[redacted]

Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2004/A/717 International Paralympic Committee v/ Brockman & WADA

[redacted]

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Luigi **Fumagalli**, Professor and Attorney-at-Law, Milan, Italy

Arbitrators: Mr Ulrich **Haas**, Professor, Wiesbaden, Germany
Mr Jean-Pierre **Morand**, Attorney-at-law, Geneva, Switzerland

between

INTERNATIONAL PARALYMPIC COMMITTEE, Bonn, Germany
Represented by Covington & Burling, Attorneys-at-Law, London, United Kingdom

as Appellant

and

ANDREW BROCKMAN, Gravesend, United Kingdom
Represented by Wright Hassal Solicitors, Attorneys-at-Law, Leamington Spa, United Kingdom

and

WORLD ANTI-DOPING AGENCY (WADA), Lausanne, Switzerland
Represented by Mr Olivier Niggli, Director of Legal Affairs, Montreal, Canada

as Respondents

1. BACKGROUND

1.1 The Parties

1. The International Paralympic Committee (hereinafter referred to as "IPC" or the "Appellant") is the international governing body of sports for athletes with a disability. It supervises and co-ordinates the organization of the Paralympic Summer and Winter Games and other multi-disability competitions on elite sport level.

2. Mr Andrew Brockman (hereinafter referred to as the "Athlete") is a British paralympic dressage rider of international level. For the purposes of this arbitration proceedings the Athlete is represented by the British Equestrian Federation (hereinafter referred to as "BEF"), being the British governing body for equestrian sport.

3. The World Anti-Doping Agency (hereinafter referred to as "WADA"; WADA and the Athlete are jointly referred to as the "Respondents") is a foundation set up under Swiss law, with seat in Lausanne, Switzerland, and headquarters in Montreal, Canada, in order to promote and coordinate the fight against doping in sport internationally. In this capacity, WADA has been responsible for the production of the World Anti-Doping Code (hereinafter referred to as the "WADC"), which is intended to harmonise the anti-doping rules and procedures across the world.

1.2 The Events

(a) *The application for a Therapeutic Use Exemption*

4. The Athlete has suffered from [redacted]. Starting from 2000 he has suffered [redacted]

5. On 17 March 2004, the Athlete applied for approval from IPC for a therapeutic use exemption (hereinafter referred to as "TUE") in respect of the administration of a substance [redacted] intended to treat his physical conditions. [redacted] in fact, is listed as a prohibited substance in the list identifying the Prohibited Substances published by WADA and IPC. As such, its use, if not upon a proper TUE, would constitute an anti-doping rule infringement pursuant to the WADC as well as under the IPC Anti-Doping Code (which constitutes an implementation in the IPC system of the rules contained in the WADC).

6. The application for the TUE was made to UK Sport (being the agent recognized by the British Paralympic Committee for TUE applications from British athletes), which forwarded it to IPC on 15 April 2004.

7. The application for the TUE was signed also by the Athlete's medical practitioner, contained the specification of the relevant reasons for not prescribing alternative therapies and had attached some documents intended to provide evidence to substantiate the diagnosis and the necessity to use [redacted]

(b) *The IPC Decision*

8. On 15 July 2004, the Athlete was informed by a letter sent to UK Sport, that the IPC TUE Committee had decided not to approve his application for the TUE (hereinafter referred to as the "IPC Decision").

9. The IPC Decision did not specify any reason for the denial of the Athlete's application. In an e-mail message to UK Sport dated 6 August 2004, however, IPC indicated that:

"the application was denied as the IPC TUEC [the IPC TUE Committee] *felt that none of the criteria detailed in the WADC International Standards for TUE and the IPC Anti-doping code were met*".

(c) *The WADA Decision*

10. On 11 August 2004 WADA was requested by the BEF (acting on behalf of the Athlete) to review the IPC Decision pursuant to Article 6.3 of the IPC Anti-Doping Code.

11. On 23 August 2004, the WADA TUE Committee adopted the following decision (hereinafter referred to as the "WADA Decision"):

"to reverse the IPC initial decision and to grant Mr. Andrew Brockman with a TUE for the use of [redacted]

12. More specifically, the WADA TUE Committee considered that all the criteria required by Article 4 [*"Criteria for Granting a Therapeutic Use Exemption"*] of the WADC *"Standards for Granting a Therapeutic Use Exemption"* (hereinafter referred to as the "WADC TUE International Standards") for granting a TUE were fulfilled and further commented that

"the concern raised that by competing in his sport, Mr. Brockman could be worsening his conditions or putting himself at medical risk, is not within the scope of consideration of a TUE Committee. These valid issues are best assessed and evaluated by his numerous and expert treating medical practitioners".

2. THE ARBITRAL PROCEEDINGS

2.1 The Appeal

13. On 15 September 2004 IPC filed a statement of appeal with the Court of Arbitration for Sport (hereinafter referred to as the "CAS"), pursuant to the Code of Sports-related Arbitration (hereinafter referred to as the "Code"), to challenge the WADA Decision. The statement of appeal contained the appointment of Prof. Ulrich Haas as arbitrator, and the request that:

"the CAS reverses the decision of WADA, and denies the TUE given by WADA to Mr. Brockman".

14. The statement of appeal cited the Athlete and UK Sport as respondents. As explained in a letter addressed by the Appellant to the CAS Court Office on 23 September 2004 UK Sport had been named as co-respondent because UK Sport had represented the Athlete in the IPC and WADA proceedings. By letter dated 21 October 2004, however, the Appellant informed the CAS Court Office that the respondents had to be identified in the Athlete and WADA and asked the CAS Court Office to amend the records accordingly.

15. On 29 October 2004, the Appellant filed his appeal brief, together with a bundle of documents and the witness statements of Mr Andrew Parkinson, IPC Medical and Scientific Director, of Mr Bjorn Hedman, IPC Medical Officer, and of Mr Anthony Webborn, IPC TUE Committee, confirming his request:

"that CAS overturn the WADA Decision".

