to (3), and if, therefore, the Panel holds a minimum period of ineligibility of two years: Should the sanction be reduced on the basis of proportionality?

(5) Are there reasons of fairness that require that the period of ineligibility should start before 23 July 2004?

A. Which of the points 1-5 of the operative part of the Decision is attacked by the Appellant's petition "to rescind the Decision […]"*?*

9. In his petitions for relief, the Appellant applies for the rescission of the Decision without limiting his appeal to certain points of the Decision. The Appellant therefore appears to ask for the integral rescission of the Decision.

10. However, his requests for relief No. 2 and 4 appear to pertain to points 3-5 of the operative part of the Decision, i.e. to the duration and commencement of the period of ineligibility. These requests do not make any sense if the Appellant is also challenging the finding that there was a doping offence (point 1 of the operative part of the Decision). Further, both in his Statement of Appeal and in his Appeal Brief, the Appellant does not dispute the analysis of his urine and the results, i.e. the presence of a prohibited substance in his body.

11. The Appellant does not make any further submissions – neither in his petitions nor in his contentions – regarding points 2, 4 and 5 of the operative part of the Decision.

12. As a consequence, the scope of the appeal submitted by the Appellant is unclear. Given the statutory obligation of the Panel to decide all filed requests (Art. 190 para. 2 let. c of the Swiss Private International Law Statute – PILS), this Panel finds that is has the legal obligation to decide on all points of the Decision.

13. The Appellant does not dispute the conclusion of the analysis of his urine sample taken at the ATP tournament of Vina del Mar in Chile in February 2004, i.e. the presence of cocaine and metabolites in his body. The Panel sees no reason to disturb the finding of the Tribunal that the coca tea and the coca leaves were the reason for the presence of the cocaine metabolites in the organism of the Appellant. Therefore, it relies on these facts for its decision. According to Rule S1. of Appendix Three of the ATP Rules, cocaine is considered a prohibited substance. Thus, the Appellant committed a doping offence in the sense of Rule C.1.a of the ATP Rules, as he did not establish a granted therapeutic use exemption, and point 1 of the Decision is upheld.

14. The urine sample containing the prohibited substance was taken from the Appellant during the ATP International Series tournament "BellSouth Open" in Vina del Mar in Chile, on 9 February 2004. The offence thus was committed in-competition in the sense of Rule L.1. of

the ATP Rules, which leads to the automatical disqualification of the individual results obtained in that tournament with all resulting consequences, including forfeiture of any medals, titles, computer ranking points and prize money, without deduction for tax. Therefore, point 2 of the operative part of the Decision is upheld.

B. Did the Appellant know or suspect or could he have reasonably known or suspected, with the exercise of the utmost caution, that the tea he was drinking and the leaves he was chewing were of a coca plant and that this could result in the presence of cocaine in his body?

15. The Appellant submits that he did not know that he was eating coca leaves or that sipping coca tea or eating coca leaves were a source of cocaine. Cocaine being the result of a process involving a chemical treatment of the natural coca leaves, he alleges that he was not supposed to consider that consuming a tea prepared with coca leaves could lead to ingestion of a prohibited substance. The Appellant further submits that, in light of the well known side effect of cocaine, he did not want to risk worsening his sickness with such side effects. He submitted that he thought he was using natural medicine plants just as vervain and lime tea in European latitudes to cure his sickness. In conclusion, the Appellant submits that he could not reasonably have known, even by showing the utmost caution, that the leaves contained cocaine.

16. The Appellant further submits that the Respondent has never warned players against the use of natural products, and that no natural products and coca leaves in particular appear on the list of prohibited substances.

17. The Tribunal's comparison of the ingestion of coca leaves and coca tea with the use of nutritional supplements is contested by the Appellant submitting that he did not intend to improve his performance. He further argues that the Respondent considers that trainers who have been distributing supplements containing prohibited substances for years in spite of warnings from the Respondent were not supposed to consider the supplements to be a risk of contamination because of the long-standing use of such products without any incident, and that in consequence, one should also believe a player who did not consider that there was a risk of contamination in consuming coca leaves.

18. The Respondent submits that according to the applicable anti-doping rules, an ATP player is responsible for the presence of the prohibited substance in his body, and that the Respondent is not required to establish knowing use of a substance by the player. The Respondent further submits that the evidence showed that the Appellant knew he was drinking coca tea and chewing coca leaves, and that, even in the absence of such awareness, the Appellant before chewing unknown leaves and drinking unknown tea should have undertaken steps to determine whether he was consuming a prohibited substance.

