

INTERNATIONAL TENNIS FEDERATION

INDEPENDENT ANTI-DOPING TRIBUNAL

DECISION IN THE CASE OF MR FILIPPO VOLANDRI

Tim Kerr QC, Chairman

Dr Anik Sax

Dr Barry O’Driscoll

Introduction

1. This is the decision of the independent Anti-Doping Tribunal (“the Tribunal”) appointed by the Anti-Doping Manager of the International Tennis Federation (“the ITF”) under Article K.1.1 of the ITF Tennis Anti-Doping Programme 2008 (“the Programme” or “the 2008 Programme”) to determine charges brought against Mr Filippo Volandri (“the player”) following a positive drug test result in respect of a urine sample no. 3011747 provided by the player on 13 March 2008 at the Indian Wells tournament in California.
2. The player was represented at the hearing by Mr Massimo Rossi, of Studio Legale Caprarulo, Milan, Italy. The ITF was represented by Mr Jonathan Taylor of Bird & Bird, the ITF’s solicitors in London. Both the advocates gave invaluable assistance to the Tribunal with submissions of high quality for which the Tribunal is very grateful.
3. The player did not dispute the presence of salbutamol in his sample, in a concentration over 1,000 ng/ml. A concentration of 1,000 ng/ml or less would not have constituted an Adverse Analytical Finding because the player had a Therapeutic Use Exemption (“TUE”) in respect of salbutamol when he gave his

sample (see the Prohibited List at Appendix 2 to the 2008 Programme at S.3). The player's case was that "abnormal result was the consequence of the therapeutic use of inhaled salbutamol" (ibid.).

4. By Article A.10 of the Programme, the proceedings before the Tribunal are governed by English law, subject to Article A.8, which requires the Tribunal to interpret the Programme in a manner that is consistent with the World Anti-Doping Code ("the Code"). The Code prevails in the event of a conflict between its provisions and those of the Programme (Article A.8).
5. The Code (and therefore the Programme) must be interpreted in a manner that is consistent with Swiss law (see the CAS decision in *Puerta v. ITF*, CAS 2006/A/1025, at para 10.8). Article A.8 of the Programme further provides that the comments annotating various provisions of the Code may, where applicable, assist in the understanding and interpretation of the Programme.
6. The Tennis Anti-Doping Programme 2009 ("the 2009 Programme") entered into force on 1 January 2009 subject to transitional provisions including Article A.6.2 which preserves the applicability to this case of the 2008 Programme "subject to any application of the principle of *lex mitior* by the Anti-Doping Tribunal hearing the case".
7. The parties are agreed that by virtue of those words, salbutamol is to be treated as a "Specified Substance": it was not a Specified Substance under the 2008 Programme, but is under the 2009 Programme. Accordingly, the parties agree that Article M.4 of the 2009 Programme (reduction or elimination of a period of ineligibility for specified substances under specified circumstances) may in principle be relied upon by the player, if a doping offence has been committed.

The Facts

8. The player was born on 5 September 1981 and is an Italian citizen. He has been a professional tennis player since about 1998, when aged about 17. He

has achieved highly, reaching the top 50 in the world rankings in 2003, when aged 22. The highest world ranking he has achieved is 25th place, in 2007.

9. However, the player has suffered from asthma since childhood. His asthma is induced by physical exercise, dust mites and dog epithelium. His treating physician since childhood has been Dr Fabrizio Gadducci, who practises in Livorno and specialises in respiratory allergy. From November 2008, he has also consulted Professor Pierluigi Paggiario, Professor of Respiratory Medicine at the University of Pisa. During the period we are concerned with in this case, the player's main treatment has been inhalation of salbutamol, also known under the name albuterol. For simplicity, we will use the term "salbutamol" below.
10. For some years the player has had a TUE in respect of his use of salbutamol. The earliest recorded TUE we have is contained in or referred to in a letter to the player dated 30 June 2003 from International Doping Tests and Management ("IDTM"), of Lindigö, Sweden. The ITF manages its anti-doping responsibilities by means of a contract with IDTM. This TUE was valid until 31 December 2003. We have no documents evidencing a TUE covering the player's use of salbutamol in the calendar year 2004, but the parties are agreed that the player did have a TUE for that year.
11. On 27 December 2004 the player, supported by Dr Gadducci, applied to IDTM for an Abbreviated Therapeutic Use Exemption ("ATUE") in respect of use of salbutamol. The player sought permission to inhale "2 puff" three times a day. No reference was made to emergency treatment. The form that has to be filled in only refers to emergency treatment in the context of a retroactive TUE. The procedures and application forms do not specifically envisage advance permission for treatment of a known condition in an emergency.
12. IDTM responded on or about 29 December 2004 (the document was mistakenly dated 29 December 2005) merely confirming receipt of the application and its

validity until 31 December 2005. There was therefore no specific exemption for any treatment that might be needed over and above a total of six puffs in a single day. There was a warning, replicated each year since then, that the dose, method and frequency of administration have to be followed meticulously.

