



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2009/A/1782 Filippo Volandri v/ ITF

ARBITRAL AWARD

Pronounced by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President: Mr Efraim **Barak**, attorney-at-law, Tel Aviv, Israel
Arbitrators: Professor Luigi **Fumagalli**, attorney-at-law, Milan, Italy
Professor Ulrich **Haas**, Zurich, Switzerland
Ad hoc Clerk: Mr Patrick **Grandjean**, attorney-at-law, Lausanne, Switzerland

in the arbitration between

Mr Filippo Volandri,

Represented by Mr Massimo **Rossi**, attorney-at-law, Milan, Italy

As Appellant

and

International Tennis Federation (ITF), London, England

Represented by Mr Jonathan **Taylor**, solicitor, London, England

As Respondent

* * * * *

I. THE PARTIES

1. Mr Filippo Volandri, born on 5 September 1981, is a professional tennis player of Italian nationality (also referred to as the "Player"). He entered the top 50 in the world ranking in 2003 and obtained the best result of his career in 2007, when he reached the 25th place in the ATP world rankings.
2. The International Tennis Federation (also referred to as the "ITF") is the international governing body for sports related to tennis worldwide. It has its registered seat in London, England.

II. BACKGROUND FACTS

3. The circumstances stated below are a summary of the main relevant facts, as established on the basis of the written submissions of the parties and the evidence examined in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion (See below section IV).

II.1 MR FILIPPO VOLANDRI'S HEALTH CONDITION AND HIS TUE APPLICATIONS

4. Since his early childhood, Mr Filippo Volandri has suffered from asthma induced by dust-mite, dog epithelium as well as by physical exercise. His treating physician was then Dr Fabrizio Gadducci, presently director of the Bronchopneumology and Respiratory Allergology Section of the Livorno Hospital, Italy.
5. When he first started his professional career as a tennis player, Mr Filippo Volandri did not take any medication for asthma nor did he seek any specific medical care.
6. Over the years, the Player's condition worsened and required notably a treatment in the form of inhalation of Ventolin, a salbutamol-based asthma medicine, achieved through a metered-dose inhaler.
7. Salbutamol is included in the list of prohibited substances under the World Anti-Doping Code (the "WADC"), which is incorporated in the ITF Tennis Anti-Doping Programme (the "ITF Programme"). The authorisation to take this substance for a legitimate medical need is treated differently depending on whether the 2008 or the 2009 ITF Programme is applicable. In the first case, the administration of salbutamol by inhalation requires an application for an abbreviated Therapeutic Use Exemption whereas in the second case, the submission for a standard Therapeutic Use Exemption is needed. Also, in the first case, salbutamol in a concentration greater than 1,000 ng/mL is a prohibited substance and not a specified substance (Par. "Specified Substances", appendix 2 to the 2008 ITF Programme), whereas in the second case, salbutamol, even in a concentration greater than 1,000 ng/mL, is qualified as a specified substance (Appendix 2 (general statement) and Par. S3, appendix 2 to the 2009 ITF Programme). However, both the 2008 and 2009 ITF Programmes provide that despite the granting of a Therapeutic Use Exemption ("TUE"), the presence of salbutamol in urine in excess of 1,000 ng/mL will be

considered an adverse analytical finding unless the Athlete proves that the abnormal result was the consequence "*of the therapeutic use of inhaled salbutamol*" (Par. S3, appendix 2 to the 2008 ITF Programme) or "*of the use of a therapeutic dose of inhaled salbutamol*" (Par. S3, appendix 2 to the 2009 ITF Programme).

8. In respect of his use of salbutamol, Mr Filippo Volandri was granted his first TUE in 2003. Since then he applied for TUEs every year.
9. Regarding the year 2006, Mr Filippo Volandri filed a submission for a TUE for the use of salbutamol by inhalation. This document is dated 8 December 2005 and the indicated dosage strength was 100 mcg to be administered by a metered-dose inhaler "*if necessary*". On the application form, the box marked "*once only*" and the box marked "*emergency*" were ticked. The space provided to "*indicate all relevant information to explain the emergency or the insufficient time to submit the TUE application*" was filled in with the words "*weezing e/o dispnea*".
10. On 8 December 2005, the International Doping Tests and Management of Lindigö, Sweden ("IDTM") confirmed the receipt of Mr Filippo Volandri's application, accepted it without reservation and drew the Player's attention on the fact that "*the dose, method and frequency of administration as it has been notified have to be followed meticulously!*"
11. On 1 December 2006, Mr Filippo Volandri applied for a TUE covering the year 2007 and permitting the use of salbutamol by inhalation. The indicated dosage strength was 200 mcg to be administered three times a day. On the application form, the box marked "*once only*" and the box marked "*emergency*" were also ticked. It is not disputed that this document was eventually accepted by the IDTM.
12. On 21 November 2007, Mr Filippo Volandri and Dr Fabrizio Gadducci signed a TUE application form for the year 2008. The prohibited substances concerned were formoterol and albuterol, which is another name for salbutamol. Regarding this last drug, the treatment foreseen consisted in two puffs of 100 mcg to be administered by inhalation twice daily. On the application form, the box marked "*once only*" and the box marked "*emergency*" were also ticked and the space provided to "*indicate all relevant information to explain the emergency or the insufficient time to submit the TUE application*" was filled in with the words "*2 puffs if necessary*".
13. It is accepted by the parties as well as by the lower instance that the present case must be examined in the light of the content of the TUE application form signed by the Player on 21 November 2007 (the "TUE of November 2007"). It is undisputed that the subsequent management of this document by the IDTM is irrelevant (See pages 9 and 18 of the appeal brief; page 5, footnote 3 of the answer; par. 22 of the appealed decision issued by the ITF Independent Anti-Doping Tribunal on 15 January 2009).
14. On 19 November 2008, Mr Filippo Volandri signed a TUE, seeking permission to take montelukast, budesonide and salbutamol. With regard to the last substance, the indicated dosage strength was 2 puffs of 100 mcg to be administered by inhalation. The box related to the "*frequency*" of administration was filled with the words "*Rescue*" and "*al bisogno*".

15. On 24 November 2008 and following his application, Mr Filippo Volandri received from the IDTM an approval for the therapeutic use of budesonide and salbutamol. This document is a fix-term authorisation for two years, effective from 21 November 2008 to 22 November 2010 and allows the Player to use salbutamol in a dosage of 200 mcg by inhalation, "as needed." It is also stipulated that the dose, method and frequency of administration as notified have to be followed meticulously.
16. At the end of the year 2008, Mr Filippo Volandri was referred to an asthma specialist, Mr Pierluigi Paggiaro, Professor in Respiratory Medicine, at the University of Pisa, Italy, and member of the executive committee of the Global Initiative for Asthma. In a written statement made on 8 December 2008, Professor Pierluigi Paggiaro confirmed among other things that "*In the last months, symptoms are present every day (2-3 times daily use of rescue medication) particularly during physical activity. (...) Therefore, we conclude for "Bronchial asthma with severe bronchial hyperresponsiveness" and we recommended the following therapeutic regimen: Budesonide. Viatris 400 mcg, one inhalation in the morning and in the evening. Montelukast 10 mg, one tablet in the evening. Rescue salbutamol, 2 puffs when needed. Periodic evaluations of pulmonary function are recommended.*"

II.2 THE ADVERSE ANALYTICAL FINDINGS

17. In March 2008, Mr Filippo Volandri was participating in an ATP Tour tournament, which took place in Indian Wells, California, United-States.
18. In the morning of 13 March 2008, at about 2:30, Mr Filippo Volandri was awakened by what he says to be the most serious asthma attack of his life. This happened just a few hours before his first match in the tournament, which was scheduled for the early afternoon of the same day.
19. Some details of this incident can be found in the transcript of the hearing held before the ITF Independent Anti-Doping Tribunal on 7 January 2009:

Transcript: pages 24 - 26

Filippo Volandri

I used Ventolin every 20 minutes up to the situation getting back to normal.