19. In order to examine whether the Appellant was at fault, i.e. has acted with intent or with negligence regarding the presence of a prohibited substance in his organism, one must

determine the standard of care to be observed by the Appellant in such a situation and the knowledge to be expected from the Appellant.

20. The situation in which the Appellant was when he ingested the coca tea and chewed the coca leaves may, according to the undisputed facts of the case, be summarised as follows: Before playing at the tournament in Vina del Mar in Chile, he visited a friend in Tucoman, a town of Northeastern Argentina at a level of more than 3,000 metres above sea level. The Appellant stayed there for three to four days. He suffered from headaches and an upset stomach. He was advised to drink a certain herbal tea and chew certain leaves, which were given to him. Upon his departure, the Appellant took a bag of said leaves with him in order to continue to drink the tea and chew the leaves to both rid himself of the symptoms he suffered and to prepare himself for a return to his friend's home in Argentina. At that time, the Appellant did not know about the nature or the source of the leaves.

21. The Appellant has been a professional tennis player participating in the ATP Tour since 1994. As a professional athlete he must be considered to be highly sensitive and alert to issues of doping. The concept of strict liability has been applied consistently by international sport federations ("IF") and CAS Panels and ultimately prescribed in the World Anti Doping Code (WADC), as well as echoed in most anti-doping regulations of IFs and of the Respondent. The principle of strict liability means that an athlete is responsible for whatever substance is in his body, without having regard to the reasons for such presence and the degree of any respective fault of the athlete. While there are exceptions to this principle under the anti-doping regulations inspired and influenced by the WADC, every athlete must be considered to be aware of the fact that he is responsible for any substance found in his body. This also means that every athlete must be concerned about substances he or she is ingesting, in particular if this is done for a medicinal purpose.

22. The Panel is of the opinion that in light of these circumstances, the duty of care in the present situation and with the presumed knowledge of the Appellant should have lead him, at the very least, to inquire about the tea he ingested and the leaves he chewed for several days, and which were of unknown nature and source. The Appellant does not allege that he was unable to make enquiries due to his state of health; he explained that he suffered from headaches and an unsettled stomach. There is no evidence indicating aggravating circumstances such as a medical emergency or lack of adequate medical care. One cannot say, therefore, that the Appellant had no other choice than to take whatever he was told by a friend to take in order to get relief from his symptoms. Further, the Appellant states that not only did he consume the leaves during his 3-4 day stay in Tucoman, but that he continued to drink the tea and chew the leaves after his departure in order to prepare himself for a return to his friend's place in Argentina after the tournament, i.e. at a time when the symptoms had presumably disappeared.

23. According to his own testimony, the Appellant did not inquire about the leaves even though this would have been possible from a medical point of view. The Panel therefore finds that the Appellant did not comply with his duty of care and thereby acted negligently.

24. "No Fault or Negligence" may be admitted under the ATP Rules if the athlete *could not*, even with the exercise of the utmost caution, *reasonably have suspected, that he had been administered a Prohibited Substance*. It is therefore necessary to establish whether the Appellant could have, had he inquired about the tea and leaves, suspected that here was a risk of contamination with cocaine.

25. The Appellant testified that he did not know that he was chewing coca leaves and that sipping coca tea or eating coca leaves were a source of cocaine. In his Appeal Brief, the Appellant argues that cocaine is the result of a chemical treatment of the coca leaves, so that *"one could not consider that consuming a tea prepared with coca leaves can lead to the ingestion of a prohibited substance just as nobody would consider they were ingesting alcohol while eating grapes"*. Mr Cusin, who gave the tea and the leaves to the Appellant, testified that he knew that the leaves were coca leaves, but that he was unaware that cocaine derived from coca leaves or that coca leaves were a problem as they were readily available in Argentina.

26. The Panel bases its considerations on the Appellant's undisputed testimony according to which he did not know he was chewing coca leaves, and that chewing coca leaves and sipping coca tea could be a source of cocaine. However, under the applicable rules, what is determinative is not only what the athlete actually knew or expected but also what he *could have suspected*.