13. On 8 December 2005 the player and Dr Gadducci again applied for an ATUE. This time the application specifically covered the calendar year 2006, and sought permission to inhale 100 microgrammes (mcg) “if necessary”. In Italian this is rendered as “al bisogno” which more accurately translates to “as and when needed”. Confusingly, the box marked “emergency” was ticked, as well as the box marked “once only”. There was a space to “explain the emergency or the insufficient time to submit the TUE application”. Dr Gadducci entered the words “wheezing &/or dispnea” in that box. On 8 December 2005 IDTM responded briefly, with a single page acknowledgment merely recognising that the application was complete and that the notification was valid during the calendar year 2006.
14. On 1 December 2006 the player again applied for an ATUE covering use of salbutamol by inhalation, in a 200 mcg dose three times daily, from 1 January to 31 December 2007. Again, both the “once only” and “emergency” boxes were ticked, but this time nothing was entered by way of explaining the potential emergency. IDTM responded the same day saying the application was not complete because the third page was missing and explaining that if the treatment was ongoing there was no need to tick the “once only” and “emergency” boxes.
15. We do not have the full documentary record but the application (in a form different to the version we have, which is the version IDTM treated as incomplete) was eventually treated as complete on 14 December 2006, according to IDTM’s records. These records refer to difficulties reaching the player and Dr Gadducci by fax, and having to use email instead of fax. There is no suggestion that the player failed to receive the email confirmation, which is

likely to have been sent to the email address on the incomplete copy of the application form which we have. It is the same email address as the player's current one.

16. During the currency of the player's ATUE for 2007 he achieved his best ever world ranking, the 25th place, and even beat the then world number one Mr Roger Federer. On 20 November 2007 IDTM faxed a blank application form to the player. We accept the correctness of Mr Taylor's instructions, which were ultimately not challenged, that the blank application form did not have any reference number printed on it, although the filled in version we have does have a reference number printed on it.
17. We find that the reference number was printed on the form only after it had been filled in by the player and returned to IDTM. This is consistent with a handwritten fax cover sheet prepared by the player, which in our papers has the same number printed on it, but could not realistically have had that number printed on it when the player wrote on it by hand the name of his contact at IDTM, Ms Melania Balseiro.
18. Dr Gadducci entered the medical details on the application form on 21 November 2007. Again, both the "once only" box and the "emergency treatment/exceptional circumstances" box were ticked. In the box corresponding to the latter, Dr Gadducci wrote "2 puff if necessary". The normal treatment was described as 100 mcg, 2 puffs, twice a day, from 1 January to 31 December 2008.
19. The completed form was faxed to IDTM on 27 November 2007 and receipt was acknowledged the same day. This time IDTM did not query the way in which the form had been filled in. The next day, 28 November, Ms Maria Edman, of the International Drug Information Centre, IDTM's agent, attempted to fax IDTM's confirmation notification to the player and Dr Gadducci. She was unable to make contact by fax so she emailed the notification to the player's

email address indicated on the application form (the same one as used the previous year without incident), and followed up with a further email to the effect that receipt would be assumed unless the player contacted her.

20. Ms Edman's notification of confirmation did not correspond to the ATUE application form sent to IDTM by the player, in that it purported to authorise inhalation of only 200 mcg of salbutamol each day, not 400 mcg. She accepts that this was an error. The confirmation also said nothing about emergency treatment. IDTM did not request an acknowledgment of receipt of her emails. Ms Edman received no error message in response to them.
21. The player denies receipt of the emails and says he was unaware of the non-correspondence between IDTM's confirmation and the prior application form. However, he was subsequently able to quote the correct reference number of his ATUE on the doping control form, in his own handwriting (see further below). He accepted that he had received that number from one of his entourage and had made a note of it in his mobile phone.
22. We therefore reject any suggestion that neither the player nor any of his agents received IDTM's confirmation document. Whether he or his agents appreciated the discrepancy between it and the application form is another question, but for reasons given more fully below we do not think it matters: our conclusions are based on consideration of the ATUE as sought by the player on his application form, and not on the ATUE as set out by Ms Edman in her document responding to the application.
23. On 27 December 2007 the player signed a consent form which included his agreement to be bound by the 2008 Programme. He then began playing in the calendar year 2008. In March 2008 he was taking part in the tournament at Indian Wells, California. On the night of 12 March 2008 he was staying at an hotel there. The player prefers hotel rooms with a wooden floor and without carpets and curtains, which are likely to produce dust. However, such hotels

are hard to find in that area. The player's coach, Mr Fabrizio Fanucci, was staying at a different hotel.