Jonathan Taylor

Do you remember how many puffs you had to take to get the situation back to normal?

Filippo Volandri

No, I don't recall the number exactly.

(...)

Jonathan Taylor

I'm not asking you exactly for how many puffs you think it took to get you back to normal, but one can try and narrow the range, so would it have been more than four?

Filippo Volandri

I don't feel I can answer that question because I don't remember when exactly it happened when I wake up, so I'm not really entirely awake yet and I can't actually count them sometimes. It was a situation which started during the night.

Jonathan Taylor

...any range, it would have been something between zero and ten, it would have been something between 20 and 30, or you just simply can't say?

Filippo Volandri

I cannot say, but it's between zero and ten, I would say (...)."

Transcript: pages 48 and 49

"Filippo Volandri

What I remember was that this attack began in the middle of the night as usually happens. It was perhaps half past two/three o'clock in the morning I woke up due to this attack. The attack woke me up and I wasn't breathing well. I didn't wake up to say go to the toilet and then realise that I wasn't breathing well. I woke up because I was not breathing well. I began using Ventolin as had been explained to me by my physician, one or two puffs every 15 to 20 minutes. I was a little concerned about the situation, I called my trainer because it was the first time that such a serious attack had taken place, and apart from the fact that my trainer could not help me, he came to me for support. I continued using Ventolin, he came to my room approximately an hour later because we were sleeping in different hotels. I continued with the Ventolin, also following his own advice, he noticed that my medical situation was not normal, and around four/half past four in the morning the situation normalised and my trainer left my room. One of his pieces of advice was, 'Let's call a doctor,' then luckily there was no need for this.

(...)

Jonathan Taylor

First of all you say you were taking – would it be two puffs every 15 to 20 minutes?

Filippo Volandri

Yes.

Jonathan Taylor

In this period did you do that throughout? So in every 15/20 minutes you took two puffs, or were there sometimes longer gaps?

Filippo Volandri

There were some longer gaps when the situation went back to normal, and then perhaps I had another small attack, but I'd say 15/20 minutes, or maybe when my coach arrived it was a longer gap, one hour, for instance. What I want you to understand is that in a situation like this, looking at the watch to see how long the gap is, is a bit unrealistic.

Jonathan Taylor

I'm trying to see if there's any way for us to getting the parameters of how many puffs. Let me see if I've got this right. The period lasted from about 2.30 to three, to four to 4.30, so that would be a maximum of two hours about?

Filippo Vollandri

More or less, yes.

Jonathan Taylor

And during that time the trainer came and there was a gap then of about an hour when you didn't need to take any puffs? Did I understand that correct?

Filippo Vollandri

More or less, yes. I repeat that it's hard to remember exactly because this happened last March, not last week, so it's difficult to remember the times. I can give you a general timeframe, but I cannot be more precise than this."

20. In the briefs filed on behalf of Mr Filippo Vollandri with the ITF Independent Anti-Doping Tribunal (page 9) and with the Court of Arbitration for Sport (page 7), it is stated that when his coach joined the Player in his hotel room, he found the latter "gasping for breath".
21. On 13 March 2008, just after the loss of his first game in two straight sets, Mr Filippo Vollandri was subject to in-competition doping testing. On the doping control form, the Player indicated the correct number of his TUE as well as the use of Ventolin.
22. It is undisputed that the WADA-accredited laboratory in Montreal, Canada, was instructed to conduct the analysis of Mr Filippo Vollandri's urine sample and that, on 9 April 2008, it identified in the Player's A sample the presence of salbutamol in a concentration of 1,167 ng/mL (without taking into account the measurement uncertainty of 87 ng/mL).
23. It is only on 25 July 2008 (three and a half months after the finding on the A sample and four and a half months after the doping test), that Mr Stuart Miller, the ITF technical manager, notified in writing the Player of the result of the A sample analysis and asked him documented explanations with regard to the said concentration of 1,167 ng/mL.
24. The same day, the Player sent to Mr Stuart Miller an e-mail with the following justification: "*the reason why the level of salbutamol on my urine collected during the last Indian Wells was a bit higher, is that due to a strong attack of allergy caused by the dust of the carpet I had to use more Ventolin, the inhalation spray with salbutamol. I use as therapeutic treatment. I had to do that because I couldn't breath well, especially with that hot temperature.*"
25. It then took the ITF another almost two months to refer to the Player's letter. By courier dated 18 September 2008, Mr Stuart Miller acknowledged receipt of the Player's e-mail and explained that his clarifications were insufficient. On this letter, that was sent six months after the event, Mr Miller requested Mr Filippo Vollandri to provide details on a)

the time at which he last urinated prior to providing sample on 13 March 2008, b) the time(s) at which he used his inhaler on 13 March 2008 and c) the number of puffs he took on each of those occasions. In particular, Mr Stuart Miller stated that *"if the Review Board finds that you have no case to answer, you will be informed and no further action will be taken. If the Review Board finds that you have a case to answer, then you will be charged with commission of a Doping Offence under Article C.1 of the Programme"*.

26. On 22 September 2008, the Player answered to Mr Stuart Miller by e-mail, referring to his TUE and confirming notably the following:

"I wouldn't be honest, Dr Stuart, if I try to answer to the 3 questions you sent me in the letter, as I have no chance to remember when I urinated before the one connected to the fact, or the times I used the inhaler on 13 March 2008.

The only thing I can perfectly remember is that the temperature at the tennis centre was terrible, and I had to use the inhaler several times in those days, also during the night because of the dust of the carpet in my room. I had so many problems to breath and sleep.

I had to do that otherwise I would have called the hospital."

27. In a letter dated 8 October 2008 and addressed to Mr Filippo Vollandri, Mr Staffan Sahlström of IDTM, presented himself as the Anti-Doping Programme Administrator of the ITF Programme appointed by the ITF *"to administer various aspects of the Programme"*. Mr Staffan Sahlström informed the Player that a confirmatory analysis was going to be carried out on his B sample. He also reported to the Player that he or his representative could attend the opening of the B sample. The letter also reads as follow:

"No Provisional Suspension

For the avoidance of any doubt, (1) you have not yet been formally charged with the commission of a Doping Offence; and (2) unless and until you are charged and you have formally admitted committing a Doping Offence, or you have been found by Anti-Doping Tribunal to have committed a Doping Offence, you will not be deemed to have committed such an offence. Nor will any provisional period of ineligibility be imposed upon you and you will remain free to compete. (See Article J.4.1 of the Programme).

However, in the event that you are subsequently found to have committed a Doping Offence, and a period of Ineligibility is imposed, any period after the date of receipt of this letter during which you have voluntarily foregone any form of involvement in Competitions will be credited against the total period of any Ineligibility that you have to serve. (See Article M.8.3 of the Programme)."

28. On 16 October 2008, the WADA accredited laboratory in Montreal, Canada, conducted the confirmatory analysis on the Player's B sample and corroborated the presence of salbutamol in a concentration of 1,192 ng/mL.