27. In the view of the Panel, it is clear that if the Appellant had asked Mr Cusin about the nature and the source of the leaves he was offered, Mr Cusin would have told the Appellant that the leaves were coca leaves. One must therefore examine what the Appellant could have suspected if he had known that the tea and the leaves he was offered were coca leaves.

28. As a professional tennis player, the Appellant is, in principle, obliged to ensure that no prohibited substance enter his body. He is therefore supposed to know if a substance he is ingesting is a prohibited substance or not. The Appellant was 27 years old when the doping offence occurred. He is of Spanish and Argentinean citizenship and lives in Barcelona, the second largest city of Spain. In the opinion of the Panel, an average European of the age of the Appellant must be assumed to make an intellectual link between the natural product of coca leaves and cocaine that is available in European cities, even if there is no specific knowledge about the process of production of cocaine. Further, the words cocaine (in Spanish *"cocaina"*), coca leaves (in Spanish *"hojas de coca"*) and coca tea (in Spanish *"mate de coca"*) are phonetically very much alike. In other words, the Panel is of the opinion, that it must be assumed that the Appellant could have, should have, and indeed would have suspected that he was consuming cocaine or a related substance, if he had acted cautiously and asked Mr Cusin about the nature and the source of the leaves.

29. The Appellant further argues that the Respondent has not warned the players against the use of natural products, and that coca leaves do not appear on the list of prohibited substances of the Respondent. Under the applicable anti-doping regulations, it is not the duty of the Respondent to warn athletes against the use of certain substances. While it is certainly desirable that the Respondent and any IF should make every effort to educate athletes about

doping, it is principally the sole duty of the individual athlete to ensure that no prohibited substances enter his body. It is therefore irrelevant whether the Respondent has warned athletes against the use of natural products. The list of prohibited substances is not intended to include each and every possible ingredient or base product – whether natural or synthetic – to a substance that is prohibited. For instance, the current list includes several exogenous anabolic androgenic steroids but also adds that any substance with similar chemical structure or similar biological effects is prohibited. The list also includes heroine as a prohibited substance in-competition without stating that the corn poppy is an ingredient to heroine. The Panel therefore considers irrelevant whether coca leaves are listed on the list of prohibited substances of the Respondent.

30. The Panel further finds no relevance in the comparison between the Appellant's behaviour and the issue of supplements. While the Panel does not agree with the allegation of the Appellant that the Tribunal excluded the existence of exceptional circumstances on the basis of a comparison with the issue of supplement, the question can be left undecided. Pursuant to R57 of the Code, the Panel has full power to review the facts and the law. The Panel may therefore confirm the finding of the Tribunal on different grounds. As stated above, the Appellant had the obligation to enquire about the nature and the source of the leaves and the tea, which he did not do.

31. The case of the Appellant is different from the issue regarding the pattern of positive tests on 19-norandrosterone found in specimens of ATP players between August 2002 and May 2003 (see the Investigation Report of Mr Richard Young, dated 9 July 2003). One of the tribunals involved in these cases held that the principle of strict liability could not be enforced, and the burden of proof to establish a doping offence shifted to the ATP, because it was the ATP itself – its trainers – that gave the tablets that were likely to be the source of the prohibited substance to the athletes. These cases were unique because the *"ATP is both the party seeking to impose discipline and is also the party whose trainers' conduct may have led to the positive tests. Because of its own trainers' acts, the ATP is estopped from enforcing its normal rules"* (see p. 9-10 of the Investigation Report of Mr Young). In the case at hand, the situation was quite different. The coca leaves were not distributed by the Respondent or its trainers or other staff. It was rather the Appellant himself, and a third person whose behaviour is attributed to the Appellant, who procured the coca leaves. Further, the anti-doping rules have changed since the implementation of the WADC. In the opinion of the Panel, therefore, the question of how the Respondent and the independent anti-doping tribunals decided the cases of the repeated positive 19-norandrosterone in 2003 is of no relevance for the case at hand.

32. In conclusion, the Appellant cannot be considered as bearing no fault or negligence in the sense of Rule M.5.a of the ATP Rules. An elimination of the sanction under said rule is therefore not possible.

C. Was the negligence of the Appellant significant in relation to his doping offence?

33. In addition to his arguments regarding "No Fault or Negligence" as summarised above, the Appellant submits that he underwent an anti-doping control at a national tournament in Italy on 16 July 2004 which turned out to be negative, and that throughout his career, his conduct had always been irreproachable. He further submits that he did not consume the substance in its *"usual way"* and not in order to enhance performance. Unlike in the case of cannabis-consuming C., the Appellant did not consume cocaine (but only the leaves).

