INTERNATIONAL TENNIS FEDERATION

INDEPENDENT ANTI-DOPING TRIBUNAL

DECISION IN THE CASE OF ALEX BOGOMOLOV JR

Tim Kerr QC, Chairman (sitting alone)

Introduction

1. This is the decision of the independent Anti-Doping Tribunal ("the Tribunal") appointed by the Anti-Doping Administrator of the International Tennis Federation ("the ITF") under Article K.1.1 of the ITF Tennis Anti-Doping Programme 2005 ("the Programme") to determine a charge brought against Mr Alex Bogomolov Jr ("the player") following a positive drug test result in respect of a urine sample no. 385312 provided by the player on 13 January 2005 at the Australian Open, in Melbourne.

2. The player was represented by Mr Howard Jacobs of Forgey & Hurrell LLP, attorneys in Los Angeles, California. The ITF was represented by Mr Jonathan Taylor of Hammonds, the ITF's solicitors in London. I am grateful to both for the high quality of their written and oral presentations.

3. The player did not dispute the presence in his body of a prohibited substance, salbutamol, in a concentration of about 129 ng/ml. However he asserted that use of the prohibited substance was not intended to enhance sport performance, within the meaning of M.3 of the Programme. Further, he asserted that he bore "No Fault or Negligence" for the offence, within the meaning of Article M.5.1 of the Programme. Accordingly the player sought an oral hearing, which took place in New York City on 2 September 2005.

4. By Article S.3 of the Programme, the proceedings before the Tribunal are governed by English law, subject to Article S.1, which requires the Tribunal to interpret the Programme in a manner that is consistent with applicable provisions of the World Anti-Doping Code ("the Code").

The Facts

5. The player was born on 23 April 1983 and is therefore now aged 22. He was born in Moscow and moved to Tampico, Mexico with his family at the age of nine. Two years later the family moved to Miami, Florida. In December 2004 he moved to Georgia, USA. His father was a Davis Cup coach in the former Soviet Union.

6. The player has played tennis since childhood. He has also suffered from episodes of bronchitis since childhood, but was not diagnosed as asthmatic. He turned professional and joined the ATP tour in about 2000. He is currently ranked about 180th in the world. The highest ranking he has achieved is 97th.

7. From about 2001 until December 2004 his coach was a Mr Francisco Montana. The player and Mr Montana were aware in general terms of anti-doping rules, but did not pay great attention to them. The player thought they were mainly concerned with prohibiting steroids and other performance enhancing drugs. He was aware, however, that players could be banned for inadvertent use of banned substances contained in medication or dietary supplements, as well as for deliberate use.

8. The player had been tested on about three to six occasions before January 2005. All those tests were negative. The last one before January 2005 was at the US Open in the summer of 2004.

9. On 29 April 2002 the player consulted Dr Rodolpho Cepero in Miami, complaining of shortness of breath while playing tennis. Dr Cepero has

practised internal medicine since 1992. He has been a tournament doctor at the Nasdaq tournament, at Key Biscayne, Florida, since about 1996 or 1997. In that capacity he was given pocket guides about banned substances and the need for medical exemptions in the case of some of them. He was aware of anti-doping rules in general and in particular that Beta-2 agonists such as salbutamol required a medical exemption.

10. On 25 August 2003 at the US Open, the player suffered shortness of breath and collapsed during a match and had to withdraw. He was taken off the court on a stretcher and given some treatment, but was soon able to walk and was discharged. The next day he consulted Dr Damion Martins, a doctor in New York, who carried out lung function tests and started him on albuterol, giving him an inhaler and recommending two puffs 30 minutes before exercise.

11. On 28 August 2003 Dr Brian Hainline, the Chief Medical Officer at the US Open, submitted an application on the player's behalf for a medical exemption (as it was then known) in respect of salmeterol and albutamol to International Doping Tests & Management ("IDTM") by fax to IDTM's office in Lindigö, Sweden. The application was approved by fax to Dr Hainline from IDTM on 1 September and was stated to be valid until 1 October 2003. A further application was requested in the event that a further exemption was required after 1 October 2003.

12. The fax ended with a request to "forward this information to the player" and it is probable that Dr Hainline did so. The player was aware in September 2003 that an exemption from the tennis authorities was needed in order for him to use his inhaler to treat his asthma. Since then he has used his inhaler shortly before playing matches about 50 per cent of the time, i.e. before about half the competitive matches he has played. He continued doing so until mid-June 2005, when he stopped using it.

13. On 5 September 2003 he went to see Dr Cepero in Miami. It is probable that he gave Dr Cepero information he had received from Dr Hainline about the temporary exemption that had been granted. There was some discussion between the two about the need for a medical exemption. Dr Cepero was aware that the then current exemption was time limited until the beginning of October, and I find that the player was aware of that too.

14. But neither Dr Cepero nor the player was aware that any further exemption would be time limited. Dr Cepero thought it would not be, because asthma is a chronic, normally lifelong condition, though he thought it should be subject to periodic medical review. He thought it would be pointless to resubmit forms periodically when the nature of asthma is such that the process would almost certainly be repetitive.

15. Dr Cepero invited the player to return in December 2003 after the end of the tennis season, in order that he could undergo further lung function tests, which Dr Cepero thought would be advisable. The player did not return to see Dr Cepero then, as he did not feel unwell. He telephoned Dr Cepero or his office periodically to consult him about other matters or to obtain repeat prescriptions, and occasionally mentioned to Dr Cepero that he was doing fine with the inhaler.