29. By letter dated 13 November 2008, Mr Stuart Miller notified Mr Filippo Volandri that he was charged with commission of a doping offence within the meaning of article C.1 of the ITF Programme. The letter also indicates the potential consequences of a doping offence: Disqualification of the results obtained at the Indian Wells tournament; disqualification of the results obtained in Covered Events since 13 March 2008; imposition of ineligibility for a period of two years.

II.3 THE PLAYER'S RESULTS AFTER THE 2008 EDITION OF THE INDIAN WELLS TOURNAMENT

30. Between the period following the 2008 edition of the Indian Wells tournament and the notice of charge dated 13 November 2008, Mr Filippo Volandri took part in several tennis tournaments and was selected for three doping controls:

Event	Date	Event Points	Prize Money	Concentration of salbutamol found after deduction of the measurement uncertainty
ATP Master Series Miami	27.03.08	5	\$5,800	
ATP Masters Series Monte Carlo	20.04.08	35	€15,000	
Barcelona	28.04.08	15	€5,500	
ATP Masters Series Rome	05.05.08	5	€7,000	634
ATP Masters Series Hamburg	11.05.08	5	€7,000	978
Roland Garros	25.05.08	5	€14,290 (singles) + €3,350 (doubles)	
Warsaw	09.06.08	0	€3,950	
Wimbledon	23.06.08	5	£10,250	937
Turin	30.06.08	0	€885	
Bastad	07.07.08	0	€3,075	
Umag	14.07.08	15	€5,400	
San Marino	21.07.08	80	€12,250	
Cordenons	28.07.08	80	€12,250	
Manerbio	18.08.08	31	€3,250	
Como	25.08.08	0	0	
Bucharest	08.09.08	0	€3,470	
Naples	22.09.08	14	€1,245	
Vienna	06.10.08	0	€4,750	
St. Petersburg	20.10.08	0	\$9,750	

II.4 THE FINAL DECISION OF THE ITF INDEPENDENT ANTI-DOPING TRIBUNAL

31. On 7 January 2009, a hearing was held before the ITF Independent Anti-Doping Tribunal (the "ITF Tribunal").

32. On 15 January 2009, the ITF Tribunal passed a decision (the "Appealed Decision"), in which it concluded that the ITF had sufficiently established the objective elements of a violation of the applicable ITF Programme, *i.e.* the presence of salbutamol in the Player's A sample in a concentration of 1,167 ng/mL, which amounts to an adverse analytical finding.
33. In its decision, the ITF Tribunal held that "*Our best estimate on the basis of the evidence we have is that [Mr Filippo Vollandri] 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*" (See page 7, par. 25 of the Appealed Decision). Based on these findings, it concluded that the Player took too much salbutamol (See page 17, par. 66 and page 19, par. 76 of the Appealed Decision). It was fortified in its 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*" (See page 17, par. 66 of the Appealed Decision).
34. The ITF Tribunal accepted that Mr Filippo Vollandri inhaled salbutamol and did not ingest it in any other way. However, it held that the Player did not meet his burden of proof that his use of salbutamol on 13 March 2008 was therapeutic or in compliance with the TUE of November 2007, according to which salbutamol was to be administered daily with 2 times two puffs of 100 mcg, plus "*2 puffs if necessary*". The ITF Tribunal found that the reference to inhalation of salbutamol "*if necessary*" must be interpreted in line with an objective approach, which requires treating as therapeutic only doses of salbutamol which do not exceed what is regarded as necessary and appropriate treatment, according to accepted medical opinion. The ITF Tribunal held 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". In the view of the circumstances and in the presence of a severe asthma attack qualified by the Player himself as life threatening, the ITF Tribunal was of the opinion that the GINA guidelines commended the Player to seek care in a clinic or 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. (...). 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*" (See page 16 par. 64 and 65 of the Appealed Decision).
35. With regard to the sanction imposed upon Mr Filippo Vollandri, according to the 2009 ITF Programme, the ITF Tribunal, applying the *lex mitior* principle, accepted that salbutamol is a specified substance and that it had not been used to enhance sport performance or to mask the use of a performance enhancing substance. It held that the Player was at fault for inhaling too much salbutamol. It found fair not to disqualify the Player's results (including ranking points and prize money) obtained before the Manerbio tournament, as he was not aware of any problem arising from the test done at the 2008 edition of the Indian Wells tournament. "*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. [The ITF Tribunal] consider[s] that fairness does not require his results in competitions from then onwards to remain undisturbed” (See par. 89 of the Appealed Decision).

36. On 15 January 2009, the ITF Tribunal decided the following:

“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.”*

III. PROCEEDINGS BEFORE THE CAS

III.1 THE APPEAL

37. On 4 February 2009, Mr Filippo Volandri filed a statement of appeal and, on 13 February 2009, an appeal brief with the Court of Arbitration for Sport (the "CAS"). It challenged the Appealed Decision of the ITF Tribunal, submitting the following request for relief:

"Appellant prays the Court:

***principally:** to acquit Filippo Volandri of the charge of having committed a doping offence as specified in the charge dated 13 November 2008, and as a consequence revoke the period of disqualification imposed, and declare that the player's results (including ranking points and prize money), which have been revoked, be declared to be valid;*

***alternatively:** in the unlikely event that the player were still to be considered guilty of having committed a doping offence, to backdate the period of disqualification imposed, counting the period of voluntary suspension observed by the athlete, and as a result, declare that all of the player's results (including ranking points and prize money) which have been revoked, be considered valid, and in any case, to reduce the period of disqualification, because it is excessive."*

38. Mr Filippo Volandri's submissions, in essence, may be summarized as follows:

- Due to his health history, the Player is aware of the proper medical management of his asthma and its attacks, whether they are mild or serious. He perfectly knows how to deal with acute asthma attacks and always makes sure he follows the GINA guidelines. In this context, the "2 puffs if necessary" mentioned on the TUE application of November 2007 must be understood as allowing Mr Filippo Volandri to take (within the GINA limitations) 2 puffs in a number of times that cannot be pre-established because it must be adjusted to the needs of each specific asthma attack.
- Considering the addition of the doses of salbutamol authorised as standard treatment (400 mcg per day) to the doses inhaled in compliance with the GINA guidelines in case of asthma attacks, the concentration of salbutamol found in the Player's urine is consistent with the therapeutic use of this substance. It is hence established that the presence of salbutamol in the Player's A sample in a concentration of 1,167 ng/mL is the consequence of the therapeutic use of the said substance. There is no need of further evidence. In particular and under the edition 2008 of the ITF Programme, a pharmacokinetic study is not required.
- Mr Filippo Volandri cannot agree with the contention of the ITF Tribunal according to which he should have sought medical assistance during the asthma attack in the morning of 13 March 2008. The Player had no need for such help as (a) he knew how to deal with this type of attacks; (b) he followed the GINA guidelines and his

condition/breathing improved; (c) the doctor could have only told him what he already knew. The ITF Tribunal did not pay any consideration to the fact that the Player was “*in the middle of the night, in the middle of nowhere, in a foreign country, far from home and in the middle of a breathing crisis*” (See page 15 of the appeal brief). “*It is unconceivable to disqualify a player, because he should have gone to hospital even if he managed to deal with the situation on his own!*” (See page 20 of the appeal brief).