24. The player's account of events on the night of 12-13 March 2008 is contained in his defence brief. He awoke and experienced difficulty breathing during the night. He took a number of puffs from his inhaler in the night. He does not recall how many puffs he took. He used his inhaler until his breathing was under control again. He did not seek medical help, but he did contact Mr Fanucci who came to his hotel room during the night. He experienced difficulty breathing again the next day, before the start of his match in the early afternoon of 13 March. Again, he took a number of puffs from his inhaler, but he does not recall how many.
25. The player was unwilling to speculate about how many puffs he took, even when pressed by Mr Taylor at the hearing. Our best estimate on the basis of the evidence we have is that he probably took between 10 and 20 puffs overall. It was common ground that one puff corresponds to 100 mcg of salbutamol. Therefore the amount taken corresponds, in our estimation, to between 1,000 and 2,000 mcg.
26. In a later email (of 22 September 2008) the player informed the ITF that he "use[d] the inhaler several times in those days ..." and that "I had to do that, otherwise I would have called the hospital". On the basis of all the evidence we have, we find that the player felt able to regain control of his breathing by using the inhaler, without calling for medical help, and that he used his inhaler to the extent needed to regain control of his breathing.
27. Thus, in oral evidence when answering questions from Mr Taylor, the player said:

"... one of the concerns we had the night before my anti-doping test was that of reaching a normal level [of breathing], but as the situation was not a good one, we envisaged the possibility of calling a physician, but we did not do so."

28. A little later, Mr Taylor put the following point:

“My understanding is in the situations where you’ve had an attack your breathing has been affected, you have taken puffs of Salbutamol and that has eventually got you back to normal before you’ve reached the stage where you’ve thought, ‘I need to do something different.’ Is that right?”

The player answered:

“That is correct, and luckily I have never got to stage where I had to call a physician.”

29. The player played his match in about the early afternoon of 13 March 2008. He was not playing at his best and lost in two straight sets. He was then selected for doping control and gave a urine sample at 4.12pm. He declared the use of his inhaler on the doping control form, and wrote the correct reference number for his TUE (M13759379) on the form. The player received five ranking points and US\$ 5,000 from the tournament.

30. On 20 March 2008 the player’s A sample was delivered to the WADA accredited laboratory in Montreal, Canada. The player, meanwhile, played in tournaments in Miami, Monte Carlo and Barcelona during the period from 27 March to 29 April 2008, earning 20,500 euros and US\$ 5,800 in prize money, and 55 ranking points.

31. On 9 April 2008 the A sample was found to contain salbutamol in a concentration of (after adjustment to allow for measurement uncertainty) 1,167 ng/ml. The certificate of analysis was sent to IDTM on 9 April. The full laboratory report was sent to IDTM on or about 30 April 2008. But the player was not at that stage notified of the result of his A sample analysis. The ITF accepts responsibility for this omission. In consequence, the player was not asked in April 2008 about his precise recollection of the events of 12-13 March. His recollection would probably have been better if he had been asked then.

32. Unaware of the positive test result, the player continued competing, playing in Rome, Hamburg, Roland Garros, Warsaw, Wimbledon, Turin, Bastad, Umag and San Marino in the period from 5 May to 21 July 2008. On or about 21 July 2008 he won the tournament in San Marino. During this period he earned 53,850 euros and £10,250 in prize money, and gained 115 ranking points.
33. The player was tested three times during the same period (at Rome, Hamburg and Wimbledon), each time with negative result after allowing for measurement uncertainty, and having regard to the threshold of 1,000 ng/ml resulting from the player's TUE (see paragraph 3 above, and see the Prohibited List at Appendix 2 to the 2008 Programme at S.3).
34. On 25 July 2008 Dr Stuart Miller, the ITF's Head of Science and Technical, wrote to the player by email and courier notifying him of the result of the A sample analysis and asking for his explanation for the concentration of 1,167 ng/ml with all supporting evidence, by 8 August 2008. This deadline is short compared with the time it took to inform the player of the result and given that the player would have to obtain both expert legal advice and expert scientific evidence.
35. On 25 July 2008 the player was playing or about to play in the Cordenons international tournament. However, he sent Dr Miller an email that very day saying that he had to use more salbutamol than usual "as therapeutic treatment" because of difficulty breathing caused by the dust from the carpet. He concluded by expressing the hope that his explanation was sufficient and if not, asking "what document I should forward you".
36. On 28 July 2008 the player won the Cordenons international tournament, earning 12,250 euros in prize money and 80 ranking points. He then continued competing during the period from 18 August to 8 September 2008 in competitions in Manerbio, Como and Bucharest. From two of those three competitions he earned 6,720 euros in prize money and 31 ranking points.