16. In support of his requests for relief, the Appellant submits that:

"1. WADA made an error in finding that the IPC should not have refused the granting of a therapeutic use exemption on the basis of the Athlete's health;

2. WADA failed to properly consider whether or not the International Standard had been applied correctly by the IPC in assessing the Athlete's application;

3. The provisions of the International Standard, as well as practical and ethical considerations, oblige or permit a TUE Committee to take an athlete's health into account when assessing the merits of a TUE application, and, if appropriate, provide that a TUE Committee may refuse the granting of a TUE application on such basis".

17. More specifically, the IPC challenges the WADA Decision where it concluded that, whilst not necessarily disagreeing with the proposition that the IPC should have the power to exclude athletes from competition for reasons of health, such determination should not be made in the context of a TUE application. The IPC in fact submits, contrary to the WADA Decision, that the provisions of the IPC Anti-Doping Code give IPC the *"discretion ... to restrict Athletes from competing in circumstances where such competition may result in a risk to the athlete's health"*. And, in that respect, the IPC states that *"IPC refused the Athlete permission to use* [redacted] *because the body that assessed the Athlete's application for a therapeutic use exemption was most concerned that, in competing whilst using* [redacted] *the Athlete could be putting his own health at risk ... . [B]y using* [redacted]*e in competition, the Athlete could exacerbate an existing injury"*.

18. The IPC invokes, in support of its position,

    i. the relevance given to "*health*" by the WADC "*Fundamental Rationale*" as a value characterising the "*spirit of sport*";

    ii. Article 21.1 of the IPC Anti-Doping Code, which states that "*health of the Participants must prevail above the sport performance or result*"; and

    iii. Article 21.4 of the IPC Anti-Doping Code, according to which "*If an Athlete is deem*[ed] *by the IPC Medical Officer to be endangering their health or the health of others by continuing to compete, then, after consultation with the Athlete NPC, the Athlete may be required to withdraw from Competition*".

19. The IPC, on the other hand, maintains that no rule prohibits a TUE application to be declined for reasons other than those indicated in the WADC TUE International Standards. In any case, according to the IPC, the very criteria set forth in the WADC TUE International Standards imply an assessment of the Athlete's health and of the impact on it of the use of the prohibited substance for which the TUE is requested.

20. In addition, the IPC notes that pursuant to Article 4.4 of the WADC (and Article 6.3 of the IPC Anti-Doping Code) WADA could reverse the IPC Decision only if it had determined that the WADC TUE International Standards had not been correctly applied. As a result, WADA could not reverse the IPC Decision while confirming that the WADC TUE International Standards had been correctly applied by IPC.

21. Finally, IPC maintains that practical and ethical considerations demand that a TUE Committee assess the health of the athlete in connection with a TUE application. In the IPC's opinion, in fact, "*a responsible TUE Committee cannot avoid drawing conclusions as to the likely effect upon an athlete's health of the granting of a TUE or otherwise*"; as a result such responsible TUE Committee should deny – for practical and ethical reasons – the application that might have an "*injurious effect*" upon the athlete.

22. In the light of the foregoing, IPC summarizes its criticism of the WADA Decision as follows:

    "*(i) WADA could only disregard the IPC TUEC's opinion that the Athlete's health may be endangered by the grant of a TUE if the IPC TUEC, in acting in this way, had breached the International Standard. The International Standard does not restrict a TUE Committee from refusing to grant a TUE if that TUE Committee believes that the health of an athlete may be harmed if a TUE is granted. WADA was therefore wrong to conclude that the IPC TUEC could not take these issues into account when assessing the Athlete's application for a TUE.*

    (ii) The provisions of the International Standard require a TUE Committee to assess an athlete's health in the course of assessing a TUE application. In assessing the Athlete's health the IPC TUEC was acting in accordance with the International Standard. WADA was wrong to conclude that these issues should only be assessed by an athlete's own medical advisors. WADA should have considered the

comprehensive basis upon which the Athlete's application for a TUE was refused, and in particular examined the conclusion reached by the IPC TUEC with regard to the Athlete's health. WADA did not examine the merits of the IPC TUEC's decision to refuse to grant a TUE on the basis of the Athlete's health, nor did it seek comment from IPC in this regard. It therefore failed to examine all relevant matters pursuant to the International Standard".

2.2 The Answers to the Appeal

23. By letter dated 25 October 2004, the Respondents jointly appointed Mr Jean-Pierre Morand as arbitrator.

24. On 13 December 2004, the Athlete filed his answer to the appeal brief, together with the witness statements signed by the Appellant himself, by his mother, Mrs Carol Ann Brockman, by Ms Helen Ruth Huggett, executive officer of BEF, and by Mr Peter Norman Whitehead, general medical practitioner. The answer filed by the Athlete contained the following request for relief:

"*to dismiss the appeal and to uphold the findings of the WADA TUE Committee and to award costs in his favour*".

25. On the same 13 December 2004, WADA filed its answer to the appeal brief, together with a bundle of documents including the witness statement signed by Mrs Anita Sax, chairperson of the WADA TUE Committee that rendered the WADA Decision. The answer filed by WADA contained the indication of Dr Michael Cauderay as witness/expert to be heard at the hearing and the following requests for relief:

"*i) reject the appeal filed by the Appellant on September 15, 2004;*

ii) confirm the decision of WADA TUEC of August 23, 2004;

iii) allocate to the Respondent WADA, a contribution for its legal fees and other expenses incurred in connection with these proceedings".

26. In his answer the Athlete submits that "*it is entirely proper... for Mr Brockman to be granted a TUE in respect of the use of* [redacted] *and to do so would be entirely consistent with the provisions of WADC, the International Standards .... and within the spirit of sporting competition and the Olympic and Paralympic movement*".