- There is no reason for the Player to bear the consequences of “*the malfunctioning and ambiguity in the ‘TUE system’ set up by the IDTM (compare paragraphs 59 and 60 of the decision) as well as the mistakes and omissions of its members with regard to the events at issue (see paragraphs 20 and 58 of the decision)*” (See page 18 of the appeal brief).
- Until 13 November 2008, Mr Filippo Volandri had not been notified of any charge of doping offence. Until then, he had no reason to believe that further action would be taken against him. This is particularly true as the positive findings related to the A sample were slightly above the threshold of 1,000 ng/mL. Under such circumstances, it is arbitrary for the ITF Tribunal to disqualify the Player’s results obtained in competitions organised between 18 August and 20 October 2008, in which he took part in good faith.
- “*Additionally, it should be stressed on this matter, that even the lab tests documentation on the analysis of the “A” sample (completed in the first days of April, 2008) were notified to the athlete together with the “B” sample results only in the notice of charge of 13th November, 2008! The above represents a clear and evident breach of the right of defence which the Ruling Panel should have considered with respect to the start of the ineligibility period*” (See page 21 of the appeal brief).
- In view of the circumstances, the three-month ban imposed upon the Player is too severe and, in any event, the beginning of the period of ineligibility should have been backdated.

III.2 THE ANSWER

39. On 9 March 2009, the ITF submitted an answer containing the following prayers for relief:

“For the reasons set out above, the ITF respectfully submits that the Player has failed to make out any grounds for disturbing the Decision and that therefore the appeal should be dismissed in its entirety”

40. The submissions of the ITF, in essence, may be summarized as follows:

- The scope of review of the CAS is limited by article O.5.1 of the 2008 ITF Programme which is mandatory and which gives guidance on how the discretion of the CAS Panel should be applied. Given that there are no allegations of unfairness nor other suggestion that the present matter requires a full *de novo* approach, “*the*

decision of the first instance tribunal is entitled to some deference and so should only be disturbed to the extent the appellant shows it to be erroneous” (See page 13, par. 5.4 of the answer).

- The Player agreed for the first time in the proceedings before the CAS that the indication “2 puffs if necessary” on the TUE of November 2007 must be interpreted in accordance with the GINA guidelines. The Player’s claim “*that he only took the amount of salbutamol specified in the GINA guidelines is contradicted by his own submission and evidence, and is inconsistent with the concentration of salbutamol found in his urine*” (See page 16, par 6.2.4 of the answer).
- In the view of the evidence presented before the ITF Tribunal, the asthma attack which occurred in the morning of 13 March 2008 must be classified as severe under the GINA guidelines. The Player’s allegation according to which his breathing eased within an hour after the beginning of the attack is new and in conflict:
 - a. with his own statements according to which he alleged that he was authorized to take as much salbutamol as he needed, for as long as he needed, in order to restore normal breathing after attack;
 - b. with the statements made on his behalf before the ITF Tribunal according to which his coach found him “*gasping for breath*”.

Under such circumstances and in compliance with the GINA guidelines, Mr Filippo Volandri should have gone to the hospital as suggested by his coach.

- Mr Filippo Volandri’s position is also inconsistent with scientific evidence.
- Mr Filippo Volandri has not established any good grounds to interfere with the ITF Tribunal sanctions.

III.3 THE HEARING

41. A hearing was held on 26 March 2009 at the CAS premises in Lausanne. All the members of the Panel were present. The parties did not raise any objection as to the constitution and composition of the Panel.
42. Mr Filippo Volandri attended the hearing and was accompanied by his attorney, Mr Massimo Rossi, assisted by Ms Estella Castoldi, interpreter.
43. The ITF was represented by its technical manager, Mr Stuart Miller, assisted by Mr Jonathan Taylor, solicitor.
44. During the hearing, the parties made full oral submissions. No witness was called to testify. After the parties’ final arguments, the Panel closed the hearing and announced that its award would be rendered in due course. Upon closure, the parties expressly stated that they did not have any objection in respect to their right to be heard and to be treated equally in these arbitration proceedings.

IV DISCUSSION

IV.1 CAS JURISDICTION

45. The jurisdiction of the CAS, which is not disputed, derives (a) from article 33 of the Articles of Association of ITF Limited, (b) from section O of the 2008 ITF Programme and (c) from article R47 of the Code of Sports-related Arbitration (the "CAS Code"). It is further confirmed by the order of procedure duly signed by the parties.
46. It follows that the CAS has jurisdiction to decide the present dispute.

IV.2 APPLICABLE LAW

47. Article R58 of the CAS Code provides the following:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

48. In the present case, it results from their respective submissions that the parties agree that the matter under appeal is governed by the rules and regulations of the ITF. In this respect and on 28 December 2007, Mr Filippo Volandri signed an agreement confirming that he would comply with and be bound *"by all provisions of the 2008 ATP OFFICIAL RULEBOOK and the ATP Tour, Inc's ("ATP") By-Laws (the "ATP Rules"), including, but not limited to, all amendments to the ATP Rules"*.
49. The 2009 ITF Programme reads as follows where relevant:

"A.5 The effective date of this Programme is 1 January 2009 (the "Effective Date")

A.6 Transitional provisions:

A.6.1 The Programme shall apply in full to all cases where the alleged Doping Offence occurs after the Effective Date.

A.6.2 Any case pending prior to the Effective Date, or brought after the Effective Date but based on a Doping Offence that occurred before the Effective Date, shall be governed by the predecessor version of the Programme in force at the time of the Doping Offence, subject to any application of the principle of lex mitior by the Anti-Doping Tribunal hearing the case."

50. It appears that the 2009 ITF Programme contains an express transitional provision, which clearly indicates that the 2008 ITF Programme remains applicable in the present proceedings because Mr Filippo Volandri's case was pending before the 2009 ITF Programme came into force on 1 January 2009. However, article A.6 of the 2009 ITF Programme allows the ITF Independent Anti-Doping Tribunal as well as the CAS Panel

to apply the *lex mitior* principle, *i.e.* the principle whereby a disciplinary regulation applies as soon as it comes into force if it is more favourable to the accused. This is a fundamental principle of law applicable and accepted by most legal regimes and which applies by analogy to anti-doping regulations in view of the quasi penal or at the very least disciplinary nature of the penalties that they allow to be imposed (CAS 2005/C/841 CONI, page 14; CAS 94/128 UCI and CONI, Digest of CAS Awards (1986-1998), p. 477 at 491).

51. It follows that the ITF regulations, in particular the 2008 ITF Programme (subject to more favourable provisions to Mr Filippo Vollandri under the 2009 ITF Programme) are applicable.
52. Article A.10 of the 2008 ITF Programme provides that it is governed by and shall be construed in accordance with English law, subject to article A.8, which requires the ITF Programme to be interpreted in a manner that is consistent with the WADC. The WADC prevails in the event of a conflict between its provisions and those of the ITF Programme.
53. The application of the (rules of) law chosen by the parties has its confines in the *ordre public* (Zürcher Kommentar zum IPRG/Heini, 2nd edition 2004, Art. 187 marg. no. 18; see also Kaufmann-Kohler/Rigozzi, Arbitrage International, 2006, marg. no. 657). Usually, the term *ordre public* is thereby divested of its purely Swiss character and is understood in the sense of a universal, international or transnational sense (Kaufmann-Kohler/Rigozzi, Arbitrage International, 2006, margin no. 666; Zürcher Kommentar zum IPRG/Heini, 2nd edition 2004, Art. 187 margin no. 18; cf. also Portmann causa sport 2/2006 pp. 200, 203 and 205). The *ordre public* proviso is meant to prevent a decision conflicting with basic legal or moral principles that apply supranationally. This, in turn, is to be assumed if the application of the rules of law agreed by the parties were to breach fundamental legal doctrines or were simply incompatible with the system of law and values (TF 8.3.2006, 4P.278/2005 marg. no. 2.2.2; Zürcher Kommentar zum IPRG/Heini, 2nd edition 2004, Art. 190 margin no. 44; CAS 2006/A/1180, no. 7.4; CAS 2005/A/983&984, no. 70).