16. On 23 September 2003 Dr Cepero wrote a letter addressed "To Whom It May Concern", stating that the player's condition was "a chronic condition" and requesting that he be allowed to "continue using either an Albuterol or Salmeterol Inhaler indefinitely as needed for his condition". He enclosed a copy of Dr Hainline's earlier application, so he must have had a copy of it. The letter was faxed to IDTM by a secretary of Dr Cepero's practice. The player may or may not have read it or received a copy of it. He says he did not see the letter, but I do not think he would now recall if he had seen it.

17. On 26 September 2003, IDTM sent a fax back to Dr Cepero (initially to the wrong fax number but subsequently the same day to the correct fax number) saying the information received was "incomplete" and enclosing a new request form. More information about the brand, the generic name of the substance, the dosage and the route of administration was asked for, as well as "how long the medication will be used" and any other relevant information.

18. Dr Cepero says he cannot recall ever personally receiving that fax and does not believe he did. He cannot say it was not received by his office. The transmission slip from IDTM's records confirms that it was successfully sent. The player has not produced any fax journal from Dr Cepero's practice recording faxes received on the date in question (or any other date). I infer that Dr Cepero's office did receive the fax.

19. I am not persuaded that Dr Cepero himself never saw the fax. When asked by Mr Jacobs, he said (transcript page 100): "Well, I don't know .. well, I guess I never saw it, I'll put it that way." A later important fax dated 31 March 2004, to which I shall come shortly, was indeed not received by Dr Cepero or his office. I think it is quite likely, on the evidence I have, that Dr Cepero is mixing up in his mind his non-receipt of that later fax, with his supposed non-receipt of the fax of 26 September 2003. However, if he did not personally receive it, I find that his office did receive it.

20. The fax of 26 September 2003 went on to state that the case would be put "on hold" until the requested information was received by IDTM, and asked Dr Cepero to "update" the player, as "we have not received any contact details to [sic] the player …". In Dr Hainline's application the player's address had indeed been omitted, but I do not think it would have been difficult for IDTM to obtain the player's address through the ATP or the ITF.

21. Dr Cepero then forgot about the matter and did not hear from the player. I do not think that is necessarily inconsistent with his having received the fax of 23 September 2003. I do not think he necessarily would have thought it incumbent on him to act on the fax, if he received it. He knew that the player rarely contacted him, travelled a lot, was frequently away from Miami, had advice from his coach and could well be getting advice from the ATP and other medical personnel such as Dr Martins and Dr Hainline.

22. The temporary medical exemption granted up to 1 October accordingly expired on that date. The player had no medical exemption, or as it became known from 1 January 2004, therapeutic use exemption ("TUE") from 2 October 2003 to 30 March 2004, a period of almost six months. He used his inhaler during this period about 50 per cent of the time when playing competitive matches, but if he was tested during this period the result was negative.

23. On 24 October 2003, IDTM successfully sent a further fax to the correct fax number of Dr Cepero's office, enclosing a further copy of the fax of 26 September 2003, noting that no response had been received, stating that the case would be "closed" unless further information were sent. The successful sending of that second fax, enclosing a copy of the first, makes it less likely that Dr Cepero did not see at least one of the two copies of the fax received at his office.

24. Dr Cepero believes he did not receive the second fax either. Again, it is possible that his staff failed to draw it to his attention, but I rather doubt it. Whether they did or not, Dr Cepero did not follow up his initial fax addressed "To Whom It May Concern". He said he forgot and "I thought they were going to contact the Player as well, or me, to let me know what happened" (transcript page 101).

25. On 1 January 2004 the Code entered into force, with wide publicity throughout the sporting world. Medical exemptions were replaced by TUEs. The scope for retroactive exemptions was narrowed considerably to cases of medical emergency or treatment of an acute condition. Treatment of asthma would not fall into the latter category and only rarely into the former.

26. To educate players about the new Code, a mandatory meeting was arranged for 17 January 2004 for all players taking part in the Australian Open. Richard Ings of the ATP gave a presentation on anti-doping rules and stressed the need for players to be aware of them and of their personal responsibility for substances entering their system. The player attended but did not listen very carefully. He explained that many players would have had their minds on their forthcoming matches. He himself played against Roger Federer two days later. He thought he need not worry too much about doping issues since he does not take steroids.

27. At the meeting on 17 January 2004 the player recalls that he was given a wallet card, so called because it is made of cardboard and deliberately designed to be folded up and carried in a player's wallet. The wallet card contained a warning that players should keep the card with them at all times and should give a copy to their physician, coach and personal trainer. He looked at it but did not read it carefully.

28. It also warned that a player "must apply for a TUE before using any banned substance" and invited players to "check with the ITF, WTA Tour or ATP" if there were any questions. A "hotline" telephone and fax number was also given on the card. In small print there was also a summary of the applicable sanctions under the Programme, and a long list of substances and methods prohibited in and out of competition.

29. In March 2004 the player was taking part in the Nasdaq tournament at Key Biscayne, Florida. His evidence was that his coach, Mr Montana, told him that he must "go see Rudy", i.e. Dr Cepero, "to fill out a form that would enable you to use an inhaler". Dr Cepero was working as a doctor at the tournament. His evidence was that the player came to see him about an upper respiratory tract infection and that he, Dr Cepero, asked the player if he had a TUE for his asthma medication, and that the player said either that he did not have one or that did not remember whether he had one or not.

30. I accept Dr Cepero's evidence that he alerted the player to the need for a TUE. I do not think the player would have applied for a TUE in March 2004 at all if he had not happened to consult Dr Cepero about his upper respiratory tract infection. The player's evidence was very unclear as to whether he told Dr Cepero that his exemption had expired, or whether he told Dr Cepero that he did not have a TUE. In his oral testimony he appeared at times unaware of the difference between applying for a TUE and being granted one. In his redirect evidence he said that his recollection was not necessarily very accurate because the conversations were brief and fast.