27. Preliminarily, the Athlete notes that IPC failed to deal with the TUE application "*within a reasonable timescale*": the application was received on 15 April 2004; and the IPC Decision was communicated on 20 July 2004. In addition, the Athlete notes that the explanation submitted by IPC for the denial of the TUE, as specified in the correspondence exchanged following the adoption of the IPC Decision, is "*inconsistent*" with the grounds for the appeal being pursued by IPC before the CAS arbitration panel.

28. In this respect, the Athlete remarks that the basis of the appeal filed by IPC is not that the WADC TUE International Standards have not been met (because it is accepted that the criteria have been complied with). IPC's case is that the IPC TUE Committee was entitled to take into account additional factors, relating to the health of the athlete. Such case is challenged as follows:

    i. As to the submission that the WADA TUE Committee had no power to overturn the IPC Decision. The Athlete maintains that "*the WADA TUE Committee can reconsider the TUE Application in its entirety and make their own decision on whether or not a TUE should be denied or granted based upon the International Standards*". According to the Athlete "*it is implicit that ... WADA considered that IPC had not considered the International Standards, TUE because they had taken into consideration matters outside the criteria and which are irrelevant*".

    ii. As to the submission that health is required to be assessed by the WADC TUE International Standards. The Athlete states that a TUE has to be granted "*in strict accordance*" with the criteria set forth in the WADC TUE International Standards, and denies that any of such criteria implies an evaluation of the health of the athlete in the sense indicated by the Appellant.

    iii. As to submission concerning practical and ethical considerations. The Athlete remarks that ethical grounds are not part of the WADC TUE International Standards and that it is for the Athlete to decide, with advice from medical and other experts, whether it is in his best interest to use the substance in question and to continue to compete in his chosen sport.

29. Finally, the Athlete remarks that a TUE should be granted him even if the health factor was to be taken into account: contrary to the IPC's submission, the Athlete maintains that "*the effect of the position taken by IPC would in fact be to make ...* [his] *health worse because he would be prevented from competing*".

30. The submissions of the Appellant are challenged also by WADA. WADA, in this respect, notes that "*the parties ... are in agreement that all the requirements set out in the TUE Standards* [the WADC TUE International Standards] *for deliverance of a TUE were met by the Athlete ... . the only dispute lies in the question of whether it was right for the Appellant to look for criteria other than those stated*" in the WADC TUE International Standards, and specifically to look into "*the medical ability of an athlete to practise a sport*". On this point it is submitted that "*while WADA considers this question to be important, it is WADA's strong view that this question is not within the scope of a TUE review*".

31. In support of its position WADA states that "*the TUE procedure established within the framework of the fight against doping is not a full medical assessment of the Athlete's health, but rather an administration process whereby medical experts evaluate, based on existing medical records, whether it is justified for an athlete to use a prohibited substance or method when practising his/her sport*". It is the WADA's position that the criteria to be looked at by a TUE Committee are limited to those to be fulfilled by the athlete for him to be granted a TUE; the list of criteria indicated in the WADC TUE

International Standards is exhaustive, and if the athlete fulfils them, he must be granted a TUE. A different interpretation would defeat the harmonization of the rules, and the quality of treatment of the athletes sought after by the WADC.

32. At the same time, WADA submits that no criteria in the WADC TUE International Standards refer to an inquiry by the TUE Committee of whether the practice of sport, as such, impacts on the health of the athlete. That question is, in the WADA's opinion, important, but it is not to be considered at the stage of a TUE Committee. Assessing the medical ability of an athlete to practise a sport is, according to WADA, a much broader and complex question than simply assessing whether the conditions for a TUE are complied with. Such assessment of the medical ability requires a very thorough examination of the athlete, based on tests and reports which are not available from a TUE file.

2.3 The CAS Proceedings

33. By letter dated 26 November 2004, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that Prof. Luigi Fumagalli had been appointed as President of the Panel.

34. On 6 April 2004 the CAS Court Office sent a letter to WADA, and copy to the other parties, on behalf of the President of the Panel setting out some directions with regard to the hearing of Dr Cauderay, indicated by WADA in its answer (para. 25 above) as witness/expert to be heard at the hearing.

35. On 19 April 2005 a letter was sent to the CAS Court Office informing the Panel

"*... that the parties have reached agreement that BEF and/or Mr Brockman may be released from taking any further part in the current proceedings before CAS under the above case number on the following terms:*

1. *That in the event that IPC are successful in their appeal that Mr Brockman will then be entitled to pursue a further application for a TUE to IPC and that IPC will make no application for or seek payment of costs against Mr Brockman arising out of these proceedings.*

2. *That in the event that IPC are unsuccessful in their appeal that they will pay to BEF and/or Mr Brockman the sum of* [redacted] *in respect of Mr Brockman's legal costs.*

3. *That WADA or IPC will make no application or seek payment of any costs from BEF or Mr Brockman in the event that WADA are successful in this appeal.*

4. *That BEF and/or Mr Brockman will make no application or seek payment of any costs from WADA in this appeal.*

5. *That Mr Brockman agrees to be bound by the decision of CAS on the substantive issues raised in this matter.*

6. *In so far as the costs are not dealt with above, the parties agree that the costs of IPC and/or WADA should remain to be decided by CAS*".

36. On 21 April 2005 the CAS Court Office sent a letter to the parties on behalf of the Panel confirming

i. "*that the Panel has no objection to the agreement reached by the parties in this matter which was sent to the CAS on 19 April 2005, and in particular to the non-participation of Mr Brockman in the hearing*"; and

ii. "*the understanding of the Panel that Mr Brockman would remain a party (Respondent) in this procedure under the conditions set out in the parties' agreement*".