IV.3 ADMISSIBILITY

54. The appeal was filed within the deadline provided by article O.4.1 of the 2008 ITF Programme. Furthermore, it complied with all other requirements of article R48 of the CAS Code.
55. It follows that the appeal is admissible.

IV.4 PROCEDURAL MOTIONS – SCOPE OF REVIEW OF THE CAS

56. Article R57 of the CAS Code provides that “*the Panel shall have full power to review the facts and the law*”. Under this provision, the Panel’s scope of review is basically unrestricted. It has the full power to review the facts and the law and may even request the production of further evidence. In other words, the Panel not only has the power to establish whether the decision of a disciplinary body being challenged was lawful or not, but also to issue an independent decision (CAS 2004/A/607 Galabin Boevski v/ IWF;

CAS 2004/A/633 IAAF v/ FFA & Mr Chouki; CAS 2005/A/1001 Fulham FC (1987) Limited v/ FIFA; CAS 2006/A/1153 WADA v/ Portuguese Football Federation & Nuno Assis Lopes de Almeida).

57. The CAS Code contemplates a full hearing *de novo* of the original matter.
58. However, in the present case, the ITF submits a) that the power of review of the CAS Panel is limited by the applicable ITF regulations and b) that article R57 of the CAS Code applies only to the extent agreed by the parties, which did not accept the rules of arbitration fixed by the CAS Code in whole. The ITF alleges that the scope of review of the CAS is restricted to determining whether the Player has established that the ITF Tribunal's findings were erroneous based on all of the evidence before it at first instance.
59. To support its opinion, the ITF refers to article O.5.1 of the 2008 ITF Programme, which reads as follows:

"Where required in order to do justice (for example to cure procedural errors at the first instance hearing), appeals before CAS pursuant to this Article O shall take the form of a re-hearing de novo of the issues raised by the case. In all other cases such appeals shall not take the form of a de novo hearing but instead shall be limited to a consideration of whether the decision being appealed was erroneous. The CAS Panel shall be able to substitute its decision for the decision being appealed where it considers that decision to be erroneous or procedurally unsound."

60. The CAS Panel observes that the situation is not clear because of the confusion generated (a) by the apparent conflict between article O.2 and O.5.1 of the 2008 ITF Programme and (b) by the unclear wording of article O.5.1 of the 2008 ITF Programme. However, the Panel is of the opinion that this unclear situation is actually and practically solved by the ITF Programme itself, as will be explained hereunder, by reference to other articles of the ITF Programme which leads to the conclusion that the unrestricted scope of review of the CAS Panel as provided under R57 of the CAS Code does not seem to be limited by article O.5.1 of the 2008 ITF Programme.

a) The apparent conflict between the 2008 ITF Programme articles

61. Pursuant to article O.2.1 of the 2008 ITF Programme "*A decision that a Doping Offence has been committed, a decision imposing Consequences for a Doping Offence, a decision that no Doping Offence has been committed, a decision by the Review Board that there is no case to answer in a particular matter, a decision that the ITF lacks jurisdiction to rule on an alleged Doping Offence or its Consequences, may be appealed by any of the following parties exclusively to CAS, in accordance with CAS's Procedural Rules for Appeal Arbitration Procedures (...)*".
62. Article O.2.1 of the 2008 ITF Programme refers to the CAS Code without any restrictions or limitations, whereas article O.5.1 of the same Programme seems to limit, in certain circumstances, the CAS Panel's scope of review. At a first glance, the 2008 ITF Programme seems to offer no indication as to which of those two provisions should

prevail or as to how they should co-exist. However, as will be further explained, this question is indeed solved within the framework of the 2008 ITF Programme itself.

63. This possible confusion was obviously noticed by the ITF which amended its 2009 ITF Programme by suppressing the reference to the “CAS’s *Procedural Rules for Appeal Arbitration Procedures*” in its new article O.2.1.
64. Moreover, the ITF is a signatory to the WADC. Its 2008 Programme was adopted and implemented pursuant to the mandatory provisions of the WADC (Article A.2 of the 2008 ITF Programme). According to article A.8 of the 2008 ITF Programme, “*The Programme shall be interpreted in a manner that is consistent with the [WADC] (...). In the case of a conflict between the Programme on the one hand and the mandatory provisions of the [WADC] (as referenced in the Introduction to the [WADC]) on the other hand, the mandatory provisions of the [WADC] shall prevail.*”
65. In its Part One, the applicable WADC (the version approved in 2003 and effective 1 January 2004 to 31 December 2008) reads as follows where relevant: “*While some provisions of Part One of the [WADC] must be incorporated essentially verbatim by each Anti-Doping Organization in its own anti-doping rules, other provisions of Part One establish mandatory guiding principles that allow flexibility in the formulation of rules by each Anti-Doping Organization or establish requirements that must be followed by each Anti-Doping Organization but need not be repeated in its own anti-doping rules. The following Articles, as applicable to the scope of anti-doping activity which the Anti-Doping Organization performs, must be incorporated into the rules of each Anti-Doping Organization without any substantive changes (allowing for necessary non-substantive editing changes to the language in order to refer to the organization’s name, sport, section numbers, etc.); Articles 1 (Definition of Doping), 2 (Anti-Doping Rule Violations), 3 (Proof of Doping), 9 (Automatic Disqualification of individual Results), 10 (Sanctions on Individuals), 11 (Consequences to Teams), 13 (Appeals) with the exception of 13.2.2, 17 (Statute of Limitations) and Definitions*”.
66. Article 13 of the WADC sets forth the appeal process applicable in case of decisions made under the WADC or rules adopted pursuant to the WADC. It specifies in great detail which decisions may be subject to appeal, and who is entitled to file an appeal. Pursuant to article 13.2.1 of the WADC, “*In cases arising from competitions in an international Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to the Court of Arbitration for Sport (“CAS”) in accordance with the provisions applicable before such court.*” (emphasis added)
67. It is therefore the view of the CAS Panel that Art. A.8 of the 2008 ITF Programme, by adopting and implementing the principle of consistency with the WADAC and the ITF’s commitment hereunder to “*incorporate (...) without any substantive changes*”, inter alia, article 13 (Appeals) of that Code, actually solves by itself the question of the co-existence of these two articles and establishes the supremacy of Art. O.2.1. over Art. O.5.1.