34. The Respondent submits that the case of C. is not pertinent as cannabis is a Specified Substance and not a Prohibited Substance like cocaine which is in itself a performance enhancing substance. It further submits that there was significant fault or gross negligence on the part of the Appellant as he admitted consuming tea and chewing herbs recommended for medicinal purposes without any attempt to determine the nature of the leaves or the tea. As a professional athlete, the Appellant should have made sure that the leaves and the tea were not a source of a Prohibited Substance.

35. Under Rule M.5.b. of the ATP Rules, the sanction may be reduced in case of Exceptional Circumstances, if the player demonstrates that he bears "No Significant Fault or Negligence". According to the definition in the ATP Rules, "No Significant Fault or Negligence" means that a player must establish that his fault or negligence, in light of the totality of the circumstances and taking into account whether he could have reasonably known or suspected with the exercise of the utmost caution, that he had used or been administered a prohibited substance, was not significant in relationship to his Doping Offence.

36. The ATP Rules do not provide any useful guidance on the interpretation of this provision.

37. The ATP Rules have been established by the Respondent on the basis of the WADC. One of the main intentions of the WADC is the harmonisation of the worldwide fight against doping. In order to achieve this goal, it is necessary to interpret anti-doping rules that have been established on the basis of the WADC in harmony with the WADC, the respective set of rules of other international sport federations and the respective CAS case law.

38. Rule M.5.b. of the ATP Rules contains wording similar to Art. 10.5.2 WADC. It can therefore be considered by the Panel for assistance. In its explanatory footnote to Art. 10.5, the WADC gives some guidance as to the interpretation. The Panel notes that, according to the WADC, the exceptions under Art. 10.5.1 and 10.5.2 WADC are meant to have an impact only where the circumstances are truly exceptional and not in the vast majority of cases. The comment shows the intention of the WADC to apply the exception in a very restrictive manner.

39. The explanatory footnote further gives examples of exceptional circumstances that may, depending on the unique facts of a particular case, result in a reduction of the sanction: (a) mislabelled or contaminated vitamin or nutritional supplement (athletes are responsible for what they ingest and they have been warned against the possibility of contamination), (b)

administration of a prohibited substance by the athlete's personal physician or trainer without disclosure to the athlete (athletes are responsible for their choice and adequate instruction of medical personnel), (c) sabotage of the athlete's food or drink by a person within the athlete's circle of associates (athletes are responsible for the conduct of person to whom they entrust access to their food and drink). The explanatory footnote also stresses the necessity to assess the unique facts of a particular case.

40. As indicated above, the examination of anti-doping regulations of other IF may also be helpful to the interpretation of provisions of the WADC and anti-doping rules that are inspired by the WADC, such as the ATP Rules. Rule 38.12 (iii) of the current anti-doping regulations of the IAAF lists some cases that will not be regarded as exceptional: (a) the prohibited substance was given to an athlete by another person without his knowledge, (b) the prohibited substance was taken by mistake or (c) due to consumption of contaminated food supplements or (d) medication was prescribed by athlete support personnel in ignorance of the fact that it contained a prohibited substance. While the quoted IAAF regulations may not be applicable as such (see CAS OG 04/003, Torri Edwards v/ IAAF and USATF, Award of 17 August 2004, note 5.17), they can certainly be taken into consideration as the Panel searches for the meaning of Art. 10.5.2 WADC.

41. The only award of a CAS Tribunal where these provisions of the WADC were relied on is the case CAS OG 04/003 (award of 17 August 2004). In that case, the CAS Tribunal found the athlete to have acted negligently but it did not discuss the threshold for a finding of non significant negligence.

42. Contrary to the allegations of the Appellant, the decision of an ATP anti-doping tribunal dated 10 August 2004 regarding C. is not pertinent to the case at hand, even though it was rendered on the basis of the same ATP Rules that are also applicable to the present Appeal. The doping offence of C. consisted in the presence of cannabis metabolites in his specimen. Under the ATP Rules, cannabis is, unlike cocaine, a specified substance. If the athlete can prove that the use of such a specified substance was not intended to enhance performance, the anti-doping tribunal may impose a sanction ranging from a minimum of warning and reprimand to a one year period of ineligibility. In the present Appeal, the Panel does not have such discretion regarding the sanction. Furthermore, in the case of C., the ATP requested the anti doping tribunal to – only – impose a two months ineligibility period. The Respondent's request in the C. case does not prejudice the present case in any way.