37. On 18 September 2008 Dr Miller again wrote to the player by email and courier, stating that the player's explanation was insufficient and asking three specific questions about the detailed events of 12-13 March: when the player last urinated before providing his urine sample; how often he used his inhaler; and how many puffs he had taken. The player could not recall these details; over six months had elapsed since 12-13 March 2008. He replied on 22 September by email saying that he could not recall the answers to the questions, that he had spoken to Dr Gadducci and the Italian federation doctor, and that he relied on his "personal ATP certification", which we take to mean his ATUE.
38. The player's B sample was then analysed at the WADA accredited laboratory in Montreal. The player was informed by a letter dated 8 October 2008 (which we do not have but to which reference is made in the charge letter dated 13 November 2008) that the B sample would be analysed. It seems likely that the player was advised of his right to attend the B sample opening and analysis since an independent observer, a Professor Vaillancourt, was present at the opening of the B sample on 14 October 2008.
39. The player competed during the period 22 September 2008 to 20 October 2008 in Napoli, Vienna and St Petersburg. From these competitions he earned prize money of 5,995 euros and US\$ 9,750; and obtained 14 ranking points from the competition in Napoli.
40. On 16 October 2008 the player's B sample was found to contain (after adjustment to allow for measurement uncertainty) salbutamol in a concentration of 1,192 ng/ml. The full B sample report was sent to IDTM on or about 20 October 2008. The player was then charged with a doping offence by letter dated 13 November 2008.
41. On or about 18 November 2008, after consulting Professor Paggiaro, the player started a treatment with inhalation of budesonide, a glucocorticosteroid. Professor Paggiaro diagnosed "bronchial asthma of moderate severity", in what

we take to be his words on the player's latest ATUE application; a diagnosis also described in his subsequent report of 8 December 2008 as "Bronchial asthma with severe bronchial hyperresponsiveness".

42. The player, supported by Professor Paggiaro, applied for an ATUE on 19 November 2008, with the present case pending against him. This time he asked IDTM to use his email address instead of fax. He sought permission to take (among other things) budesonide "400 mcg"; "2 puffs"; twice a day. Professor Paggiaro's report indicates that this means "400 mcg, one inhalation in the morning and in the evening", which appears to be a total of 800 mcg per day.
43. IDTM's confirmation of notification dated 24 November 2008 states "800 mcg" and "Twice daily". In the light of Professor Paggiaro's report, we understand that this should be interpreted to mean a total of 800 mcg per day, taken in two doses of 400 mcg each, rather than a total of 1,600 mcg per day. We venture to comment that the format of the ATUE application form is such that when it is filled in there are likely to be ambiguities, misunderstandings and disagreements such as have occurred in this case.
44. In relation to salbutamol, the player's latest ATUE application seeks permission to inhale 100 mcg, 2 puffs, "al bisogno" (written in Italian) by way of "rescue". IDTM in its confirmation document has interpreted this to mean that the player can inhale 200 mcg of salbutamol "as needed". The current ATUE will expire on 22 November 2010. In his report dated 10 December 2008 Professor Paggiaro also uses the English word "rescue" in the sentence which reads: "In the last months, symptoms are present every day (2-3 times daily use of rescue medication) particularly during physical activity".

The Proceedings

45. By letter dated 13 November 2008 the ITF charged the player with a doping offence under Article C.1 of the Programme. The player appointed Mr Rossi as

his representative. Mr Rossi responded by letter dated 27 November 2008 denying the charge, asserting that the player's use of salbutamol had been in accordance with his TUE and that the threshold of 1,000 ng/ml could be exceeded where, as in this case, the player's use of inhaled salbutamol is therapeutic.

46. A telephone directions hearing attended by the parties' representatives then took place in accordance with Article K.1.9 of the Programme. A timetable was set for the submission of written briefs in accordance with Article K.1.9. The oral hearing was fixed for 7 January 2009 in London. The language of the case was English, but with assistance from Italian and English speaking interpreters.
47. The ITF filed its opening brief on 8 December 2008, arguing that a doping offence had been committed unless the player could prove on the balance of probabilities that the concentration of salbutamol found in his urine sample was the result of the player inhaling salbutamol, that his use was "therapeutic" and that it was in accordance with his TUE. The opening brief helpfully drew attention to CAS and other case law dealing with the approach to the term "therapeutic", and scientific studies relevant to that issue.
48. The player filed his defence brief, through Mr Rossi, on 15 December 2008. In it Mr Rossi gave the player's account of events on 12-13 March 2008 in so far as the player could recall what happened. Mr Rossi argued that no doping offence had been committed because the player had inhaled salbutamol and his use thereof was therapeutic and in accordance with his TUE which did not limit the dose that could be inhaled in the event of an emergency. He submitted that the player's use of the drug was therapeutic because he took it to preserve his very life, and that in the case of a sudden attack the required dose could not be predetermined. He produced various documents including written reports from Dr Gadducci dated 22 November 2008 and from Professor Paggiaro dated 8 December 2008.