b) The ambiguous wording of article O.5.1 of the 2008 ITF Programme

68. The wording of article O.5.1 of the 2008 ITF Programme is ambiguous and leaves the Panel in a state of perplexity:
- on the one hand, the said provision allows the CAS to review the appeal in the form of a *de novo* hearing only “*where required in order to do justice.*”
 - on the other hand, in all the other cases (*i.e.* where *not* required in order to do justice), the CAS must limit its scope of review to a “*consideration of whether the decision being appealed was erroneous.*”
69. The concept of “*in order to do justice*” is illustrated in the Programme with just one example (*i.e.* “*for example to cure procedural errors at first instance hearing*”), which does not help to understand why the CAS Panel does not “*justice*” when/if it considers that the “*decision being appealed was erroneous.*”
70. However, the Panel is a fortiori allowed to review the Appealed Decision if it is arbitrary, *i.e.* if it severely fails to consider fixed rules, a clear and undisputed legal principle or breaches a fundamental principle. A decision may be considered arbitrary also if it harms in a deplorable way a feeling of justice or of fairness or if it is based on improper considerations or lacks a plausible explanation of the connection between the facts found and the decision issued. Likewise, the Panel is of the opinion that it must be able to review the Appealed Decision with regard to the fundamental rights of the Player. Any other interpretation would lead to possible abuse of process and of authority, which would be absolutely unacceptable and would represent a substantial and specific danger to sporting spirit. Furthermore, any agreement between the parties to restrict the powers of this Panel would have to be viewed critically in the light of the limitations imposed by the Swiss *ordre public*. Agreements between athletes and international federations are – in general terms - not concluded voluntarily on the part of the athletes but rather imposed upon them unilaterally by the federation (ATF 133 III 235, 242 et seq.). There is, therefore, a danger that a federation acts in excess of its powers unless the contents of the agreement does take sufficiently into account also the interests of the athlete. The Panel has some doubts whether a provision that restricts the Panel’s power to amend a wrong decision of a federation to the benefit of the athlete balances the interests of both parties in a proportionate manner.
71. In order to exercise such a review (as apparently allowed by the 2008 ITF Programme), the CAS must be able to examine the formal aspects of the appealed decisions but also, above all, to evaluate – sometimes even *de novo* - all facts and legal issues involved in the dispute.
72. The Panel wonders if the purpose of article O.5.1 of the 2008 ITF Programme is to prohibit the parties to bring before the CAS Panel new evidence which has not been presented to the ITF Tribunal. In this respect, the Panel observes that all the parties – including ITF – have filed various submissions and evidence after the hearing before the ITF Tribunal. Moreover, in the case at hand, there was no “*evidential ambush*” which might have given unfair advantages to one or the other party.

73. In the view of all the above and under the circumstances of the case and the findings of the Panel as explained hereunder, the unrestricted scope of review of the CAS Panel as provided under R57 of the CAS Code does not seem to be limited by article O.5.1 of the 2008 ITF Programme. Furthermore, at the present case, it is the view of the Panel that there are sufficient grounds to resolve the issue at stake (*i.e.* its scope of review) even within the framework of article O.5.1 as is.

IV.5 THE MERITS

74. In the view of the above, the main issues to be resolved by the Panel are:

- a) Has a doping offence been committed?
- b) If the first question is answered in the affirmative, are the sanctions imposed by the ITF Tribunal upon the Player appropriate?

a) **Has a doping offence been committed?**

The undisputed facts

75. The following is undisputed:

- Mr Filippo Volandri suffers from asthma.
- The presence of salbutamol in a concentration of 1,167 ng/mL was found in Mr Filippo Volandri's A sample collected on 13 March 2008. The analysis on the Player's B sample confirmed the presence of salbutamol in a concentration of 1,192 ng/mL.
- The accuracy of the testing methods or the test results and positive findings are not contested. Mr Filippo Volandri did not try to allege the possible occurrence of a breach in the chain of custody.
- The presence of salbutamol in urine in excess of 1,000 ng/mL is considered an adverse analytical finding unless the player proves that the abnormal result was the consequence "*of the therapeutic use of inhaled salbutamol*" (Par. S3, appendix 2 to the 2008 ITF Programme) or "*of the use of a therapeutic dose of inhaled salbutamol*" (Par. S3, appendix 2 to the 2009 ITF Programme).
- The present case must notably be examined in the light of the content of the TUE of November 2007 irrespective of the subsequent management of this document by the IDTM. In this respect, it is not disputed that the indication "*2 puffs if necessary*" on the TUE of November 2007 must be interpreted in accordance with the GINA guidelines.
- The GINA guidelines determine the appropriate treatment objectively admissible in terms of "*therapeutic*" (or "*therapeutic dose*" under the 2009 Programme) use of salbutamol.

76. In sum, the only question that arises is whether the concentration of salbutamol found in Mr Filippo Vollandri's samples is consistent with the inhalation of the substance in accordance with the GINA guidelines.

The case at hand

77. Salbutamol is a rapid-acting inhaled beta2-agonist indicated for relief of bronchospasm during acute exacerbations of asthma and for pre-treatment of exercise-induced bronchoconstriction (See page 34 of the GINA guidelines).
78. It is here interesting to note that according to the GINA guidelines, medications to treat asthma can be classified as controllers or relievers. Controllers are medication taken daily on a long-term basis to keep asthma under clinical control. Relievers are medications used "*on a as-needed basis*" that act quickly to reverse bronchoconstriction and relieve its symptoms (See page 28 of the GINA guidelines).
79. It appears that the terms "*as needed*", "*if necessary*", "*al bisogno*" seen on the ATUE/TUE application forms filled on behalf of Mr Filippo Vollandri are not just an easy to understand way of expression, but are actually used in medical terms and are consistent with the GINA guidelines.
80. The ITF has successfully established that the presence of salbutamol in Mr Filippo Vollandri's samples was in a higher concentration than 1,000 ng/mL. Under the 2008 and 2009 ITF Programmes, the burden of adducing exculpatory circumstances is on Mr Filippo Vollandri, who must prove that the abnormal result was the consequence "*of the therapeutic use of inhaled salbutamol*" (Par. S3, appendix 2 to the 2008 ITF Programme) or "*of the use of a therapeutic dose of inhaled salbutamol*" (Par. S3, appendix 2 to the 2009 ITF Programme).
81. The ITF Tribunal held that the asthma attack on 13 March 2008 was severe as it was potentially life threatening. It held that Mr Filippo Vollandri a) took too much salbutamol and b) should have sought medical help as the Player's condition did not improve one hour after the beginning of the asthma attack. In particular, he relied on Dr Fabrizio Gadducci's statements according to which, if after the first hour, normal breathing was not restored, the patient should go to the hospital. The ITF Tribunal concluded that by not complying with those requirements, the Player did not respect the GINA guidelines and the use of salbutamol was therefore not "*therapeutic*". The ITF Tribunal was "*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.*" (See page 17, par. 66 of the Appealed Decision).
82. In the present case, Mr Filippo Vollandri has established, on the balance of probabilities, how the specified substance entered his body. It is not contested that the positive findings are the result of the inhalation of salbutamol between 12 and 13 March 2008. It is also not challenged that the Player established, to the comfortable satisfaction of the hearing body, that his ingestion of the specified substance was not intended to enhance his sporting performance or to mask the use of another prohibited substance. However, those accepted facts only allow the Player to benefit from the possible elimination or

reduction of the period of suspension (See article M.4 of the 2009 ITF Programme) but are irrelevant with regard to the occurrence or non occurrence of the adverse analytical finding.