43. In conclusion, and in the absence of any pertinent precedent, the Panel is of the opinion that the application of the exemption of "No Significant Fault or Negligence" is to be assessed on the basis of the particularities of the individual case at hand.

44. The Appellant compares his behaviour with the drinking of lime or vervain tea common in some places in Europe in case of a headache or an upset stomach. Nobody would, according to the Appellant, deny an athlete the right to drink herbal tea in case of the very common symptoms of headache and upset stomachs without having investigated contents and source of the tea beforehand.

45. If the Appellant had only consumed a tea made from coca leaves, the Panel may have been prepared to agree with the Appellant. Indeed, the Panel finds no reason to hold that the Appellant should have been particularly vigilant before drinking, in good faith, an herbal tea that was given to him by a friend and that was supposed to bring relief to his headaches and stomach aches. As members of the Panel have observed themselves, it is common practice in many Andean countries of South America to drink tea made of coca leaves to soothe the effects which high altitude may have on the human body. The Panel therefore is of the opinion that the Appellant was not significantly negligent in drinking the tea that was offered to him without enquiring about its nature or source.

46. However, the Appellant did not only drink tea. The Appellant chewed leaves of unknown origin, purpose and effect, and did so for a period of several days. Chewing leaves is a rather unusual way to cure illnesses, at least – to use the comparison invoked by the Appellant – in European latitudes. The Appellant does not submit that chewing leaves was a common practice of his home remedies. Even though the Panel has some sympathy for the Appellant's illness in a foreign country, where chewing of these leaves is rather common, it finds that the Appellant should have become alert upon being told to chew leaves. Further, the Panel notes that the Appellant has continued to chew the leaves in order to prepare himself for his return to Tucoman. In other words, the Appellant did not enquire about the leaves even after he had gotten better.

47. In conclusion, the Panel finds that the Appellant did not exercise the caution that was expected from him in his very situation and that, accordingly, the Appellant acted with significant negligence pursuant to Rule M.5.b of the ATP Rules. The sanction of a two years' period of ineligibility provided for by Rule M.2 of the ATP Rules may therefore not be reduced by the Panel but has to be upheld.

D. If yes to (C.), and if, therefore, the Panel holds a minimum period of ineligibility of two years: Should the sanction be reduced on the basis of proportionality?

48. According to the Appellant, the principle of proportionality is a general principle of law stating that a reasonable relationship must exist between legally protected interest and measures taken in that interest. In the case at hand, the Appellant considers the sanction imposed on him as not observing this principle.

49. The Respondent submits that the Panel is not permitted to conduct a proportionality analysis, as the Rules contained an exemption for exceptional circumstances the application of which the Appellant failed to demonstrate. Furthermore, the Respondent considers ineligibility of two years to be a proportional sanction.

50. The Panel agrees with the view that the principle of proportionality is a general principle of law that must also be observed in applying a sanction for a doping offence. It is also true that in the past, CAS case law took considerable care in measuring a sanction to the individual

offence and the situation of the offender. However, the CAS case law of the past is based on anti-doping rules of different IF and other institutions. Those anti-doping regulations were not necessarily harmonised and indeed varied considerably, in particular regarding sanctions. The WADC has changed this situation. The intention of the WADC is, inter alia, to make the fight against doping more effective by harmonising the legal framework and to provide uniform sanctions to be applied in all sports. Pursuant to Art. 23.3.1 WADC, the signatories of the WADC had time until the first day of the Athens Olympic Games 2004 to implement anti-doping rules that correspond with the WADC. Many IF copied the material provisions of the WADC into their own regulatory framework.

51. Art. 10.2 WADC provides for a uniform sanction of an ineligibility of two years for first offences. The only possibility for the athlete to reduce this fixed sanction is by evidence of exceptional circumstances (Art. 10.5 WADC). If a panel denies the existence of exceptional circumstances, it has, under the WADC, no other choice than to apply the sanction provided in Art. 10.2 WADC (see CAS OG 04/003, award of 17 August 2004, note 6.6.2).