37. On 25 April 2005 the Appellant filed a second witness statement signed by Mr Andrew Parkinson in relation to assertions made by WADA in its answer, asking the Panel to introduce it as evidence.

38. On 27 April 2004 the CAS Court Office sent a letter to the parties on behalf of the President of the Panel with the following information regarding the hearing:

"a. *Dr Cauderay: the directions with respect to the hearing of Dr Cauderay set out in the CAS letter dated 6 April 2005 are confirmed; Dr Cauderay will be allowed to participate in the hearing and to give his opinion on general issues related to the TUE regime.*

b. *Witnesses: further to the IPC request, each party will be allowed to examine the witnesses it has called to appear at the hearing, even if the Panel has been already provided with witness statements.*

c. *Additional evidence: the filing by IPC of the Second Statement of Mr Andrew Parkinson is allowed pursuant to Art. R56 of the Code.*

d. *Hearing's schedule: the hearing will start at 09:00am instead of 09.30 on 4 May 2005. One hour will be dedicated to each witness (approx. 15mn for examination, 30mn for cross-examination and 15mn for re-examination and questions from the Panel)*".

39. On 29 April 2005 WADA filed with CAS a "Supplementary Answer" following the second witness statement signed by Mr Andrew Parkinson.

40. A hearing was held in Lausanne on 4 May 2005. Mr Parkinson, Mr Hedman and Mr Webborn were heard as witnesses for the Appellant. Dr Cauderay was heard as expert called by WADA. During the debates, the Panel acknowledged the existence of the agreement reached by the parties and communicated to the CAS Court Office on 19

April 2005. At the conclusion of the hearing, the parties, after making submissions in support of their respective requests for relief, confirmed that they had no objections in respect of their right to be heard and to be treated equally in the arbitration proceedings.

3. LEGAL ANALYSIS

3.1 Jurisdiction

41. CAS has jurisdiction to decide the present dispute between the Athlete and the IOC. The jurisdiction of CAS *in casu* is based on Article 13.3 of the WADC and on Article 14.3 of the IPC Anti-Doping Code.

3.2 Appellate Proceedings

42. As these proceedings involve an appeal against a decision issued, in a dispute relating to the granting of a TUE, by an international organisation (WADA) whose rules provide for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings in the meaning and for the purposes of the Code.

3.3 Admissibility

43. The Athlete's statement of appeal was filed within the deadline set down in Article 14.4 of the IPC Anti-Doping Code and in Article R49 of the Code. It complies with the requirements of Article R48 of the Code. Accordingly, the appeal is admissible.

3.4 Applicable Law

44. According to Article R58 of the Code, the Panel is required to 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".

45. The Panel notes that in this case IPC and WADA rules and regulations have to be applied, the former constituting an implementation by reference of the latter in the IPC system.

46. The IPC and WADA rules to be taken into account in this arbitration are the following:

A. As to the IPC rules

i. Article 6 ["*Therapeutic Use Exemptions*"] of the IPC Anti-Doping Code:

"The IPC, in agreement with the current WADC International Standard for Therapeutic Use Exemptions, permits Athletes and their physicians to apply to the IPC TUEC for Therapeutic Use Exemptions (ie. permission to Use, for therapeutic purposes, substances whose Use is otherwise prohibited according to the rules of sport).

The IPC TUEC is composed of at least three members (in particular physicians, clinical-analytical chemists, etc) with combined experience in the care and treatment of Athletes, a sound knowledge of clinical and exercise medicine and a comprehensive understanding of anti-doping related matters.

The IPC TUEC may seek other medical or scientific expertise deemed appropriate to review the circumstances of any TUE application.

6.1 Criteria for Granting a TUE

A TUE may be granted to an Athlete permitting the Use of a Prohibited Substance or Prohibited Methods as defined by the Prohibited List for the following reasons only:

6.1.1 The Athlete would experience a significant impairment to health if the Prohibited Substance or Prohibited Method were withdrawn from the course of treatment for an acute or chronic medical condition.

6.1.2 The therapeutic Use of the Prohibited Substance or Prohibited Method would produce no additional enhancement of performance other than that which might be anticipated by a return to a state of usual health following the treatment of a legitimate medical condition.

6.1.3 There is no reasonable therapeutic alternative to the Use of the otherwise Prohibited Substance or Prohibited Method.

6.1.4 The necessity for the Use of the otherwise Prohibited Substance or Prohibited Method cannot be a consequence, wholly or in part, of the prior non-therapeutic Use of substances from the Prohibited List.

6.1.5 An application for a TUE will not be considered for retroactive approval expect in cases where:

6.1.5.1 Emergency treatment of an acute medical condition was necessary.

6.1.5.2 There was insufficient time for an applicant to submit, or a TUEC to consider, an application prior to Doping Control.

6.2 TUE Application Process

6.2.1 Any Athlete seeking TUE must submit to the IPC an application in writing, using the appropriate form as available from the IPC. A TUE will only be considered following the receipt of a correctly completed application form.

6.2.1.1 International Level Athletes who are included in the IPC's Registered Testing Pool, should apply to the IPC for TUE at the same time the Athlete first provides whereabouts information to the IPC and, except in emergency situations, no later than the final date of entry for the relevant Competition. Applications beyond the deadline for submission may not be resolved in a timely manner.

6.2.1.2 Athletes participating in IPC Sanctioned Competitions who are not included in the IPC's Registered Testing Pool, except in emergency situations, should apply to the IPC for TUE no later than the final date of entry for the relevant Competition. Applications beyond the deadline for submission may not be resolved in a timely manner.

6.2.2 The TUEC shall promptly evaluate any TUE application and render a decision on such request, which shall be the final decision of the IPC. The decision of the TUEC will be conveyed in writing to the Athlete's NPC and reported to WADA.

6.2.3 Exemptions are only granted for the substance(s) and sport(s) as detailed in the application and will be granted for no more than two years.