83. It is Mr Filippo Volandri's burden to explain that the presence of salbutamol in a concentration of 1,167 ng/mL is consistent with the "therapeutic" use of the concerned specified substance. With this respect, Mr Filippo Volandri simply affirmed that, between 12 and 13 March 2008, he only took the amount of salbutamol recommended by the GINA guidelines. Based on the Pocket Guide for Asthma Management and Prevention revised in 2007 by the GINA, the Player submitted that there was an authorized intake of approximately 32 puffs of salbutamol in the 8-18 hours before the providing of his sample on 13 March 2008. The Player alleged that the concentration of salbutamol greater than the 1,000 ng/mL is the inevitable consequence of those puffs. However, he did not offer any scientific evidence whatsoever to support this position. In order to corroborate his allegations, he exclusively produced an "expert opinion" issued on 9 February 2009 by Prof. Franco Lodi, professor of forensic toxicology, at the institute of forensic medicine in Milan, Italy. This document contains no reference to any scientific literature, no technical data, no indication with regard to Prof. Franco Lodi's field of expertise or qualifications. The CAS Panel may take into consideration the declarations of Prof. Franco Lodi as mere personal statements, with no additional evidentiary value. This is particularly true as Prof. Franco Lodi was not present at the hearing. The Player chose, although he had the right to bring any witness before the Panel, not to invite him to the hearing, and, therefore, Prof. Lodi was not exposed to any cross-examination on his opinion by Counsel for the ITF, which should have been a minimum requirement in order to add some weight to his opinion which, as already mentioned, was not supported by any scientific literature, nor any technical data.
84. The CAS Panel considers that Mr Filippo Volandri did not offer any persuasive evidence of how the concentration of 1,167 ng/mL found in his urine could be the result of the therapeutic use of salbutamol. Based upon the evaluation of the foregoing facts, the Player has not succeeded in discharging the onus on him and, hence, must be considered as having committed a doping offence.

b) Are the sanctions imposed by the ITF Tribunal upon the Player appropriate?

The undisputed facts

- Under the 2008 ITF Programme, salbutamol in a concentration greater than 1,000 ng/mL was qualified as a prohibited substance. The presence of salbutamol in a player's specimen was sanctioned with a two-year period of ineligibility, unless the player could a) establish that the presence is consistent with a therapeutic use exemption (article C.1) and/or b) show "No Fault or Negligence" (article M.5.1) or "No Significant Fault or Negligence" (article M.5.2) or c) provide assistance in discovering or establishing a doping offence by another person (article M.5.3). There was no other provision in the 2008 Programme that could have given the ITF Tribunal discretion to depart from a two-year ban.

- Under the 2009 ITF Programme, salbutamol, even in a concentration greater than 1,000 ng/mL, is reclassified as "*Specified Substances*", meaning that the hearing body has discretion (assuming it accepted that the Player did not take the medication with intent to enhance his performance or mask the use of a performance-enhancing substance) to impose a sanction of anything from a reprimand up to a two-year period of ineligibility.
- It is accepted that, on the basis of article A.6 of the 2009 ITF Programme, salbutamol must be treated as a specified substance and that the regime of sanction implemented by the 2009 ITF Programme is applicable in the present case. Therefore, Mr Filippo Volandri is entitled to rely on article M.4 of the 2009 ITF Programme ("*Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specified Circumstances*").
- The player has been able to establish how salbutamol entered his body and it is accepted that he inhaled the substance and did not ingest it in any other way. It is also not challenged that the player took salbutamol to treat his asthma and not to enhance his sporting performance. There is no question of masking the use of a performance-enhancing substance in the present case.
- In the event Mr Filippo Volandri is found guilty of a doping offence, his individual results in respect of the 2008 Indian Wells tournament must be disqualified, and in consequence, the prize money and ranking points obtained by him through his participation in that event must be forfeited.

In the case at hand

85. The ITF Tribunal found that 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.*" (See page 7, par. 25 of the Appealed Decision).
86. Based on the foregoing, the ITF Tribunal concluded "*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.*" (See page 21, par. 81 of the Appealed Decision).
87. The CAS Panel considers the Appealed Decision of the ITF Tribunal as arbitrary, because it harms a feeling of justice and of fairness and because it lacks a plausible explanation of the connection between the facts found and the decision issued.
88. As a matter of fact, the first instance held that because Mr Filippo Volandri took between 10 to 20 puffs of salbutamol, he is "*at fault for inhaling too much salbutamol*". This is inconsistent with the ITF Tribunal own findings according to which the GINA guidelines determine the appropriate treatment objectively admissible in terms of "*therapeutic*" use of salbutamol. Based on the said guidelines, Mr Filippo Volandri was allowed to take, during the relevant period of time, much more puffs than "*between 10*

to 20 overall" as accepted by the ITF Tribunal:

<u>On 12 March 2008:</u>	2 puffs	evening as allowed by the TUE of November 2007
<u>During asthma attack:</u>	16 puffs	4 puffs every 20 minutes for the 1 st hour as recommended by the GINA guidelines
	10 puffs	2 nd hour as recommended by the GINA guidelines
<u>On 13 March 2008:</u>	2 puffs	morning as allowed by the TUE of November 2007
<u>Before the match:</u>	2 puffs	as recommended by the GINA guidelines
Total	32 puffs	

89. The Player could have taken up to 32 puffs during the 8-18 hours before the providing of his samples. There is a considerable difference between the figures in accordance with the GINA guidelines and the figures taken into consideration by the ITF Tribunal. Thus, the lower instance has not ascertained objectively how the Player's degree of fault has been calculated or on what basis it was founded.
90. The ITF Tribunal held that Mr Filippo Volandri should have sought medical help as the asthma attack was life threatening. It was of the opinion that by not going to the hospital, the Player did not follow the GINA guidelines. Further, it found that "*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.*" (See page 7, par. 26 of the Appealed Decision).
91. Again, if "*the extent needed to regain control of his breathing*" amounts to 10-20 puffs, then the Player was within the limits set in the GINA guidelines.
92. Moreover, the life-threatening emergency justifying clinical assistance seems very difficult to assess as Mr Filippo Volandri was by himself when the asthma attack occurred. Under those circumstances, the CAS Panel does not see how the ITF Tribunal is in a better position than the Player to decide what is right for him. It is accepted by the Player that he called his coach and asked the latter to come to his room. This validates the fact that the situation was somehow out of ordinary. It is also agreed that it was the worse asthma attack the Player has ever dealt with and that the coach suggested to go to the hospital. In contrast, Mr Filippo Volandri obviously decided that he was able to take care of the problem. This is also in accordance with the GINA guidelines which seek to encourage self-management, that is, to give people with asthma the ability to control their own condition (Page 50 of the GINA guidelines). It appears that after a couple hours, the situation went back to normal.
93. ITF submitted that after an hour following the beginning of the attack, the breathing of Mr Filippo Volandri did not improve. In order to corroborate this allegation, it refers to the Player's own brief according to which the coach found the latter "*gasping for breath*". Here too, the only witnesses are the Player himself and his coach. At what precise time did the coach arrive? What does "*gasping for breath*" actually mean? Does it mean that the respiratory distress was greater than the one usually observed by asthmatic people under asthma attack? Was the coach impressed by a situation he is not familiar with? How much longer was the Player "*gasping for breath*" after the arrival of his coach? How many puffs did the Player take on the arrival of his coach? How is the life-threatening situation compatible with the fact that the only testimony on the event is

the one of the Player who described it during his cross-examination in front of the ITF Tribunal in the words: "**I was a little concerned about the situation?**" (the ITF Tribunal protocol, Appendix 16 to the appeal brief, pg.48), and how is the life-threatening situation compatible with the fact that the Player was able to play his match 8 hours later, and, most of all, with the fact that the coach left just an hour after he joined the Player in his room, *i.e.* less than two hours following the beginning of the asthma attack? Under such circumstances, how can the ITF Tribunal qualify the asthma attack as "*severe*" and not just "*mild*"? With this regard, and according to the GINA guidelines (page 64), milder exacerbations are defined by a reduction in peak flow of less than 20% and nocturnal awakening. Why does this definition not fit the events of the 13 March 2008?