49. The ITF did not file a reply but on or about 22 December 2008 filed evidence comprising a witness statement from Ms Edman and exhibits to that statement. This evidence was adduced to answer the player's denial of having received IDTM's confirmation of the ATUE covering the calendar year 2008, and to explain how IDTM responded to the player's application for that ATUE.
50. The hearing of the charges took place in London on 7 January 2009. The parties presented their respective cases to the Tribunal with invaluable assistance from interpreters. The Tribunal was very grateful to all those who took part in the hearing and in making the arrangements for it, for the professional and competent way in which the case was handled under time pressure which included intervention of the Christmas and New Year holiday period.
51. The Tribunal heard oral evidence from the player himself and, by telephone, from Dr Gadducci. Evidence from all other witnesses was received in written form, without oral examination. The parties then made their closing submissions. The hearing lasted from about 10.35am until about 5pm, with only a short break for refreshments.

The Tribunal's Conclusions, With Reasons

52. Under Article K.3.1 of the Programme, the ITF bears the burden of proving to the comfortable satisfaction of the Tribunal that a doping offence has been committed. Under Article C.1, the presence of a prohibited substance in a player's body is a doping offence unless the player establishes that the presence is consistent with a TUE granted in accordance with Article E. By paragraph S.3 of the Prohibited List at Appendix 2 to the Programme, salbutamol is a prohibited substance.

53. Under paragraph S.3, as an exception, salbutamol when inhaled requires an ATUE. However, despite the existence of a relevant TUE, a concentration of salbutamol greater than 1,000 ng/ml is considered to be an adverse analytical finding unless the player proves “that the abnormal result was the consequence of the therapeutic use of inhaled salbutamol”.
54. The player does not dispute the presence of salbutamol in his body; nor does he deny that the concentration exceeded 1,000 ng/ml. Therefore, the ITF succeeds in proving the commission of a doping offence unless the player succeeds in proving, on the balance of probabilities (see Article K.3.2), that the concentration was the consequence of the therapeutic use of inhaled salbutamol.
55. In this context, the CAS has interpreted the player’s burden as requiring proof that a player’s use of salbutamol is in accordance with his TUE: see *CONI v. Petacchi and FCI*, CAS/2007/A/1362; *WADA v. Petacchi and FCI*, CAS/2007/A/1393, at paragraphs 6.22-6.26. According to this approach, it is not open to a player to argue that his use of salbutamol is “therapeutic” if the amount taken exceeds the amount he is allowed to take under the terms of his TUE.
56. The Tribunal’s attention was also drawn to non-CAS case law decided by sports tribunals before the *Petacchi* case; and also to one such case decided after *Petacchi* which cannot be identified for reasons of confidentiality. In all but one of those cases the approach of the tribunals was broadly consistent with the CAS’s approach to the requirement of “therapeutic” use in the *Petacchi* case. We respectfully doubt the correctness of the tribunal’s approach in the one case (which we cannot identify) which proceeds on a different and more subjective basis, though we do not seek to question the correctness of the result.
57. We readily accept that the player inhaled salbutamol and did not ingest it in any other way. Neither party has suggested that he took salbutamol other than by inhalation. However, we do not accept that the player’s use of salbutamol on

12-13 March 2008 can properly be characterised as therapeutic. We reach that conclusion for the following reasons.

58. We take as our starting point the ATUE as applied for by the player, not the ATUE as confirmed by IDTM. We do not decide the case on the basis that the player was strictly bound by the daily limit of 200 mcg of salbutamol in all circumstances. Ms Edman admitted that she had misinterpreted the player's application. The ITF did not invite us to rule that Ms Edman's mistake became strictly binding on the player. Rather, the ITF's case was simply that the player took too much salbutamol for its use properly to be characterised as therapeutic.
59. Moreover, the International Standard for Therapeutic Use Exemptions comprising Appendix 3 to the 2008 Programme does not, in the case of an ATUE governed by paragraph 8, clearly confer upon the ITF itself, or on IDTM, the power to interpret or limit the scope of an ATUE. By paragraph 8.4a approval for use is effective upon receipt by IDTM, the ITF's agent, of a complete notification. If objection is taken to the scope of the ATUE, it is for the ITF's Therapeutic Use Exemption Committee ("TUEC"), or the WADA TUEC, to review or cancel an ATUE.
60. We do not intend the above discussion to be considered as a definitive ruling on the correct interpretation of paragraph 8 of Appendix 3 to the 2008 Programme. We do not need to reach firm conclusions on the correct meaning of paragraph 8. It is sufficient for this case that the rules do not manifestly validate Ms Edman's error and that the ITF does not invite us in plain terms to decide that the player was bound by it.
61. So we start from the proposition that the player is bound by the terms of his ATUE for 2008 as set out in his application form sent to IDTM on 27 November 2007. We do not accept that this means there is no limit to the amount of salbutamol he can inhale where he perceives that there is a medical emergency. Mr Rossi did not unequivocally contend that the player could take

any amount of salbutamol and that its use must be considered therapeutic even if manifestly excessive by all accepted medical standards.