6.2.4 Exemption does not preclude the Athlete from being tested. Any medication used in accordance with the therapeutic Use for which an exemption has been granted and detected during the analysis shall not be considered as a doping offence.

6.2.5 It is the responsibility of the Athlete to ensure that the TUE has been granted before using any Prohibited Method. Failure to do so may result in a doping violation following Doping Control.

6.3 TUE Appeals

WADA, at the request of an Athlete or on its own initiation, may review the granting or denial of any TUE to an International Level Athlete or a national level Athlete that is included in the IPC Registered Testing Pool. If WADA determines that the granting or denial of a TUE did not comply with the WADC International Standard for Therapeutic Use Exemptions in force at the time then WADA may reverse that decision. Decisions on TUEs are subject to further appeal as provided in Article 14.3.

6.3.1 If WADA does not take action to reverse the decision of the TUEC within 30 days of notification, the original decision remains in effect.

6.3.2 If the decision regarding the granting of a TUE is reversed on appeal, the reversal shall not apply retroactively and shall not disqualify the Athlete's Results during the period the TUE had been granted".

ii. Article 21 ["*Medical Care Given To Athletes*"] of the IPC Anti-Doping Code:

"*21.1 Health of the Participants must prevail above the sport performance or result.*

The Prohibited List contains a very small percentage of the currently available pharmacological substances and does not hinder the proper treatment of Athletes for justifiable therapeutic reasons.

The IPC encourages individual countries to establish their own list of permissible drugs and brand names, since the same brand may be used in different countries for medications with different composition. However, this does not give any country the authority to override WADA's determinations as to which Substances are Prohibited.

21.2 The only legitimate Use of drugs in sport is under supervision of a physician for a clinically justified purpose and when there is no conflict with the Code.

21.3 If substance on the Prohibited List is used for therapeutic purposes during a Competition, the Athletes must immediately seek for a possible exemption from the IPC TUEC or in the absence of such exemption, withdraw from Competition.

21.4 If an Athlete is deem by the IPC Medical Officer to be endangering their health or the health of others by continuing to compete, then, after consultation with the Athlete's NPC, the Athlete may be required to withdraw from Competition.

21.5 The only possibility for exemption for Use of a substance on the Prohibited List by an Athlete shall be the TUE process".

B. <u>As to the WADA rules</u>

iii. The "*Fundamental Rationale*" for the WADC:

"*Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as "the spirit of sport"; it is the essence of Olympism; it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is characterized by the following values:*

- *Ethics, fair play and honesty.*
- *Health.*
- *Excellence in performance.*
- *Character and education.*

- *Fun and joy.*
- *Teamwork.*
- *Dedication and commitment.*
- *Respect for rules and laws.*
- *Respect for self and other participants.*
- *Courage.*
- *Community and solidarity.*

Doping is fundamentally contrary to the spirit of sport".

iv. Article 4.2 ["*Prohibited Substances and Prohibited Methods Identified on the Prohibited List*"] of the WADC:

"*The Prohibited List shall identify those Prohibited Substances and Prohibited Methods which are prohibited as doping at all times (both In-Competition and Out-of-Competition) because of their potential to enhance performance in future Competitions or their masking potential and those substances and methods which are prohibited In-Competition only. Upon the recommendation of an International Federation, the Prohibited List may be expanded by WADA for that particular sport. Prohibited Substances and Prohibited Methods may be included in the Prohibited List by general category (e.g. anabolic agents) or by specific reference to a particular substance or method*".

v. Article 4.3 ["*Criteria for Including Substances and Methods on the Prohibited List*"] of the WADC:

"*WADA shall consider the following criteria in deciding whether to include a substance or method on the Prohibited List.*

4.3.1 A substance or method shall be considered for inclusion on the Prohibited List if WADA determines that the substance or method meets any two of the following three criteria:

4.3.1.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to enhance or enhances sport performance.

4.3.1.2 Medical or other specific evidence, pharmacological effect or experience that the Use of the substance or method represents an actual or potential health risk to the Athlete.

4.3.1.3 WADA's determination that the Use of the substance or method violates the spirit of sport described in the Introduction to the Code.

4.3.2 A substance or method shall also be included on the Prohibited List if WADA determines there is medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to mask the Use of the other Prohibited Substances and Prohibited Methods.

4.3.3 WADA's determination of the Prohibited Substances and Prohibited Methods that will be included on the Prohibited List shall be final and shall not be subject to challenge by an Athlete or other Person based on a argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport".

vi. Article 4.4 ["*Therapeutic Use*"] of the WADC:

"*WADA shall adopt an International Standard for the process of granting therapeutic use exemptions.*

Each International Federation shall ensure, for International-Level Athletes or any other Athlete who is entered in an International Event, that a process is in place whereby Athletes with documented medical conditions requiring the Use of a Prohibited Substance or a Prohibited Method may request a therapeutic use exemption. Each National Anti-Doping Organization shall ensure, for all Athletes within its jurisdiction that are not International-Level Athletes, that a process is in place whereby Athletes with documented medical conditions requiring the Use of a Prohibited Substance or a Prohibited Method may request a therapeutic use exemption. Such requests shall be evaluated in accordance with the International Standard on therapeutic use. International Federations and National Anti-Doping Organizations shall promptly report to WADA the granting of therapeutic use exemptions to any International-Level Athlete or national-level Athlete that is included in his or her National Anti-Doping Organization's Registered Testing Pool.