52. In an appeal regarding a motion to set aside a CAS award, the Swiss Federal Supreme Court held that under the applicable anti-doping rules of FINA, the question was not to determine whether a penalty was proportionate but to establish whether the athlete had produced evidence for mitigating circumstances (Decision dated 31 March 1999 in re *N. et al. v. FINA*, see Digest of CAS Awards II, p. 775, in particular p. 780, cons. 3.c). The Federal Supreme Court further held that, therefore, the issue of proportionality could only arise if the award were to constitute an attack on personal rights which was extremely serious and totally disproportionate to the behaviour penalised. It concluded that a two-year suspension was only a moderate restriction of the athletes' freedom of movement, and that it resulted from a proven doping violation under rules that had been previously accepted by the athletes that submitted the appeal.

53. The Swiss Federal Supreme Court thereby ruled that the application of an ineligibility period of two years, without examining the proportionality of the sanction in an individual case, does not violate general principles of Swiss law.

54. According to a legal opinion by Gabrielle Kaufmann-Kohler, Antonio Rigozzi and Giorgio Malinverni[1], the system of a fixed sanction as provided for in Art. 10.2 and 10.5 WADC may be incompatible with the principle of equal treatment (note 169). The experts demonstrate convincingly that the fixed sanction regime serves the legitimate aim of harmonisation of doping penalties (see notes 171-174). They also discuss the issue of proportionality and ultimately conclude that the system of fixed sanctions complies with human rights and general legal principles even though proportionality is not examined in the individual case (see notes 175-185).

[1] Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law, dated 26 February 2003, by Gabrielle Kaufmann-Kohler/Antonio Rigozzi/Giorgio Malinverni, available at http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf.

55. While there is some doubt within the Panel as to the conclusion of the experts' legal opinion, the case at hand does not require an in-depth discussion of the issue. The Respondent has chosen to incorporate the mechanism of a fixed sanction according to WADC into its anti-doping rules effective 1 January 2004, and the Appellant has chosen to accept these rules by way of his participation at the "BellSouth Open" tournament organised by the Respondent. In light of the jurisprudence of the Swiss Federal Supreme Court quoted above, the Panel is of the opinion that a two year suspension is not totally disproportionate to the behaviour of the Appellant, and the limitation of his freedom to practice his sport during that period can not be characterised as "extremely serious". Further, the Appellant is, as a result of the suspension, banned from participating at tournaments that are under the auspices of the Respondent, but he is still allowed to play tennis.

56. The Panel therefore affirms the two year period of ineligibility applied to the Appellant.

E. Are there reasons of fairness that require that the period of ineligibility should start before 23 July 2004?

57. According to Rule M.8.c of the ATP Rules, the period of ineligibility shall start on the date of the decision by the anti-doping tribunal. There are two exceptions:

(i) Any period during which the player demonstrates he has voluntarily foregone participation in competitions shall be credited against the total periods of ineligibility to be served, and

(ii) where required by fairness, such as the case of delays in the hearing process or other aspects of doping control not attributable to the player, the anti-doping tribunal may start the period of ineligibility at an earlier date commencing as early as the date of the sample collection.

58. The first exception does not apply. The Appellant asks for the application of the fairness-exception, without, however, specifying which reasons of fairness require the period of ineligibility to start from an earlier date than the date of the Decision.

59. Rule M.7. of the ATP Rules states that unless fairness requires otherwise, all results obtained in competitions between the sample collection and the date of commencement of the period of ineligibility shall be disqualified. Point 4 of the operative part of the Decision provides for such disqualification. Given the scope of the Appellant's petitions for relief, the appeal is also directed against this part of the Decision, even though the Appellant does not invoke any specific ground of fairness in support of the application of said exception.

60. The strict application of both principles leads to the consequence that the period of ineligibility begins on 23 July 2004 and the sporting results obtained between the sample collection on 9 February 2004 and 23 July 2004 are disqualified. This in fact leads to a period of ineligibility of 2 years and 4 ½ months.

61. The wording of Rules M.7. and M.8.c of the ATP Rules is unambiguous as to the principle of the commencement of the period of ineligibility and the disqualification of competitive results

obtained between sample collection and commencement of the ineligibility period. However, the principles of Rules M.7. and M.8.c. of the ATP Rules may result in an advantage for a player who does not contest the findings of the ATP Review Board, and in a significant disadvantage for a player who uses his defence rights under Rule K of the ATP Rules while deciding to continue to compete. As the principle of due process requires that a person must not be punished for making bona fide use of its defence rights, the conditions for the application of the exception under Rules M.8.c.(ii) and M.7 of the ATP Rules should be interpreted broadly.