31. What is reasonably clear is that either Dr Cepero or Mr Montana or the player obtained a TUE application form from Mr Per Bastholt, an ATP trainer at the Nasdaq tournament, and that the form was then filled in by hand, partly by the player, partly by Dr Cepero and, (probably) partly by Mr Bastholt. It is not clear in what order the different parts of the form were filled in, but I do not think that matters much. It was signed by Dr Cepero and by the player, who signed as "Bogie", and dated 28 March 2004.

32. The "anticipated duration" of the "medication plan" was described by Dr Cepero as "indefinite use". Under the heading "Athlete Information" the player's contact details were given, and against the words "Reply to be sent to" a fax number was given. After the words "Attnetion to:" there was written "P

Bastholt". Dr Cepero gave the form to Mr Bastholt for him to submit to IDTM. Dr Cepero did not know that IDTM's practice was to grant TUEs expiring on 31 December in the year the application is made.

33. On 30 March 2004 an acknowledgment was successfully sent by IDTM to the correct fax number of Dr Cepero, and to Mr Bastholt at the fax number indicated on the application form. Again, Dr Cepero does not recall having received this but cannot dispute that his office apparently did. We have not heard any evidence from Mr Bastholt. The fax ended by inviting Dr Cepero and Mr Bastholt to contact the "Tennis Hotline" or by email if they had any questions.

34. The next day, 31 March 2004, IDTM sent a fax enclosing a TUE in respect of player's asthma medication, stated to be valid until 31 December 2004. The covering fax invited Mr Bastholt and Dr Cepero to give the player a copy. The fax was successfully sent to Mr Bastholt and, I infer in the absence of any evidence to the contrary, received by him. The fax addressed to Dr Cepero was sent to the correct fax number, but IDTM's fax log shows that three attempts to transmit the fax were all unsuccessful.

35. The player's evidence is that he was told by his coach that the application had been granted. It is therefore likely that Mr Bastholt told the player's coach this. I accept the player's evidence that he did not know, and was not told by his coach or Mr Bastholt or anyone else, that his exemption was limited in time. The player was not concerned to enquire about the details of his exemption. He was content with being told that he had an exemption. He would probably not have taken any step to obtain one at all had he not been alerted to the point by Dr Cepero when he consulted Dr Cepero about his upper respiratory tract infection.

36. During the rest of 2004 the player was busy playing in numerous tournaments in various countries, including the US Open, where he was tested with negative result. At the end of 2004 and the beginning of 2005 he was preparing to compete in the qualifying rounds of the Australian Open, due to start in Melbourne on 13 January 2005.

37. Unbeknown to him, his TUE expired on 31 December 2004. He took a conscious decision not to take his inhaler to Australia. This was not because of anything to do with his TUE expiring. He did not know that it had. It was because he did not wish to be psychologically dependent on his medication and was determined to play without it.

38. On 10 January 2005 the player signed an entry form to enter the Australian Open. He signed his name beneath the usual declaration that he agreed to abide by the relevant anti-doping rules and submit to drug testing.

39. On 13 January 2005 the player played a three set qualifier against Daniel Gimeno-Traver of Spain. During the second set the player had difficulty breathing and decided to seek time out on medical grounds in the middle of a game, after a particularly long and difficult point. He was asked by a tournament doctor, Dr Tim Wood, whether he had an exemption on file for an asthma inhaler. The player said he did.

40. Dr Wood listened to the player's chest which was clear, and thought he may have had an asthma attack. He gave the player an inhaler and suggested he take two puffs of Ventolin. The player then felt well enough to continue playing. He finished the match, narrowly losing in the third set after winning the second in a tie-breaker.

41. The same evening, the player was selected for doping control and gave a urine sample. On the doping control form he declared that he had recently used "Ventolen".

42. In the months following, the player had his busiest ever playing schedule as a professional, competing in 65 competitive matches over a seven month period to the end of July 2005, an average of over nine competitive matches each month. It did not occur to him that he might have a problem arising from the test carried out in Melbourne. Until about 15 June 2005 he continued to use his inhaler before about half the matches he played. He had no TUE during this period.

43. In April 2005 he took a compulsory tennis education course, using a CD Rom supplied by the ATP. Anti-doping issues were covered as part of the course, but the player does not recall whether the TUE process was covered. If it was, it did not alert the player to the need to check the position regarding his own TUE, or lack of it.

44. The player's A sample was analysed at the WADA accredited laboratory in Montreal and found to contain salbutamol in a concentration of about 129 ng/ml. The certificate of analysis was faxed to IDTM on 3 February 2005. Mr Staffan Sahlström of IDTM, the ITF Anti-Doping Programme Administrator ("APA"), convened a Review Board in accordance with Article J.2 of the Programme.

45. By 5 April 2005 all three Review Board members had reached the conclusion that there was a case to answer. However the Review Board members harboured doubts about whether the player should be charged with a doping offence. A discussion took place about whether the player could perhaps obtain a retroactive TUE in respect of his use of salbutamol on 13 January 2005. After

some time the conclusion was reluctantly reached that this was impossible on the facts and under the rules contained in the Programme.

46. Consequently it was not until (on or about) 2 June 2005 that a letter was sent by mail to the player's home address in Miami informing him of the adverse test result and that the B sample would be analysed in Montreal on 9 June unless the player admitted the doping offence. The player did not receive the letter. He had been playing in a tournament in the Czech Republic which started on 30 May 2005. The letter was forwarded to his sister's house in New York.