WADA, on its own initiative, may review the granting of a therapeutic use exemption to any International-Level Athlete or national-level Athlete that is included in his or her National Anti-Doping Organization's Registered Testing Pool. Further, upon the request of any such Athlete that has been denied a therapeutic use exemption, WADA may review such denial. If WADA determines that such granting or denial of a therapeutic use exemption did not comply with the International Standard for therapeutic use exemptions, WADA may reverse the decision".

vii. Article 4 ["*Criteria for Granting a Therapeutic Use Exemption*"] of the WADC TUE International Standards:

"*A Therapeutic Use Exemption (TUE) may be granted to an Athlete permitting the use of a Prohibited Substance or Prohibited Method contained in the Prohibited List. An application for a TUE will be reviewed by a Therapeutic Use Exemption Committee (TUEC). The TUEC will be appointed by an Anti-Doping Organization. An exemption will be granted only in strict accordance with the following criteria:*

4.1 The Athlete should submit an application for a TUE no less than 21 days before participating in an Event.

4.2 The Athlete would experience a significant impairment to health if the Prohibited Substance or Prohibited Method were to be withheld in the course of treating an acute or chronic medical condition.

4.3 The therapeutic use of the Prohibited Substance or Prohibited Method would produce no additional enhancement of performance other than that which might be anticipated by a return to a state of normal health following the treatment of a legitimate medical condition. The use of any Prohibited Substance or Prohibited Method to increase "low-normal" levels of any endogenous hormone is not considered an acceptable therapeutic intervention.

4.4 There is no reasonable therapeutic alternative to the use of the otherwise Prohibited Substance or Prohibited Method.

4.5 The necessity for the use of the otherwise Prohibited Substance or Prohibited Method cannot be a consequence, wholly or in part, of prior non-therapeutic use of any substance from the Prohibited List.

4.6 The TUE will be cancelled by the granting body, if

a. The Athlete does not promptly comply with any requirements or conditions imposed by the Anti-Doping Organization granting the exemption.

b. The term for which the TUE was granted has expired.

c. The Athlete is advised that the TUE has been withdrawn by the Anti-Doping Organization.

4.7 An application for a TUE will not be considered for retroactive approval except in cases where:

a. emergency treatment or treatment of an acute medical condition was necessary, or

b. due to exceptional circumstances, there was insufficient time or opportunity for an applicant to submit, or a TUEC to consider, an application prior to Doping Control".

3.5 Scope of Panel's Review

47. Pursuant to Article R57 of the Code,

"The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. [...]".

3.6 *The Merits of the Dispute*

(a) *As to evidentiary matters*

48. Preliminarily, the Panel notes that the Respondents submitted, in the course of the arbitration, together with their written pleadings, statements from a number of witnesses. By letter dated 18 March 2005 the CAS Court Office, writing on behalf of the Panel, indicated the names of the witnesses and experts that had been allowed to give oral evidence at the hearing; at the same time, the CAS Court Office stressed that the written statement submitted by a witness would be disregarded by the Panel in the event of failure by the witness to appear to the hearing.

49. The Athlete and the witnesses Mrs Carol Ann Brockman, Ms Helen Ruth Huggett and Mr Peter Norman Whitehead, called by the Athlete, as well as the witness Mrs Anita Sax, called by WADA, who had submitted written statements, failed to appear at the hearing. As a result, their respective statements shall not be considered by the Panel.

(b) *As to the grant / denial of a TUE*

50. The dispute submitted to the Panel concerns the grant or the denial of a TUE for the use by the Athlete of an otherwise prohibited substance, [redacted], falling in Section [redacted] of the list of the prohibited substances and methods (hereinafter referred to as the "Prohibited List") in force pursuant to the WADC and the IPC Anti-Doping Code at the time of the request (and nowadays). IPC denied the TUE, which was later granted by WADA upon appeal by the Athlete.

51. In respect to disputes relating to the grant or denial of a TUE the Panel confirms that the exercise of the jurisdiction conferred upon it by the pertinent arbitration clause and by the Code must be restrained in two directions:

i. role of the CAS Panel is not that of substituting itself for the TUE Committee of the relevant anti-doping organization (see TAS 2004/A/709, *B c./UCI & WADA*, award of 18 March 2005, at para. 50);

ii. the CAS proceedings – in the same way as the procedure for the issuance of a TUE – are not a system to dispute the inclusion of a prohibited substance in the Prohibited List (Article 4.3.3 of the WADC).

52. The mentioned limits are specifically relevant in the dispute referred to this Panel, which concerns the issuance of a TUE for the use of [redacted]. In this connection, in fact, the Panel notes, on one hand, that [redacted] are prohibited – on the basis of the criteria set forth in Article 4.3 of the WADC – because [redacted] and therefore enhance performance, and/or represent a health risk, and /or violate the spirit of sport; on the other hand, the Panel remarks that, in the absence of a specific rule, which is not given, the use of [redacted] can be authorized, on the basis of a TUE, in order to eliminate (or reduce) pain. It is however the Panel's opinion that the rules concerning the granting of a TUE cannot be applied so to nullify the inclusion of

[redacted] in the list of the prohibited substances: a line of interpretation has to be found in order to reconcile the possibility to obtain a TUE for the use of [redacted] with the inclusion of [redacted] in the Prohibited List (see para. 63 below).

53. The dispute between the parties – on the issuance of a TUE for the use of [redacted] – focuses on the possibility for the relevant anti-doping authority to take into account, in addition to the criteria set forth in Articles 4.1 to 4.5 of the WADC TUE International Standards, and in Article 6.1 of the IPC Anti-Doping Code (herewith referred to as the "Technical Criteria"), also an overall "health factor". IPC, on one hand, submits that a TUE can be denied even in the case the Technical Criteria are satisfied, when the health of the athlete would be seriously impaired by the use of the otherwise prohibited substance and/or by the practice of sport under the effect of the otherwise prohibited substance. The Respondents, on the other hand, while agreeing on the importance of the "health factor" for the practice of sport, claim that the list of the Technical Criteria is exhaustive, so that an athlete has the right to obtain a TUE if he fulfils them all.

