

## **The Biological Passport: Closing The Net On Doping**

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# THE BIOLOGICAL PASSPORT: CLOSING THE NET ON DOPING

## I. INTRODUCTION

The use and, indeed, the dangers of performance-enhancing drugs in sports have a long history. For example, the first recorded death linked to such substances during athletic competition took place in 1886 when a cyclist, Arthur Linton, overdosed on trimethyl.<sup>1</sup> The first known use of performance-enhancing drugs at the Olympic Games occurred in 1904 when Thomas Hicks of the United States won the Olympic marathon despite taking a concoction that included Strychnine and alcohol.<sup>2</sup> In 1960, the first recorded death linked to drugs at the Olympic Games occurred when Danish cyclist Knud Jensen crashed and died; his autopsy revealed traces of amphetamines in his system.<sup>3</sup>

It was at this time that pressure began to mount on the sporting authorities to combat the abuse of performance-enhancing substances.<sup>4</sup> In 1966, the first drug tests were introduced by the Union Cycliste Internationale (UCI) and the Fédération Internationale de Football Association (FIFA) at their respective World Championships.<sup>5</sup> The following year, the International Olympic Committee (IOC) produced its first prohibited list of performance-enhancing substances (anabolic steroids were not added to that list until 1976), and its first official drug tests took place at the 1968 Winter and Summer Olympic Games.<sup>6</sup> Still, the 1970s and 1980s saw the enactment of State Plan 14-25 in East Germany, which was a government plan—a very successful one—used for widespread systematic doping on promising young athletes to achieve Olympic glory. In 1998, the Festina<sup>7</sup> scandal in the Tour de France occurred, in which the police discovered large quantities of drugs in the Festina

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<sup>1</sup> *Drugs in Sport: A Brief History*, OBSERVER SPORT MONTHLY (Feb. 8, 2004) <http://observer.guardian.co.uk/osm/story/0,,1140775,00.html>.

<sup>2</sup> Andy Bull, *Cheats Sometimes Prosper*, THE GUARDIAN (London) (May 30, 2008) <http://www.guardian.co.uk/sport/2008/may/30/drugsinsport.olympicgames>.

<sup>3</sup> *A Brief History of Anti-Doping*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/About-WADA/History/A-Brief-History-of-Anti-Doping> (last updated June 2010).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Festina was the number one team in the Tour de France at the time.

team car and also at the Festina team headquarters in Lyon, France.<sup>8</sup> It was this incident that eventually led to the formation of the World Anti-Doping Agency (WADA) in 1999 and the creation of the WADA Code (the Code), which came into effect January 1, 2004.<sup>9</sup> The Code was the first attempt to provide a worldwide framework for the regulation of drugs in sports.

The backbone and primary pillar of the Code was, and still is, the principle of strict liability. The Code explains the principle: “it is not necessary that intent, fault, negligence[,] or knowing [u]se on the [a]thlete’s part be demonstrated in order to establish an anti-doping violation.”<sup>10</sup> The comments to the Code go on to state that:

The strict liability rule . . . provides a reasonable balance between effective anti-doping enforcement for the benefit of all “clean” [a]thletes and fairness in the exceptional circumstance where a [p]rohibited [s]ubstance entered an [a]thlete’s system through [n]o [f]ault or [n]egligence or [n]o [s]ignificant [f]ault or [n]egligence on the [a]thlete’s part . . . . The strict liability principle set forth in the Code has been consistently upheld in the decisions of [the Court of Arbitration for Sport].<sup>11</sup>

The strict liability principle is viewed as fundamental to the fight against doping in sports. Lord Sebastian Coe<sup>12</sup> expressed this view in 2004, stating that “we cannot, without blinding reason and cause, move one millimeter from strict liability [—] if we do, the battle to save sport is lost.”<sup>13</sup> Because the strict liability rule has been the basis of anti-doping rules in sports for many years, it was no surprise that the legality of the principle, in conjunction with the provision of a two-year ban for a doping violation, was challenged over twenty years ago in *Gasser v. Stinson*.<sup>14</sup> In this case, Swiss middle-distance runner Sandra Gasser challenged the two-year ban imposed upon her for testing positive for an illegal substance.<sup>15</sup> She suggested that Rule 144 of the International Amateur Athletics Federation (IAAF), which

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<sup>8</sup> *A Brief History of Anti-Doping*, *supra* note 6.

<sup>9</sup> *WADA History*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/About-WADA/History/WADA-History/> (last updated Nov. 2009).

<sup>10</sup> WORLD ANTI-DOPING CODE art. 2.1.1 (2011) [hereinafter WADA CODE].

<sup>11</sup> *See id.* at art. 2.1.1 cmt.

<sup>12</sup> Former double Olympic Gold Medalist at the 1500m.