47. On 9 May 2005 the player's B sample was analysed, without his knowledge, in Montreal and found to contain salbutamol in a concentration of about 134 ng/ml.

48. From 13 June 2005 the qualifying rounds of the Wimbledon tournament were taking place. The player was taking part in them. On or about 15 June while at Wimbledon an ATP supervisor showed him a fax copy of the letter that had been sent to his home in Miami. The player still did not realise there might be a problem with his exemption for use of his inhaler. He thought a mistake had been made. The supervisor explained to him that he would have to hire a lawyer and that there would be a legal process.

49. The player then stopped using his inhaler, made enquiries of Dr Cepero and Mr Montana, his ex-coach, obtained legal representation and continued competing. In about July 2005 Dr Cepero started making arrangements to apply for a fresh TUE in respect of the player's use of his inhaler. The actual application was signed by Dr Cepero 16 August 2005 and by the player on 18 August 2005.

50. It was granted by IDTM on 20 August 2005 and covers the period until 31 December 2005. However the player did not use his inhaler up to the date of the hearing before me, 2 September 2005. He played in the 2005 US Open

without using it and has not used it since the middle of June when he learned that he had tested positive.

The Proceedings

51. The player was charged with a doping offence by letter dated 29 June 2005. He sent two faxes on 7 and 14 July 2005 indicating that he wished to defend himself against the charge and requesting a hearing. In the second fax he relied on his history of being granted TUEs and stated that he did not use the substance in question to gain a competitive advantage.

52. In accordance with Article K.1.7 of the Programme, a telephone directions hearing took place on 22 July 2005, attended by myself and the representatives of the parties. The ITF was represented by Mr Taylor. Mr Jacobs represented the player and confirmed that he was content to have the matter dealt with by myself as Chairman of the Tribunal sitting alone. A timetable was set for the submission of written briefs in accordance with Article K.1.7 of the Programme, and the oral hearing fixed to take place in New York City on 2 September 2005.

53. The ITF submitted its written brief on 2 August 2005, arguing that a doping offence under Article C.1 had incontestably been committed, that the player's TUE had expired at the time of the positive test, and that the issues in the case were those concerned with the question of sanctions arising under Articles L and M of the Programme. On the question of sanctions, it reserved its position pending the player's response. It produced a written statement from Mr Sahlström dated 2 August 2005 setting out the history of the player's TUE applications.

54. The player submitted his answering brief on 16 August 2005, confirming that he did not dispute the presence of the prohibited substance in his body, accepting that his TUE had expired 13 days prior to the test, submitting that the

doping offence was technical and caused by others besides the player, and asserting that the appropriate sanction pursuant to Articles M.3, M.5.1 and M.7 of the Programme was a warning and reprimand, no period of ineligibility and no disqualification of results or forfeiture of prize money and ranking points, except in respect of the Australian Open itself.

55. The ITF submitted its written reply brief on 26 August 2005. In it the ITF asserted that the player was at fault; that the approach to disqualification of subsequent results and forfeiture should be that disqualification is the norm and not the exception, in order to give players an incentive not to compete while the hearing of a charge is pending; and that the player's approach to obtaining a TUE even since the bringing of the charge had been "cavalier" (the ITF not then being aware of the player's assertion that he stopped using his inhaler as soon as he became aware of the positive test result). The ITF made no positive case that the player had sought or derived any sporting advantage by use of the inhaler on 13 January 2005.

56. The Tribunal heard the matter on 2 September 2005 in New York City, from about 10am to about 5pm. Evidence was heard from Dr Cepero by telephone and from the player, who attended the hearing.

The Tribunal's Conclusions, With Reasons

57. The player has admitted the commission of a doping offence under Article C.1 of the Programme. Accordingly pursuant to Article K.1.3 of the Programme, I am required to confirm the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 29 June 2005. I therefore do so confirm.

58. Irrespective of questions of fault or negligence under Article M.5 of the Programme, and irrespective of the player's intention or otherwise to enhance performance for the purpose of determining the applicability of Article M.3 of

the Programme, the Tribunal is obliged to apply the mandatory sanctions provided sanctions provided for in Article L.1 of the Programme.

59. It follows that pursuant to Article L.1, the player's individual result must be disqualified in respect of the Australian Open, and in consequence any ranking points and the prize money obtained by the player by taking part in that event, must be forfeited. By his participation in the Australian Open, the player gained US$ 2,143. That prize money and any ranking points derived from the Australian Open must be forfeited.

60. It follows, further, that pursuant to Article M.7 of the Programme, unless the Tribunal considers that fairness requires otherwise, the player's individual result must be disqualified in respect of his participation in competitions subsequent to the Australian Open. I will return to this aspect shortly.

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

62. In order to establish "No Fault or Negligence" for the purpose of eliminating the otherwise applicable period of ineligibility, the player must establish (according to the definitions in Appendix One to the Programme) that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered with the prohibited substance.

63. In my judgment, this definition means that Article M.5.1 cannot be relied upon by the player in the present case. The player does not here assert that he inhaled salbutamol without knowing that he had done so. The player does not dispute that salbutamol is a prohibited substance and that he knew he could be inhaling a prohibited substance on 13 January 2005. He says he was unaware that the prohibition applied to him, because he thought he was exempted from the prohibition. That assertion does not, even if correct, meet the definition of "No Fault or Negligence" in Appendix One to the Programme.