62. We consider that the reference to inhalation of salbutamol “if necessary”, or “al bisogno”, must be interpreted in line with the objective approach of the CAS in the *Petacchi* case. This objective approach requires us to treat as therapeutic only doses of salbutamol which would do not exceed what would be regarded as necessary and appropriate treatment to meet the situation, according to accepted medical opinion. This approach is consistent with the definition of the term “therapeutic” at paragraph 3.2 of the International Standard for TUEs: “Of or relating to the treatment of a medical condition by remedial agents or methods; or providing or assisting in a cure”.
63. In the present case, both parties agreed that the appropriate treatment is to be found in the guidelines issued by the Global Initiative for Asthma, as revised in 2007, known as the “GINA guidelines”. These make it clear (at page 19) that “Moderate attacks may require, and severe attacks usually require, care in a clinic or hospital”. The passage that follows includes a recommendation for prompt treatment with inhaled beta-2 agonists (of which salbutamol is one), starting with 2-4 puffs every 20 minutes for the first hour.
64. We think that where an attack is considered by the patient to be so severe as to threaten his very life, the patient can be expected to seek medical help. Dr Gadducci agreed when giving evidence that if after the first hour normal breathing was not restored, the patient should go to hospital as he would need oxygen. Here, the player himself referred in a subsequent email to the possibility that he could have called a hospital. He decided not to do so. Instead, he called his coach and opted to deal with the situation by inhaling salbutamol, apparently without imposing any limit on himself.
65. If this were acceptable, the player himself would become the judge of what is therapeutic, even though he is not medically qualified. We do not think that

can be right. The issue must be judged by reference to accepted medical opinion, not the player's subjective and medically uninformed view of what dose is therapeutic.

66. We conclude that, as in the *Petacchi* case, the player took too much salbutamol, i.e. more than was therapeutic. We are fortified in that conclusion by the fact that the player did not adduce any scientific evidence to show that the amount of salbutamol which he took, according to his best estimate, could have produced a concentration of 1,167 ng/ml in his urine 8-18 hours later. We appreciate that such evidence is difficult without knowledge of the precise dose taken and it is not the player's fault that he was not notified of the test result until late July 2008.
67. Nevertheless, the onus of proof is on the player and the ITF has produced scientific studies, not challenged by the player, tending to show that a concentration as high as the player's in this case would be likely to result from a higher dose of inhaled salbutamol than the player's evidence (albeit without full recollection because of delay) would suggest he took. We consider that a player would normally have to adduce a pharmacokinetic study in order to discharge the onus on him in a case such as the present. To do so was not an express requirement under the 2008 Programme, though it now is, under the 2009 Programme.
68. As the player has not succeeded in discharging the onus on him, it follows that a doping offence has been committed. Accordingly, pursuant to Article L.1 of the 2008 Programme, the player's results, prize money and ranking points obtained from his participation in the Indian Wells tournament, must be forfeited.
69. It is briefly asserted in Mr Rossi's defence brief that the player was not at fault and that he can therefore achieve complete elimination of a period of ineligibility by reference to Article M.5.1 of the 2008 Programme. Article

M.5.1 provides, so far as material, that the otherwise applicable period of ineligibility shall be eliminated if the player establishes - on the balance of probabilities, see Article K.3.2 - that he bears “No Fault or Negligence” for the offence. Where, as in the present case, the offence is committed under Article C.1 (presence of a prohibited substance in the body), the player has to establish also how the prohibited substance entered his system.

70. In order to establish “No Fault or Negligence” for the purpose of eliminating the otherwise applicable period of ineligibility, the player must establish (according to the definitions in Appendix 1 to the Programme) that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered with the prohibited substance.
71. In our judgment, this definition means that Article M.5.1 cannot be relied upon by the player in the present case. The player does not here assert that he inhaled salbutamol without knowing that he had done so. He says he was unaware that the prohibition applied to him, because he thought he was exempted from the prohibition. That assertion would not, even if correct, meet the definition of “No Fault or Negligence” in Appendix One to the Programme.
72. Even if that interpretation were incorrect, we would not in any event accept that the player could establish “No Fault or Negligence” on the facts here. We consider below the degree of his fault but it was on any view more than negligible. The test under Article M.5.1 is very strict and the fault of the player must normally include, for this purpose, fault on the part of his entourage and medical personnel consulted by him, as established in other cases including *Koubek* (ITF Anti-Doping Tribunal decision of 18.1.5 (see at para 75), upheld by the CAS sole arbitrator, CAS/A/828 (see at paras 53-61)).
73. The player is also entitled to rely on Article M.5.2 of the Programme (“No Significant Fault or Negligence”). However, in view of our further conclusions

below in the context of Article M.4 of the 2009 Programme, which is applicable under the *lex mitior* doctrine, it is unnecessary to consider further whether the player would have succeeded in establishing “No Significant Fault or Negligence” under Article M.5.2 of the 2008 Programme.