<sup>13</sup> Sebastian Coe, *We Cannot Move From Strict Liability Rule*, DAILY TEL. (London) (Feb. 25, 2004) <http://www.telegraph.co.uk/sport/main.jhtml?xml=/sport/2004/02/25/socoe25.xml>.

<sup>14</sup> *See generally* *Gasser v. Stinson*, [1988] EWHC (Q.B.) 1 (Eng.).

<sup>15</sup> *Id.*

provided strict liability, did not allow her to prove her innocence, and coupled with the subsequent two-year ban imposed on her for the commission of the doping violation, amounted to an unlawful restraint of trade.<sup>16</sup> The Court of Queen's Bench examined the strict liability rule and stated the following:

The disqualification it imposes is automatic. The disqualification does not depend upon any guilty intent on the part of the athlete. He or she may not have known that the substance was being ingested. The disqualification depends on no more than the finding of the prohibited substance in the athlete's urine.<sup>17</sup>

The Court of Queen's Bench went on to support the IAAF's position that doping posed a very serious threat to the integrity and future of sports, specifically by endorsing the view of the then-IAAF General Secretary, who stated,

"The use of drugs is widely regarded as a disease in sport. Competitors who use drugs to enhance their performance are simply cheating. Any sport [that] is infiltrated by drugs and in respect of which it becomes common knowledge that its participants use drugs is likely to suffer substantially in its public image and reputation."<sup>18</sup>

Set in this context, the Court of Queen's Bench ruled that the restraint of trade imposed by the two-year ban, which was founded on the principle of strict liability, was indeed reasonable and proportionate and, therefore, not unlawful.<sup>19</sup>

The principle of strict liability has also received appropriate endorsement from the CAS, which made clear as far back as 1995 in the case of *USA Shooting & Q. v. Union Internationale de Tir*<sup>20</sup> that "[t]he fact that the [CAS] has sympathy for the principle of a strict liability rule obviously does not allow the CAS to create such a rule where it does not exist."<sup>21</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 4.

<sup>18</sup> *Id.* at 15.

<sup>19</sup> *Id.* at 16.

<sup>20</sup> See generally *USA Shooting & Q. v. Union Int'l de Tir*, CAS 94/A/129, (May 23, 1995).

<sup>21</sup> *Id.* at 1, ¶ 1.

Quite clearly, the policy of strict liability can sometimes lead to unjust results.<sup>22</sup>

However, without a doubt, the policy was implemented for very specific reasons, which were aptly summed up by the CAS in *USA Shooting & Q.*:

It is true that a strict liability test is likely in some sense to be unfair in an individual case . . . where the [a]thlete may have taken medication as the result of [mislabeling] or faulty advice for which he or she is not responsible . . . . But it is also in some sense “unfair” for an athlete to get food poisoning on the eve of an important competition. Yet in neither case will the rules of the competition be altered to undo the unfairness. Just as the competition will not be postponed to await the athlete’s recovery, so the prohibition of banned substance will not be lifted in recognition of its accidental absorption. The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable persons, which the law cannot repair. . . . Furthermore, it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations . . . .<sup>23</sup>

That pillar, upon which anti-doping control stands, remains in place today. Although it is clear that strict liability is of fundamental importance in anti-doping policies, it has come as no surprise that strict liability has been aided in recent years by further provisions that have filled in the gaps left by strict liability. Quite obviously, without the smoking gun of a failed drug test, strict liability is a weapon incapable of finding its target. This weakness was best demonstrated in the events surrounding the Bay Area Laboratory Co-Operative (BALCO) scandal.<sup>24</sup> If a sporting authority does not have an effective test for a performance-enhancing substance, then strict liability becomes irrelevant. This was the problem that the sporting authorities faced with the existence of tetrahydrogestrinone (THG) before any test became

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<sup>22</sup> For example, Alain Baxter and Andrea Raducan both lost Olympic medals, while arguably being blameless for the failed tests that caused the loss of those medals.

<sup>23</sup> *USA Shooting*, CAS 94/A/129, ¶¶ 14–15.

<sup>24</sup> The Bay Area Laboratory Co-Operative (BALCO) scandal was an attempt to create the world’s fastest human being through the design and then use of artificially created, undetectable steroids. The project succeeded when Tim Montgomery broke the world 100m record in September 2002 running a time of 9.78 seconds. See generally *U.S. Anti-Doping Agency v. Montgomery*, CAS 2004/O/645, at 2 (Dec. 13, 2005).

available. The remedy for this lacuna was as predictable as it was effective. Non-analytical positives were used to great effect in securing convictions against those benefitting from the “undetectable,” artificially-created, performance-enhancing drugs.<sup>25</sup>