64. If that interpretation were incorrect, I would not in any event accept that the player could establish "No Fault or Negligence" on the facts here, for the reasons given below when considering the issues arising under Article M.3. The test under Article M.5.1 is very strict and the fault of the player must normally include, for this purpose, fault on the part of his entourage and medical personnel consulted by him, as established in other cases including *Koubek* (ITF Anti-Doping Tribunal decision of 18.1.5 (see at para 75), upheld by the CAS sole arbitrator, CAS/A/828 (see at paras 53-61)).

65. I turn to consider whether the player can establish the conditions for applicability of Article M.3 of the Programme. This provides that in the case of a "Specified Substance", identified as such in the list of prohibited substances, where a player can establish - again on the balance of probabilities, see Article K.3.2 - that the use of the substance "was not intended to enhance sport performance", the period of ineligibility for a first offence shall be, instead of a mandatory period of two years, at a minimum a warning and reprimand and no period of ineligibility, and at a maximum one year.

66. The ITF accepts that salbutamol (being a Beta-2 agonist), when inhaled, is a Specified Substance under Appendix Two to the Programme, in respect of which the defence against a two year mandatory ban may be available under Article M.3, depending on the facts. The issue is therefore whether the player

can establish on the balance of probabilities that his use of the inhaler on 13 January 2005 was not intended to enhance his sport performance.

67. The ITF has not suggested that salbutamol is by its nature apt to enhance performance, as distinct from alleviating a defect in performance caused by a medical condition. The ITF makes no positive case that the player intended to enhance his sport performance. There is no reason to doubt the truth of his assertion that he did not intend to do so.

68. I therefore conclude that the player has succeeded in establishing on the balance of probabilities that his use of salbutamol leading to the positive test result was "not intended to enhance sport performance". As this is the player's first offence, the Tribunal therefore has discretion under Article M.3 to impose, at a minimum, a warning and reprimand and no period of ineligibility, and at a maximum, one year's ineligibility.

69. As in the *Koubek* case (see para 95 of the Anti-Doping Tribunal's decision) the Tribunal's task is to consider the question of sanctions in the round, so as to arrive at a result that meets the justice of the case overall. In that connection, I note that the prize money lost by Mr Koubek through automatic disqualification was much greater than that which the player here must necessarily lose.

70. The most important consideration is the degree of the player's personal fault. For this purpose, fault on the part of his advisers is not attributed to the player; but it is the player's responsibility personally to check and enquire into the actions and omissions of his advisers and entourage. I accept Mr Taylor's submission that he is likely to be personally at fault if he fails to do so, especially since Article 21 of the Code places a personal responsibility on athletes to ensure that any medical treatment received does not violate anti-doping policies and applicable rules.

71. The ITF submits that the player was at fault by failing to take an interest in the validity or otherwise of any medical exemption or TUE, and failing to ascertain that it had expired by 13 January 2005. The ITF submits that, as in *Koubek*, the player was at fault by failing to heed the advice and warnings on the wallet card given to him in January 2004. He was not entitled to rely on Mr Montana, Mr Bastholt and Dr Cepero to obtain a valid TUE in March 2004. He should have checked its validity and expiry date and ensured that it was renewed in good time.

72. Mr Taylor submitted that it would be wrong to regard the offence as technical, because the player used a prohibited substance at the Australian Open without having "made the required showing that such use remained therapeutically necessary" (reply brief paragraph 2.9). That conclusion is not altered, he argued, merely because it is very likely that the application for renewal would have been granted if it had been made.

73. Although asthma is a chronic condition, submitted Mr Taylor, its effect is not always uniform or permanent. It is not reasonable to expect a TUE of indefinite duration to be granted when Dr Cepero himself accepted the need for periodic medical review of the player's condition. The relevant provisions in the Code and the Programme consequently do not specifically provide for TUEs of indefinite duration, even under the abbreviated procedure apt for use in the case of common ailments such as asthma.

74. The player submitted through Mr Jacobs that the offence was purely technical and that he was not at fault or not significantly at fault. Mr Jacobs submitted that the range of possible periods of suspension was from nil to three months, having regard to the precedents in the cases of *Koubek* (cit. sup.); *Coutelot* (ATP Anti-Doping Tribunal decision dated 10 August 2004), *Dedig* (International Rugby Board Judicial Committee decision dated 8 December 2004); *Hewitt* (International Rugby Board Judicial Committee decision dated

22 December 2004); and *Mette Jacobsen* (Final Doping Panel 2/04, award dated 20 July 2004).

75. Mr Jacobs pointed out that in the first four of those five cases – including *Dedig* where the rugby player suffered no suspension at all (except a very short provisional suspension for a matter of days pending the hearing under the relevant rules) no TUE had ever been applied for at all, unlike in the present case; and that in *Mette Jacobsen* the swimmer's TUE did not cover all the prohibited substances found in her sample, yet she received only a warning and reprimand.

76. In the present case, Mr Jacobs emphasised, the player had cooperated and filled in the necessary paperwork in March 2004 and September 2003 in order to prevent any doping offence, and had merely inadvertently overlooked the expiry date in December 2004, being like Dr Cepero unaware that there was any expiry date.

77. Mr Jacobs emphasised that there would have been no doping offence had the test been administered two weeks earlier than it was. He pointed out that every exemption applied for by the player has been granted. So, inevitably, would an application for renewal, if one had been made. He submitted that on ordinary principles of causation, this meant that the omission to apply for renewal was not causative of any mischief, and the same consideration had weighed with the FINA Anti-Doping Panel in deciding not to impose any suspension in *Mette Jacobsen*.