74. We turn to consider next the question of sanctions with respect to Article M.4 of the 2009 Programme. The ITF accepts that under the 2009 Programme, salbutamol is a “Specified Substance” and that accordingly the player is entitled to rely on Article M.4. Under Article M.4.1, if the player can show how the salbutamol entered his body and that it was not intended to enhance his sport performance or mask the use of a performance enhancing substance, the otherwise applicable period of ineligibility is replaced, in the case of a first offence, with, at the minimum, a warning and reprimand and no period of ineligibility, and, at the maximum, a two year period of ineligibility.
75. By Article M.4.2, the player must produce some corroborating evidence of the absence of intent to enhance sport performance or mask a performance enhancing substance, over and above the player’s word. The evidence must comfortably satisfy the Tribunal of the requisite absence of intent. Where the player is able to do so, “the Participant’s degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility”.
76. In the present case, the ITF does not allege that the player is a cheat who deliberately doped himself to enhance his performance. The ITF’s case is that the player took too much salbutamol but not that he did so with intent to enhance his performance in the match on 13 March 2008. We have no reason not to accept the player’s word, corroborated for the purposes of Article M.4.2 by the medical evidence of Dr Gadducci, that the player took salbutamol to treat his asthma and not to enhance his performance. No question of masking arises in the present case.

77. We therefore conclude that we have discretion to impose a period of ineligibility of up to two years, or at the minimum a warning and reprimand instead. We bear in mind that we should approach the question of sanctions so as to reach a result that meets the justice of the case overall (see e.g. *Antony Dupuis*, decision of the Anti-Doping Tribunal dated 29 September 2006, para 31).
78. In the specified substance cases decided under Article M.3 of the Programme (in the versions in force in 2008 and earlier), the question of fault for the purposes of Article M.3 was determined by reference to the player's personal fault and did not (unlike under Articles M.5.1 and M.5.2) include the fault of the player's agents such as coaches and medical advisers: see e.g. *Bogomolov*, decision of the Anti-Doping Tribunal dated 26 September 2005, para 70).
79. It is not completely clear that the same is true when applying Article M.4 of the 2009 Programme, which refers to the "Participant's" degree of fault. A "Participant" is defined in Appendix One as a player or "Player Support Personnel"; which term is defined in Article B.6 as including coaches, medical advisers, etc. However the purpose of Article B.6 is to define this class of persons so as to make clear that they, like players, are bound by the 2009 Programme.
80. On balance, we incline to the view that the reference to a "Participant" in Article M.4 does not expand the category of persons whose fault should be taken into account when applying the concluding words of Article M.4.2. We consider that the word "Participant" is used because non-players may also be subject to sanctions under Article M.4. However, in many cases it will make little or no difference, since it is the player's responsibility personally to check and enquire into the actions and omissions of his advisers and entourage, and he is likely to be personally at fault if he fails to do so (see *Bogomolov*, para 70).

81. In the present case, the player was at fault for inhaling too much salbutamol. He ought to have sought medical advice on what dose was therapeutic, just as he ought to have sought medical assistance if he felt his life was at risk. However, the lack of clarity about how much he was permitted to take without seeking medical advice, was not only of his making. The procedure and the application form were a recipe for lack of clarity. Neither the player nor IDTM should in our judgment readily have accepted a TUE with dosage defined by vague phrases such as “if necessary” or “al bisogno”.
82. If the player had properly addressed himself to the limits of his TUE, he would (with appropriate advice) have become aware how many puffs he could safely take without serious risk that any urine sample given shortly afterwards would contain salbutamol in a concentration higher than 1,000 ng/ml. He would then have known that if he felt the need to take more puffs than that limit, he should immediately call for medical help. In an extreme case he could also apply for a retroactive TUE. He could have done so in this case, but did not.
83. The player’s mind ought to have been on the limit of 1,000 ng/ml but it was not. Even where the player feels that he has to take a lot of puffs in order to safeguard his well-being, it does not follow that he can confidently assume he is not committing a doping offence if he fails to take the necessary steps to obtain an exemption in sufficiently clear terms.
84. With those considerations in mind, we shall return shortly to the duration of any period of ineligibility. We turn first to consider the question arising under Articles M.7 of the 2008 Programme, whether the player’s results should be disqualified in respect of competitions subsequent to the Indian Wells tournament. The correct approach to this question was discussed in *Dupuis* (cit. sup.) at paras 35-41. Since then, the CAS has emphasised in *Petacchi*, paras 7.22-7.25 that each case depends upon its own facts.