The case brought against Michelle Collins by the United States Anti-Doping Agency (USADA) on December 10, 2004 was one of the first attempts by an anti-doping agency to secure a conviction against an athlete for taking performance-enhancing substances without the existence of a positive test.<sup>26</sup> The fact that the ruling by the arbitration panel went against Collins was not contentious. The USADA panel pointed out that there was substantial evidence against Collins, which included documents seized from BALCO, incriminating e-mails, and suspicious, although not positive, blood and urine tests at different IOC accredited laboratories over several years.<sup>27</sup>

The significance of non-analytical positives, as a further pillar upon which doping control stands, cannot be underestimated. Although a relatively new weapon in the armory of sporting authorities, non-analytical positives have seen significant developments. Richard McLaren has commented that “[p]rior to the cases arising from the BALCO affair, non-analytical positive cases before [the] CAS primarily involved an apparent manipulation or contamination of a sample given by an athlete as part of the doping control sample collection process.”<sup>28</sup> Any attempted manipulation or contamination of an athlete's sample is considered a doping offense, readily proven without the necessity of establishing the purity of the sample itself.<sup>29</sup>

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<sup>25</sup> Tim Montgomery, Dwain Chambers, Chryste Gaines, Michelle Collins, Marion Jones, and Kelli White were just some of the athletes caught up in the BALCO scandal. *See infra* note 118.

<sup>26</sup> *See generally* U.S. Anti-Doping Agency v. Collins, AM. ARBITRATION ASS'N No. 30 190 00658 04 (N. Am. CAS Panel Dec. 10, 2004).

<sup>27</sup> *Id.* ¶ 1.2.

<sup>28</sup> Richard H. McLaren, *An Overview of Non-Analytical Positive and Circumstantial Evidence Cases in Sports*, 16 MARQ. SPORTS. L. REV. 193, 195–96 (2006).

<sup>29</sup> *Id.* at 196.

Article 2.2 of the Code makes it clear that use or attempted use of a prohibited substance is a doping violation.<sup>30</sup> Perhaps the most obvious example of a successful action against an athlete charged with interfering with her sample was brought against Irish swimmer Michelle Smith de Bruin.<sup>31</sup> In making clear the appropriate burden of proof, the CAS explained,

In essence, the [a]ppellant contended that the burden of proof lay upon the [r]espondent to eliminate all possibilities other than manipulation by the [a]ppellant. We do not believe that this position reflects a correct legal analysis. The [r]espondent's burden was only, but sufficiently, to make the Panel “comfortably satisfied” that the [a]ppellant was the culprit.<sup>32</sup>

The justification for the adoption of this standard, rather than one of beyond reasonable doubt, was expressed by the CAS as being necessary to avoid applying standards appropriate in the “public law of the state [rather than] the private law of an association.”<sup>33</sup> This standard has been specifically identified as being appropriate in cases involving personal reputation and professional misconduct and, as such, with one or two reservations identified elsewhere in this article, would appear to be appropriate for anti-doping incidents such as those being discussed.<sup>34</sup> Further, it is this standard that has been adopted by WADA and therefore applies to anti-doping cases in general, and in particular, to Claudia Pechstein’s biological passport case. Indeed, when Pechstein challenged the application of this standard, the Swiss Federal Tribunal (SFT) opined,

The view of the Arbitral Tribunal that the [r]espondent must prove a doping [offense] “to the comfortable satisfaction of the hearing panel” does not violate public policy but refers to the allocation of the burden of proof and the standard of evidence which, in the area of application of private law—even where disciplinary measures of private sporting [organizations] are under review—cannot be determined from the perspective of criminal law concepts such as the presumption of innocence or the principles of “*in dubio pro reo*” or on the basis of the guarantees which result from the ECHR. Even with respect

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<sup>30</sup> WADA CODE art. 2.2.

<sup>31</sup> See generally *B. v. Féd’n Int’l de Natation*, CAS 98/A/211, (June 7, 1999) (de Bruin was found guilty of tampering with her urine sample given during an out-of-competition test).

<sup>32</sup> *Id.* ¶¶ 39–40.

<sup>33</sup> *Id.* ¶ 26 (citing *N., J., Y., & W. v. Féd’n Int’l de Natation*, CAS 98/A/208, ¶ 13 (Dec. 22, 1998)).

<sup>34</sup> See *Collins*, AM. ARBITRATION ASS’N No. 30 190 00658 04, ¶ 3.4.

to her [defense] that the standard of evidence on which the decision was based leads to disregard of the principle of proportionality, the [a]ppellant does not point out a violation of public policy.<sup>35</sup>

This article will first briefly explain the nature of the biological passport and why it represents a significant evolutionary development in the fight against doping in sports. This article will then go on to analyze, in detail, the first case brought to CAS using the biological passport, specifically against German speed skater Claudia Pechstein. The article will then shift to Pechstein's unsuccessful appeal to the SFT against her conviction and will move on to consider her request for revision of that decision back to the SFT. This piece will end with a brief consideration of the position that the passport may prove to be part of the armory of measures available to the anti-doping organizations, which raises the question of whether it may lead to a fundamental shift in the emphasis of the war on doping in sports.