78. Mr Jacobs submitted that, as in *Koubek*, others besides the player were partly to blame for the failure to apply for renewal of the player's TUE and their omissions had contributed to the doping offence being committed. Those others were Dr Cepero, Mr Montana and Mr Bastholt. He also said that Dr Wood had contributed to it by giving the player an inhaler on 13 January 2005,

though in oral argument accepted that it is difficult to argue that Dr Wood could reasonably be expected to do more than enquire of the player whether he had a TUE in place and rely on the player's assurance that he had.

79. Mr Jacobs went on to submit that the ITF and IDTM were also to blame for the commission of the doping offence, and pointed to recognition in the CAS jurisprudence (*Quigley v. UIT, CAS 92/129*) that rule makers and rule appliers must be strict with themselves, just as the rules to which they subject their athletes need to be strict.

80. Specifically, Mr Jacobs submitted that the ITF and IDTM violated Article E.4 of the Programme, which required notification to the player personally as well as to his physician. Mr Jacobs submitted that IDTM's fax to Mr Bastholt did not constitute compliance with Article E.4 because Mr Bastholt is not the player and there is no provision for notification to a nominated agent instead of the player.

81. Mr Jacobs pointed to Mr Sahlström's admission in his witness statement (paragraph 8) that IDTM "is responsible for notifying the Player and his physician of the decision" in relation to a TUE application. He pointed to parallel rules in the WADA International Standard. At paragraph 8.4 b. there is provision for notification to the player personally, and separate provision for notification, as appropriate, to his or her national or international federation and the relevant national anti-doping agency. At paragraph 8.6 there is similar provision for separate and personal notification to the player in the event that a TUE is "cancelled".

82. Mr Jacobs said that in view of those rules it was not good enough for IDTM in 2003 and 2004 to rely on Dr Cepero to keep the player informed and give him copies of documents. Nor was it good enough to rely on communication to Mr Bastholt as fulfilling the obligation to communicate with the player. Moreover,

IDTM had in one instance failed to achieve fax communication with Dr Cepero, and had it not so failed, he submitted, the doping offence would not have been committed because Dr Cepero would have been aware of the TUE's expiry date of 31 December 2004.

83. In answer to Mr Taylor's arguments on the topic of notification (summarised below), he pointed out that any lack of clarity in the relevant rules ought to be construed *contra proferentem*, i.e. against the drafter, in this case WADA and, by adoption, the ITF.

84. On the topic of notification, Mr Taylor accepted that he could not show that IDTM had succeeded in faxing the TUE dated 31 March 2004 to Dr Cepero. But he contended that the fax had successfully been sent to Mr Bastholt and that this constituted compliance with the obligation under Article E.4 of the Programme, since the player himself had signed the form which included the request for communication to him to go to the given fax number, for the attention of Mr Bastholt.

85. There is nothing unusual, he submitted, in a player nominating a person to receive a document on his behalf or to designate a particular means of communication, e.g. by giving a particular fax number or email address. It cannot be the responsibility of the ITF and IDTM to ensure that the player does what is necessary to become personally aware of the contents of communications properly sent, particularly since players frequently travel.

86. Furthermore, although Mr Taylor accepted that Article E.4 is not on its face confined to TUEs applied for by the abbreviated process, apt for use in the case of medication for asthma, he submitted that the parallel rule in the Code, paragraph 8.4 b. of the International Standard, is confined to the abbreviated process and arises only on receipt of a "complete notification", i.e. an application which complies with all information requirements. Dr Cepero's

letter of 23 September 2003 (which, I note, was governed by earlier rules) was not complete.

87. Mr Taylor also submitted that the player's reliance on paragraph 8.6 of the International Standard in the Code was misplaced, since it applies where a TUE is cancelled in mid-term and not where a TUE merely expires. He submitted that cancellation and expiry are two different things and that the latter does not trigger any notification obligation. It was noted that paragraph 4.6 b. of the International Standard provides that a TUE will be "cancelled" if "The term for which [it] was granted has expired."

88. I have carefully considered the parties' rival contentions. I accept that for the reasons given by the player, Mr Montana, Mr Bastholt – from whom I have no explanation despite the player citing him as a potential witness in his written brief - and Dr Cepero, all by their omissions contributed to the player's ignorance of the expiry date of his TUE dated 31 March 2004 and of the fact that it had an expiry date at all.

89. I do not know why Mr Bastholt or Mr Montana, if they knew the situation in March 2004, did not communicate it to the player. In the case of Dr Cepero, I bear in mind that he was a doctor treating a player and as such bound from 1 January 2004 by Article B.3 of the Programme to comply with its provisions, and before 1 January 2004 doubtless by a similarly worded provision in the ATP's rules. He should have enquired into the position having received no substantive response from IDTM in March 2004.

90. As for IDTM: I start from the proposition that IDTM should communicate with the player direct, and not leave it to his doctor to update the player, pass on information and copy documents. Doctors are notoriously busy people and players travel a lot and frequently do not see their doctors for long periods. IDTM should communicate direct with the player whether or not the rules in

play before and after 1 January 2004 (when the Code entered into force) strictly so required or not. I accept Mr Jacobs' submission that Article E.4 of the Programme requires communication to the player directly.

91. Furthermore, I do not think the application form in use at the time of the March 2004 TUE application is fully congruent with Article E.4 of the Programme. There is nothing in the Programme to indicate in what circumstances communications are deemed to have been sent and received. Such provisions are common in commercial contracts, precisely in order to avoid the sort of communication failures and subsequent arguments that have arisen here.

92. Equally, the Programme is silent on the question whether communication to a player is validly effected by communicating with his or her nominated agent. In my view, the application form should, at least, have included a prominent statement to the effect that if the player nominates another person to receive communications on his behalf, it is the player's responsibility to ensure that he or she retrieves the communication from that person and becomes aware of its contents. That did not happen here.