85. We consider first the player's participation in competitions after the Indian Wells tournament down to 30 April 2008, when IDTM became aware that the concentration found in the A sample exceeded 1,000 ng/ml. Normally the player's results in that period would be disqualified. We have concluded, however, that fairness requires those results to remain undisturbed.
86. We reach this conclusion not just because of the absence of any enhancement to the player's performance during those competitions, but also because of the lack of clarity about the scope of the player's TUE, the absence of correspondence between the application form and the notification of confirmation, and because the player could have been informed of the positive test result as early as about mid-April 2008, given that staff at the laboratory in Montreal became aware of the A sample result as early as 9 April 2008.
87. Likewise, we consider that fairness requires the player's results to remain undisturbed during the period up to and including his victory at the Cordenons tournament on 28 July 2007. The player underwent three negative tests during that period. He was not aware of any problem arising from the test done at Indian Wells. The ITF has not sought to justify the delay in informing the player of the adverse A sample result. He could not realistically be expected to cease competing until made aware of that result.
88. He was in fact informed of that result on 25 July 2008, three days before winning the Cordenons tournament. But he did not have adequate time, three days before completing and winning that competition, to do more than send a brief email back to Dr Miller. He needed more than three days in which to seek advice including advice on the delicate and complicated question (more complex where a TUE is in issue than in other cases) whether to cease competing or not. We think it would be unfair to deprive him of his victory in the Cordenons competition.

89. However, by 18 August 2008 when the player next competed at Manerbio, he had had sufficient time to obtain some advice about the adverse A sample result, including on the question of whether to cease competing. We consider that fairness does not require his results in competitions from then onwards to remain undisturbed. We therefore decide that his results in that competition and the five subsequent competitions in which he took part (Como, Bucharest, Napoli, Vienna and St Petersburg) should be annulled, and his prize money and ranking points from those competitions forfeited.
90. We now return to the question of any period of ineligibility. This is not a case where, so far as we are aware, the player has notified the ITF in writing of any decision not to compete. He has not asked the Tribunal to credit any voluntary period of abstention from competition against any period of ineligibility, pursuant to Article M.8.3(a) of the 2008 Programme.
91. Nor do we consider, in the circumstances of this case, that we should backdate any period of ineligibility by reference to Article M.8.3(b). Instead, we have taken account of the ITF's delay in notifying the player of the adverse A sample result by allowing his results to stand until after he won the Cordenons competition on 28 July 2008.
92. Taking all the factors discussed above into account, and in an attempt to arrive at a result that meets the justice of the case overall, we have reached the conclusion that we should impose a period of ineligibility of three months and that this should commence on the date of this decision, 15 January 2009. The player's period of ineligibility will expire at midnight London time on 14 April 2009.

The Tribunal's Ruling

93. Accordingly, for the reasons given above, the Tribunal:

- (1) confirms the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 13 November 2008; namely that a prohibited substance, salbutamol, has been found to be present in the urine sample that the player provided at Indian Wells on 13 March 2008;
- (2) finds that the player has failed to establish on the balance of probabilities that the abnormal test result was the consequence of the player's therapeutic use of inhaled salbutamol;
- (3) orders that the player's individual result must be disqualified in respect of the Indian Wells tournament, and in consequence rules that the prize money and ranking points obtained by the player through his participation in that event must be forfeited;
- (4) orders, further, that the player's individual results (including ranking points and prize money) in competitions including and subsequent to the Manerbio competition on 18 August 2008 shall be disqualified and all prize money and ranking points in respect of those competitions shall be forfeited;
- (5) orders, however, that the player's results (including ranking points and prize money) in all competitions subsequent to the Indian Wells tournament up to and including the Cordenons competition on 28 July 2008 shall remain undisturbed;
- (6) finds that the player has succeeded in establishing to the comfortable satisfaction of the Tribunal that his use of the prohibited substance leading to the positive test result in respect of the sample taken on 13 March 2008 was not intended to enhance his sport performance;

- (7) declares that the player shall be ineligible for a period of three months (i.e. calendar months) starting on 15 January 2009 and expiring at midnight London time on 14 April 2009 from participating in any capacity in any event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised by the ITF or any national or regional entity which is a member of or is recognised by the ITF as the entity governing the sport of tennis in that nation or region.

Tim Kerr QC, Chairman

Dr Anik Sax

Dr Barry O'Driscoll

15 January 2009