94. The fact that the above questions, that could lead to a better understanding of the circumstances and the facts and to a more accurate assessment of the severance of the event, did not find an answer cannot be blamed on Mr Filippo Volandri as he was informed of the positive findings only on 25 July 2008, that is more than 4 month after the sample collection. Despite of the facts that those questions remain unanswered, the ITF Tribunal felt comfortable to come to the conclusion that Mr Filippo Volandri violated the Gina guidelines by not going to a hospital. It is obvious to the CAS Panel that the lower instance has assumed that the Player was at high risk of asthma-related death, which is arbitrary and purely speculative.
95. Furthermore, the ITF Tribunal has not explained how or why Mr Filippo Volandri did not respect the GINA guidelines when "*he probably took between 10 and 20 puffs overall*" nor has it established that the Player had to get medical help. Under such circumstances, the CAS Panel does not see on what basis the ITF Tribunal imposed such harsh sanctions upon the Player.
96. As a result, the CAS Panel considers that it has no duty of deference towards the holdings of the ITF Tribunal.
97. The CAS Panel observes that Mr Filippo Volandri was indeed at fault, as he has not been able to prove that the presence of salbutamol in his sample in excess of 1,000 ng/mL was the consequence "*of the therapeutic use of inhaled salbutamol*". However, the degree of his fault is minor as the threshold of 1,000 ng/mL was just exceeded. If, as ascertained by the ITF Tribunal itself (See page 7, par. 25 of the Appealed Decision), one puff corresponds to 100 mcg of salbutamol, the litigious excess represents less than a couple of puffs. Furthermore, the CAS Panel cannot ignore the fact that the Player traveled all the way to California to take part in a tournament, that he was far from home, a few hours away from a match, in the very early morning. After having put all that effort into coming to play, it is understandable that Mr Filippo Volandri decided not to go to the hospital as it would probably have kept him from playing.
98. However, in assessing the appropriate sanction, the CAS Panel also took the following factors into account. First, Mr Filippo Volandri has never previously been found guilty of an anti-doping rule violation. This, of itself, is of comparatively little weight: the same point can be made for any first-time offender. Secondly, however, and more importantly, the CAS Panel has been concerned that the procedures before the ITF were

slow and suffered from inconsistencies, with the result that the Player was left in a state of uncertainty of over 8 months, which is very long in sporting matters. As a matter of fact, it is only on 13 November 2008 that the Player was formally charged with a doping offence. Before then, Mr Filippo Vollandri received information from the ITF which is to some extent contradictory and may also be confusing:

- The litigious samples collection occurred on 13 March 2008; the positive findings were known on 9 April 2008 but communicated to the Player on 25 July 2008. Between the sampling and the communication of its results, the Player was able to take part in 12 tournaments and to undergo 3 anti-doping tests (which were all negative).
- On 25 July 2005, the Player was requested by the ITF to explain the presence of the important concentration of salbutamol found in his urine in March 2008. The same day, Mr Filippo Vollandri wrote to the ITF to give his version of the facts. It is only on 18 September 2008 that the ITF reacted to the Player's mail. Between those two dates, the Player took part in at least four more tournaments.
- On 8 October 2008, the Anti-Doping Programme Administrator of the ITF Programme wrote to the Player a letter with very ambiguous terms, which could easily be misleading: "For the avoidance of any doubt, (1) you have not yet been formally charged with the commission of a Doping Offence; and (2) unless and until you are charged and you have formally admitted committing a Doping Offence, or you have been found by Anti-Doping Tribunal to have committed a Doping Offence, you will not be deemed to have committed such an offence. Nor will any provisional period of ineligibility be imposed upon you and you will remain free to compete. (See Article J.4.1 of the Programme)." (emphasis added).
- Finally a notice of charge was addressed to Mr Filippo Vollandri on 13 November 2008. Between 18 September and 13 November 2008, the latter played in three more tournaments.

99. Although the ITF knew of the adverse analytical findings, it chose not to inform Mr Filippo Vollandri and to let the latter take part in 19 tournaments before formally charging him with a doping offence. Such a long period is unacceptable and incompatible with the intention of the anti-doping regime that matters should be dealt with speedily. The Panel was taken aback when it saw that on 18 September 2008 (more than 6 months after the sampling collection) the ITF requested Mr Filippo Vollandri to provide details on a) the time at which he last urinated prior to providing sample on 13 March 2008, b) the time(s) at which he used his inhaler on 13 March 2008 and c) the number of puffs he took on each of those occasions. It is obvious that the Player was not in the position to answer to such questions precisely, because of ITF's fault and was therefore deprived of the right to fair evidence proceedings, which emerges from the right to be heard, the right to a fair trial and the principle of equal treatment, which are fundamental and which were disregarded in the present case.

100. Based on the above considerations, the Panel is of the opinion that fairness requires that a) a reprimand is imposed upon Mr Filippo Vollandri, b) that no period of ineligibility is imposed on the Player and c) that his individual result in respect of the 2008 Indian Wells tournament only is disqualified, and in consequence, the prize money and ranking points obtained by him through his participation in that event are forfeited.

V. Costs

101. Articles R65.1 and R65.3 of the CAS Code provide that, subject to articles R65.2 and R65.4, the proceedings shall be free; that the costs of the parties, witnesses, experts and interpreters shall be advanced by the parties; and that, in the Award, the Panel shall decide which party shall bear them, or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.
102. As a general rule the CAS grants the prevailing party a contribution toward its legal fees and other expenses incurred in connection with the proceedings. However, in the light of all of the circumstances and of the financial resources of the parties, the Panel concludes that it is reasonable for the parties to bear their own costs and other expenses incurred in connection with this arbitration.

THE COURT OF ARBITRATION FOR SPORT

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal of Mr Filippo Vollandri against the decision of the ITF Independent Anti-Doping Tribunal dated 15 January 2009 is partially upheld.
2. The decision issued by the ITF Independent Anti-Doping Tribunal on 15 January 2009 is set aside.
3. On these grounds:
 - a. Mr Filippo Vollandri is found guilty of the anti-doping offence specified in the notice of charge set out in the ITF's letter to the player dated 13 November 2008.
 - b. A reprimand is imposed upon Mr Vollandri.
 - c. No period of ineligibility is imposed on Mr Vollandri.
 - d. Mr Vollandri's individual result in respect of the 2008 Indian Wells tournament only is disqualified, and in consequence, the prize money and ranking points obtained by him through his participation in that event are forfeited.
 - e. All of Mr Vollandri's results (including ranking points and prize money) in all competitions subsequent to the 2008 Indian Wells tournament shall remain undisturbed.
4. This award is pronounced without costs, except for the Court Office fee of CHF 500 (five hundred Swiss Francs) already paid by Mr Filippo Vollandri and to be retained by the CAS.
5. Each party shall bear its own legal and other costs.
6. All other motions or prayers for relief are dismissed.

The operative part of this award was communicated to the parties on 30 March 2009.

Done in Lausanne, 12 May 2009

THE COURT OF ARBITRATION FOR SPORT

President of the Panel


Efraim Barak