93. In the light of the above, I consider that IDTM was to a degree at fault for asking Dr Cepero to communicate with and copy documents to the player; to a lesser extent for assuming that Mr Bastholt would do so; and most notably for failing to ensure that the fax of 31 March 2004 addressed to Dr Cepero actually reached his office.

94. That said, I am not convinced that non-receipt of the fax of 31 March 2004 by Dr Cepero's office was causative of the doping offence. To put the point the other way round, I am not convinced that if Dr Cepero's office had received that fax, the doping offence would have been prevented. Apparent receipt of the same fax by Mr Bastholt did not prevent it. Nor, on the evidence, does receipt by Dr Cepero's office of communications guarantee that he will

necessarily become aware of such communications, nor, if he does, that he will act on them.

95. If Dr Cepero had become aware of the contents of the fax of 31 October 2004, he would most likely not have taken the matter up with the player unless the player had happened to consult him on some specific medical matter such as a respiratory tract infection, and not just on a routine prescription renewal by telephone. I think that Dr Cepero would otherwise have assumed, as he did in 2003, that the player or his coach and other advisers would take care of the matter.

96. I reject any suggestion that Dr Tim Wood, the doctor at the Australian Open who gave the player an inhaler on 13 January 2005, was to blame in any way. It is unrealistic to expect a tournament doctor to require proof of the existence of a valid TUE at the tennis court. The rules do not so require. A doctor in Dr Wood's position who withheld treatment after receiving an assurance from a player such as that given in this case, could be criticised, or even sued.

97. I turn to the central question in the case: the degree of fault on the part of the player. His evidence was rather unclear though not deliberately misleading. He was inclined to downplay the extent of his knowledge and appeared to regard it as acceptable to expect his advisers to deal with his TUE, and to justify himself by shifting responsibility to them for what went wrong.

98. That is not consistent with the spirit or the letter of the Code or the Programme. It is precisely what Mr Ings' presentation and the issuing of the wallet card were intended to prevent. I find the player was at fault for not personally ensuring, by whatever steps were necessary, that his TUE was valid in January 2005.

99. I bear in mind all the points eloquently made on his behalf by Mr Jacobs, particularly that he had applied for TUEs in the past and never had a TUE application rejected, that his condition is chronic and that an application for renewal would surely have been granted. Non sequitur that the offence was purely technical: the player had not provided the necessary medical evidence to demonstrate the continuing need for therapeutic use of medication containing salbutamol.

100. I bear in mind also that the player cooperated helpfully with the Tribunal process, that he did not ask for analysis of the B sample and cannot be blamed for the fact that the B sample was unnecessarily analysed, first because he did not know it had been, and secondly because the rules do not allow B sample analysis to be dispensed with where the doping offence is denied on the basis of a TUE, even though such a defence raises no issue as to the content of the sample.

101. With those considerations in mind, I now turn to consider appropriate sanctions under Articles M.7 and M.3. I approach the matter on the basis that the sanctions imposed under each head should be such that together they meet the justice of the case overall.

102. I will consider first the question of disqualification of results and forfeiture or ranking points and prize money for competitions subsequent to the Australian Open. I am required by Article M.7 to impose such disqualification unless I determine that "fairness requires otherwise".

103. Mr Taylor submitted that the approach of the ATP Tour Anti-Doping Tribunal in *Oliver* (Anti-Doping Tribunal decision dated February 2004) is too generous to players, and that the Tribunal should be rigorous in ensuring that disqualification of subsequent competition results is the norm and does not become the exception. In *Oliver* the rules in play were differently worded and

the discretion was at large. The Tribunal's approach (see para 64) was that it was not prepared to disturb the results of competitions subsequent to that in which the positive test result occurred, "in recognition that the case is not one of performance enhancement or use of a masking agent".

104. In *Coutelot* (ATP Anti-Doping Tribunal decision dated 10 August 2004), at paras 17-18, the Tribunal applying the same rules as those at issue here adopted a similar approach, but at the invitation of the ATP which specifically asked for a two month suspension with no forfeiture of points or prize money except for the competition at which the player was tested. In *Koubek* (not appealed to the CAS on this point) the Tribunal pointed out at paragraphs 113-114 that disqualification "***may*** be inappropriate" (emphasis supplied) where the doping offence has created no unfairness to other players, and indeed may in such a case undesirably confer a windfall advantage on other players.

105. Mr Taylor noted that in *Cañas* (ATP Anti-Doping Tribunal decision dated 7 August 2005), a Tribunal presided over by Professor Richard McLaren, the same chairman as in *Oliver*, had adopted a harsher approach than in *Oliver*. At paragraph 75ff in *Cañas* the Tribunal, applying the current rules, simply imposed disqualification of subsequent results with the exception of one tournament at which the player had tested negative. The result was forfeiture of nearly US $266,000 and loss of 560 entry points.

106. *Cañas* was a case where the player's testimony was found to be untruthful. The Tribunal distinguished *Oliver* on the basis that in that case the player's use of the banned substance as a masking agent to mask other drugs was eliminated on the evidence, while in *Cañas* it was not. It is implicit in the reasoning that the Tribunal was not satisfied that the player had derived no unlawful sporting advantage in the subsequent competitions at issue, with the exception of the one at which he had tested negative.

107. Mr Taylor pointed out that the point is of importance because of the decision that players who have tested positive must make as to whether they should voluntarily forego competition after being notified of the positive test result, up to the date of the Tribunal's decision. He pointed out that the rules were intended to create an incentive to abstain voluntarily, and that the approach in *Oliver* - and, it follows by implication, in *Koubek* - was likely to undermine that incentive.