54. The Technical Criteria (to be cumulatively satisfied) are set forth in Article 6.1 of the IPC Anti-Doping Code and in Article 4 of the WADC TUE International Standards, and are the following:

i. the athlete would experience a significant impairment to health if the prohibited substance were withheld in the course of treating an acute or chronic medical condition;

ii. the therapeutic use of a prohibited substance would produce no additional enhancement of performance other than that which might be anticipated by return to a state of usual health following the treatment of a legitimate medical condition;

iii. there is no reasonable therapeutic alternative to the use of the otherwise prohibited substance;

iv. the necessity for the use of the otherwise prohibited substance cannot be a consequence, wholly or in part, of prior non-therapeutic use of a prohibited substance.

55. In respect of the Technical Criteria, the Panel notes that the "health factor" is an important element thereof. The physical conditions of the athlete, the disease he is suffering, the effects on such disease of the otherwise prohibited substance, the medical justification of the prescription of the otherwise prohibited substance, the existence of a reasonable alternative therapy, the causes leading to the necessity of the use of the otherwise prohibited substance, are all elements pertaining to the "health factor", to be evaluated by the competent TUE Committee (which – exactly for this reason – has to include physicians with experience in the care and treatment of athletes and a sound knowledge of clinical, sports and exercise medicine).

56. A correct application of the Technical Criteria in the process of the decision on a TUE application implies, in the Panel's opinion, also an evaluation of the health of the athlete for the purposes invoked by IPC "outside" the Technical Criteria.

57. The Panel, in fact, remarks that the effects produced by the otherwise prohibited substance (and by the practice of sport under the effects of the substance) on the health of the athlete must be evaluated (at least) in the framework of the first and the third condition listed above (at para. 54 hereof), which express the "necessity" of the administration of the substance in question.

58. The requirement that the use of a prohibited substance is "necessary" is dictated by the very spirit of the TUE process. The grant of a TUE is an exception to the absolute prohibition of the use of a prohibited substance, which constitutes the founding principles of all anti-doping codes, and as such can be allowed only under strict conditions (confirmed by the wording of the relevant rules: "*A TUE may be granted... only ...*": Article 6.1 of the IPC Anti-Doping Code, "*A ... TUE ... may be granted ...only in strict accordance ...*": Article 4.0 of the WADC TUE International Standards; where the use of "*may*" indicates the permission to grant an exception to the prohibition), and is intended to permit an athlete to undergo the necessary treatment of a disease while competing (and without being forced to stop competing).

59. The first condition (Article 6.1.1 of the IPC Anti-Doping Code and Article 4.1 of the WADC TUE International Standards), in fact, implies a review of the effects of the administration of the otherwise prohibited substance in order to assess the consequences on the health of the athlete of its non-administration. A TUE can be granted only if the health of the athlete would be seriously impaired if treatment involving the use of the prohibited substance were discontinued in order to allow the athlete to compete without committing an anti-doping rule infringement. An assessment of the "beneficial" effects of the prohibited substance vis-à-vis a pathological condition is therefore required, in order to determine whether its use is necessary, because the athlete's health would otherwise be significantly impaired.

60. This condition, it is to be noted, implies the existence of a pathology ("*an acute or chronic medical condition*") in the athlete. An athlete that is healthy does not require the administration of any substance and a TUE cannot be granted because his health would not be impaired by the non-administration of the prohibited substance.

61. The necessity of the use of the otherwise prohibited substance is evaluated also in the framework of the third condition (Article 6.1.3 of the IPC Anti-Doping Code and Article 4.4 of the WADC TUE International Standards) for the issuance of a TUE. A TUE can in fact be issued only if there is no "*reasonable therapeutic alternative*" to the use of the prohibited substance. And for the purposes of such evaluation, the physical conditions of the athlete, the disease he is suffering from and the available therapies and their effects have to be assessed.

62. The Panel stresses that the "*reasonable therapeutic alternative*" to be evaluated against the use of the otherwise prohibited substance is not limited to the use of another substance not included in the Prohibited List, but also has to consider the general physical conditions of the athlete and the effects on his health of the administration of the otherwise prohibited substance. The Panel, in fact, submits that in specific circumstances (to be assessed by the relevant TUE Committee: see para. 51 above) the

"alternative therapy" could also consist in (or include) the suspension of the sporting activity: and chiefly so when the athlete, as a result of the administration of the prohibited substance or of the sporting exercise under the effect of the prohibited substance, would experience a significant impairment to health.

63. The above conclusion is relevant chiefly when the use of [redacted] is involved. The grant of a TUE to treat an acute medical condition consisting of [redacted] would put into question the inclusion of [redacted] in the Prohibited List. The TUE issuance procedure, on the contrary, should take into account the "*reasonable*" alternative therapies, focusing on the disease [redacted] or on the possibility to have the athlete rest while recovering. The same applies, indeed, when chronic medical conditions are involved: in such case, however, the alternative of substantially forcing the athlete to cease his sporting activity (see para. 68 below) as opposed to the granting of a TUE becomes possible only if a very high level of evidence, assessed on the basis of a direct examination of the athlete concerned, is given that the administration of the prohibited substance and/or the practice of sport under the effects of the substance would seriously impair the health of the athlete. Failing such evidence – if the pathological condition is chronic, the use of the prohibited substance finds no "*reasonable therapeutic alternative*" and the other Technical Criteria are met – the TUE has to be granted.

64. In the Panel's opinion, in fact, when the Technical Criteria are met, the athlete that has requested a TUE has the right to obtain it, and the competent anti-doping organization has the obligation (and not the simple possibility or discretion) to issue it. More specifically, the TUE in such situation cannot be denied on the basis of factors (relating to health) not included in the list of the Technical Criteria.