62. The respective ATP Rules correspond to Art. 10.7 and 10.8 WADC. Given the WADC's objective of harmonization in the fight against doping, it is essential that the ATP Rules be interpreted in harmony with the WADC. According to the explanatory footnote to Art. 10.8 WADC, the mechanism of commencement of the period of ineligibility is intended to give athletes a strong disincentive to drag out the hearing process while they compete in the interim, and it encourages them to voluntarily accept provisional suspensions pending a hearing. It is therefore not the objective of the WADC to automatically prolong the period of ineligibility, but to discourage athletes to abuse the procedural rights they enjoy under the applicable rules.

63. One could argue that the wording of Art. 10.7 and 10.8 WADC does not accurately reflect the main purpose. While the purpose is to avoid abusive prolongation of proceedings, the athlete bears now the burden to prove that in his specific case, rule of fairness requires a solution different to the principle. If he is unable to produce evidence in support of his allegation, the principle is applied to him. The Panel is concerned that this mechanism may lead to results that are unfair to an individual athlete. However, in light of the clear wording of Art. 10.7 and 10.8 WADC, and hence Rules M.7 and M.8.c(ii) of the ATP Rules, the Panel finds that it is not allowed to depart from the wording. At the same time, the Panel is of the opinion that in cases where it is obvious that the athlete did not abuse his defence rights, the application of the fairness-exception must not be weakened by the application of a very stringent standard of proof.

64. Further, the Panel notes that the Appellant was not provisionally suspended by the Respondent. Unlike other IF (see, e.g., Art. 10.8 of the anti-doping rules of FISA), the Respondent has chosen, in Rule J.4.a of the ATP Rules, to exclude the possibility of provisional suspensions provided for in Art. 7.5 WADC. In the view of the Panel, a provisional suspension of an athlete is a delicate decision that needs thorough examination and a sound legal basis. The decision of the Respondent not to provide for such a possibility is therefore not questioned. However, according to Art. 10.8 WADC, if there was a provisional suspension, such period must be credited against the total period of ineligibility to be served. Considering the above, it appears unfair to retroactively annul all results of the Appellant if the Respondent did not provisionally suspend him following the positive test results. This would, in fact, result in a period of ineligibility that is longer than the fixed sanction of two years, and such longer penalty would not apply to all sports.

65. In the case of the Appellant, the Panel finds that he obviously did not abuse his defence rights in order to obtain an unfair advantage in his career as professional tennis player. The Appellant has only made reasonable use of the rights granted to him under the ATP Rules. Further, the Appellant is not the type of athlete who has been found to have used prohibited substances with the objective of enhancing performance and thus to gain a competitive advantage. He has consumed a natural product that is, in the region where he was at the time, commonly used against common symptoms of altitude sickness, and this product has lead to the presence of a prohibited substance in his body. The fault of the Appellant consists of having consumed coca leaves without enquiring about their nature or source and without thinking at all about the possibility of contamination. The Panel found that this behaviour could not be considered as reaching the threshold of non significant negligence in the sense of Rule M.5.b of the ATP Rules. However, the Panel found some mitigating circumstances that are to be taken into account in the application of the fairness requirement under Rule M.8.c(ii) of the ATP Rules.

66. Considering the above, the Panel finds for reasons of fairness that the period of ineligibility should commence on the date of the sample collection, i.e. on 9 February 2004.

67. Following this finding, the question that formerly arose under Rule M.7 of the ATP Rules and the Appeal against point 4 of the operative part of the Decision has become obsolete.

The Court of Arbitration for Sport hereby rules:

1. The Appeal filed by H. is partially allowed.

2. The Decision of the ATP Anti-Doping Tribunal dated 23 July 2004 is upheld, save points 3 and 4 which are modified as follows:

   "3. [*Sentence 1 is annulled*] The period of ineligibility has commenced on 9 February 2004 and will end on 8 February 2006.

   4. [*Sentence 1 is annulled*] It is ordered that medals, titles, computer ranking points and prize money earned since 9 February 2004 be forfeited. [*Sentence 3 is upheld*]".

(…)