108. Mr Jacobs, for his part, submitted that any disqualification of subsequent results in this case would be disproportionate and inequitable having regard to the nil or minimal degree of fault on the player's part. Such disqualification would be especially harsh in the event that I were to impose a period of ineligibility, contrary to his invitation to me not to do so. He pointed out that the facts in *Cañas* were very far removed from those in *Oliver*.

109. I do not think the distinguished Tribunals in *Oliver*, *Coutelot* and *Cañas*, or the Tribunal in *Koubek*, were intending to lay down any general principle. The question is one of fairness on the facts of each case, but the starting point is indeed, as Mr Taylor points out, that disqualification is the norm and not the exception. Otherwise the rule would have been drafted the other way round, so as to make non-disqualification the norm unless the Tribunal considers that fairness requires disqualification.

110. But when considering the question of fairness on the facts, one of the factors to which regard must be had along with other relevant factors, is whether the player derived any sporting advantage, intended or unintended, in the subsequent competitions. Another is that the Tribunal's decision as to the length of any period of ineligibility may be informed by its decision in relation to subsequent disqualification - or vice versa if the Tribunal considers the issues in the reverse order.

111. I note that in *Koubek* the player did not know (albeit that he should have done more to check the position), at the time of his test that the substance he had used would be likely to cause a positive test result. In the present case, by contrast, the player must have known that his use of the inhaler provided by Dr Woods created at least a real possibility that his test result would be positive.

112. As in *Koubek*, he derived no intended or unintended sporting advantage in subsequent competitions. But he did continue using his inhaler knowing that he had been tested and in circumstances where he must have known that the result might well be positive. That means he should have realised that unless his TUE was in order, there was a real risk that he would commit further doping offences by continuing to use his inhaler. He had even more reason to check his TUE position after being tested than before. Yet still he did not do so.

113. I am conscious that the player underwent no tests between 13 January and 15 June 2005 and that he has not been charged with, still less convicted of, any doping offence in respect of his use of his inhaler during that period. I make no finding that he committed any doping offence during that period. But I do find that he failed to protect against the risk that he might inadvertently commit a doping offence, created by the fact that he was continuing to inhale a prohibited substance without medical exemption. The test administered on 13 January should have acted as a spur to him to check his TUE position.

114. Mr Taylor accepted that delay in notifying a player is a relevant factor when considering the "fairness" issue under Article M.7. But for the delay occasioned by the debate within the ITF about the possibility of a retroactive TUE, the player would have been notified of the adverse test result earlier, probably in April 2005.

115. The hearing could have taken place before the start of the vacation period in August and the decision might well have been available before the end of July

2005. Had that occurred, however, the player could have commenced a period of ineligibility, if one were imposed, in July 2005, at the height of the tennis season, and he could well have missed the US Open and other major tournaments in north America which take place over the summer months. On the other hand, he ought not to suffer any greater loss of results, prize money and ranking points than if the delay had not occurred.

116. Taking all the above factors into account, I have reached the conclusion that the player should suffer disqualification of his results and forfeiture of his prize money and ranking points in respect of all competitions in which he participated after the Australian Open, up to and including the Mexico City Challenger competition which took place from 4-10 April 2005. He should have been told by 10 April of the adverse test result and if he had been he would have at once stopped using the inhaler. In respect of all competitions from the Bermuda Challenger (11-17 April 2005) onwards, I find that fairness requires that his results, prize money and ranking points should remain undisturbed.

117. I turn finally to consider whether I should impose a period of ineligibility and if so for how long. I bear in mind the degree of fault on the part of the player, and on the part of others, already discussed. I bear in mind all the other points made on the player's behalf by Mr Jacobs, summarised above. I take into account that the player will lose US $2,143 in respect of the Australian Open, and a further sum in the region of US $11,540 in respect of competitions subsequent to it. I bear in mind that he will lose ranking points and that it is difficult to recover from lost ranking points because of the "vicious circle" effect whereby such losses affect eligibility to play in subsequent competitions in which points can be regained.

118. Taking all the above factors into account I conclude that a period of ineligibility of one and a half months should be imposed. The player has continued

competing since the adverse test result, as he is entitled to do. Therefore any period of ineligibility should in principle begin from the date of this decision, and should not be backdated.

The Tribunal's Ruling

119. 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 29 June 2005; namely that a prohibited substance, salbutamol, has been found to be present in the urine sample that the player provided at the Australian Open on 13 January 2005;

(2) orders that the player's individual result must be disqualified in respect of the Australian Open, and in consequence rules that the prize money and any ranking points obtained by the player through his participation in that event, must be forfeited;

(3) orders, further, that the player's individual results in competitions subsequent to the Australian Open shall be disqualified and all prize money and ranking points in respect of those competitions forfeited, up to and including the Mexico City Challenger competition which took place from 4-10 April 2005, but that the player's results in all competitions subsequent to the Mexico City Challenger shall remain undisturbed;

(4) finds that the player has succeeded in establishing on the balance of probabilities that his use of the prohibited substance leading to the positive test result in respect of the sample taken on 13 January 2005 was not intended to enhance sport performance;

(5) declares that the player shall be ineligible for a period of 1½ months (i.e. calendar months) starting on Monday 26 September 2005 and expiring at 12 noon London time on 10 November 2005 from participating in any capacity in any event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised by the ITF or any national or regional entity which is a member of or is recognised by the ITF as the entity governing the sport of tennis in that nation or region.

Tim Kerr QC, Chairman
Dated: 26 September 2005