65. The Panel is led to this conclusion by the consideration that the health of the athlete is made relevant under several aspects and for various purposes specifically mentioned by the Technical Criteria. Would an overall consideration of the health of the athlete be possible as a general rule, outside and "on top" of the Technical Criteria, the conditions relating to health specified in the Technical Criteria would become meaningless. In addition, in the Panel's opinion, the construction of the list of the Technical Criteria as exhaustive adds to the smooth administration of the TUE issuance procedure, conforms to the expectancy of the athletes, favours the certainty and the rule of the law, secures the uniformity in the application of the rules.

66. In any case, the Panel notes that an examination of the overall "health factor" is under no circumstances precluded to the relevant sport authority, which has in any case the power, according to – and in the limits of – its own rules, to verify the health conditions of the athletes under its jurisdiction and to impose any medical standards for the performance of the sporting activity it administers.

67. In the Panel's opinion, however, the examination of the health of the athlete, under perspectives other than those indicated in the Technical Criteria, and the assessment of the satisfaction of the Technical Criteria (also to the extent they relate to the health of the athlete), correspond to two different issues and answer to two distinct questions. The first is directly linked to the physical ability of a subject to practice a sport; the

second is linked to doping control. The first can lead to the exclusion of the capacity of the athlete to take part in competitions and, more in general, to participate in sporting activities under the jurisdiction of the relevant federation; the second can lead only to the denial of an exemption from the prohibition to use a prohibited substance and does not imply the exclusion of the athlete from competitions. In this respect, therefore, the Panel confirms and endorses the statements of the award of 18 March 2005, TAS 2004/A/709, *B c./UCI & WADA*, at para. 51, where it was held that

"*la procédure de l'AUT ne porte pas sur l'aptitude du sportif à pratiquer sa discipline. La responsabilité de cette décision incombe à d'autres instances. Par conséquent, le fait qu'un sportif puisse être considéré inapte à pratiquer sa discipline en l'absence d'une substance interdite n'est pas un facteur que les CAUT ont à prendre en considération dans le cadre d'une demande d'AUT. Inversement, par contre, le corps médical compétent pour décider de l'aptitude d'un sportif doit tenir compte des effets possibles sur lui de l'utilisation d'une substance interdite lors de l'évaluation de son aptitude à exercer le sport en question*".

68. The above mentioned distinction does not exclude a possible coordination between the procedures in which the separate issues are examined. To the contrary a coordination appears to be necessary chiefly when a TUE application makes it clear to the sports organization that the athlete is no longer physically fit for competitions. This could happen, for instance, in situations of a chronic disease, where the practice of sport, under the effects of the substance used by the athlete to treat the disease (or even without the use of such substance), could seriously impair the health of the athlete. In such case, the denial of the TUE (see above, para. 63) could be followed by the exercise of the power to exclude the athlete from competitions because of health reasons.

(c) *Conclusion*

69. In the light of the foregoing, the Panel holds that the appeal has to be dismissed and the WADA Decision has to be confirmed. It is the Panel's opinion that a TUE had to be granted to the Athlete.

70. The Panel notes, in fact, according to the evidence available, that the Athlete – as also the Appellant seems to concede – was suffering from a chronic medical condition, that the otherwise prohibited substance was not specifically used for sport, but also in the course of the normal life of the Athlete, that the administration of the otherwise prohibited substance was medically justified and that there was reasonable therapeutic alternative. In this latter respect the Panel notes that no evidence, assessed on the basis of a direct examination of the Athlete, was given that the cessation of the practice of the sport by the Athlete was a reasonable alternative to the administration of the prohibited substance. As a result, the IPC, by denying the TUE, did not properly apply the Technical Criteria (as set forth by the WADC TUE International Standards and by the IPC Anti-Doping Code). WADA, therefore, was entitled to reverse the IPC Decision pursuant to Article 6.3 of the IPC Anti-Doping Code.

71. Such conclusion, it is to be noted, does not exclude the possibility for the IPC to make use of the powers granted upon the IPC Medical Officer pursuant to Article 21.4 of the IPC Medical Code in order to deal with the concerns (specified in these arbitration proceedings) that led to the denial of the TUE to the Athlete. The use of such powers, however, should fall into a specific procedure and does not need to interfere with the TUE application procedure.

4. COSTS

72. Pursuant to Article R65.1 of the Code, disciplinary cases of an international nature shall be free of charge, except for the Court Office fee to be paid by the appellant and retained by the CAS.

73. Having taken into account the specificity of the matter, the international nature of the dispute and its proximity with disciplinary disputes concerning doping, the Panel decides that no arbitration costs will be applied, with the exception of the Court Office fee paid by the Appellant, which shall be retained by the CAS.

74. Article R65.3 of the Code provides that the Panel shall decide which party shall bear the costs of the parties, witnesses, experts and interpreters, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

75. Having taken into account the specificity of the matter, the conduct and the financial resources of the parties, the Panel is of the view that the Appellant and WADA shall bear their own expenses incurred in connection with these arbitration proceedings. However, in the light of the outcome of the arbitration and taking into account also the agreement reached by the parties (para. 35 above), the Panel confirms that the Appellant shall pay to the Athlete a contribution, determined in the amount of [redacted] to the Athlete towards the expenses incurred by the Athlete in connection with these arbitration proceedings.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the International Paralympic Committee on 15 September 2004 is dismissed.

2. The decision adopted by the Therapeutic Use Exemption Committee of the World Anti-Doping Agency on 23 August 2004 is confirmed.

3. This award is rendered without costs, except for the Court Office fee of CHF 500 (five hundred Swiss Francs) paid by the International Paralympic Committee, which shall be retained by the Court of Arbitration for Sport.

4. The International Paralympic Committee shall pay to Mr Andrew Brockman the amount of [redacted] as a contribution towards the expenses incurred in connection with these arbitration proceedings. The International Paralympic Committee and the World Anti-Doping Agency shall bear their own expenses.

Lausanne, 8 June 2005

THE COURT OF ARBITRATION FOR SPORT

President of the Panel

Luigi Fumagalli