## II. THE BIOLOGICAL PASSPORT

The biological passport is an individual electronic record of blood and urine tests taken from sports participants over an extended period of time.<sup>36</sup> These tests enable an individual hematological profile to be created, which consists of a number of different hematological parameters.<sup>37</sup> The principle behind the passport is that certain drugs have an impact on these parameters, either raising them or lowering them, and therefore making it possible to detect doping without the necessity of a failed drug test.<sup>38</sup> The individualized nature of the profiles increases the sensitivity of the passport, effectively using the athlete's

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<sup>35</sup> See Tribunal fédéral [TF] [Federal Tribunal] Feb. 10, 2010, 4A\_612/2009 (Switz.), ¶ 6.3.2.

<sup>36</sup> *Biological Passport – Questions/Answers*, UNION CYCLISTE INT'L, <http://www.uci.ch/templates/UCI/UCI2/layout.asp?MenuId=MTU4ODY&LangId=1> (last visited June 21, 2011).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

own physiology as a base rather than population norms, as is the case with conventional drugs tests.<sup>39</sup>

The SFT's recent ruling in *Pechstein v. International Skating Union*<sup>40</sup>, which confirmed the decision of the CAS against Pechstein,<sup>41</sup> seems to have added yet another string to the bow of the sporting authorities against doping users. Although the International Skating Union (ISU) has been at the forefront of the development of the biological passport, it is not the only international sporting authority that has been pushing the development of the technology. The International Cycling Union (UCI) introduced its own biological passport at the start of the 2008 season.<sup>42</sup> After some initial problems and disagreements with WADA, which at one point led WADA to withdraw its support for UCI's program,<sup>43</sup> the UCI declared that five cyclists needed to respond to doping allegations after submitting abnormal results under the new testing program.<sup>44</sup> Thus, WADA imposed the first sanction of a sports participant caught using the biological passport on May 28, 2010, which led to its Director General stating that

“The Athlete Biological Passport adds a powerful tool to support the fight against doping in sport . . . Coupled with other strategies, it makes prohibited preparations harder to implement by those athletes who may take the risk to cheat. We know that the effects of some substances remain detectable in the body longer than the substances themselves. The Athlete Biological Passport Model allows the anti-doping community to exploit this reality through a similar approach to that used in forensic science. . . . We look forward to seeing more anti-doping organizations follow in the UCI's footsteps and

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<sup>39</sup> See *Athlete Biological Passport*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/Science-Medicine/Athlete-Biological-Passport/> (last updated Dec. 2009); *Biological Passport – Questions/Answers*, *supra* note 36.

<sup>40</sup> See generally Tribunal fédéral, 4A\_612/2009.

<sup>41</sup> See generally Arbitral Award, *Pechstein v. Int'l Skating Union*, CAS 2009/A/1912 & *Deutsche Eisschnelllauf Gemeinschaft e.V. v. Int'l Skating Union*, CAS 2009/A/1913 (Nov. 25, 2009).

<sup>42</sup> See *Has Peloton Cleaned Up Its Act or Will Dirty Tactics Prevail?*, THE SUN. TIMES (London) (July 4, 2008) [http://www.timesonline.co.uk/tol/sport/more\\_sport/cycling/article4264752.ece](http://www.timesonline.co.uk/tol/sport/more_sport/cycling/article4264752.ece).

<sup>43</sup> Julien Pretot, *WADA Withdraws Support for UCI Biological Passport*, REUTERS (Mar. 27, 2008), <http://www.reuters.com/article/idUSL2784271420080327>.

<sup>44</sup> Gregor Brown, *UCI Names First Five Biological Passport Violators*, CYCLING NEWS (June 17, 2009), <http://www.cyclingnews.com/news/uci-names-first-five-biological-passport-violators>.

implement such longitudinal follow-up programs in the comings [sic] months and years.”<sup>45</sup>

The UCI followed the sanction with notable success with the CAS, which confirmed the rigor of the biological passport in detecting doping violations, which was highlighted in recent decisions rendered by the CAS against Pietro Caucchioli,<sup>46</sup> Franco Pellizotti,<sup>47</sup> and Tadej Valjavec.<sup>48</sup>

On December 1, 2009, WADA approved new Athlete Biological Passport Operating Guidelines, which stated very clearly that “[t]he fundamental principle of the Athlete Biological Passport is based on the monitoring of an athlete’s biological variables over time to facilitate indirect detection of doping on a longitudinal basis, rather than on the traditional direct detection of doping.”<sup>49</sup>

At the same time, in the United Kingdom, several British athletes were placed on the biological passport program, which required them to submit blood samples throughout their careers.<sup>50</sup> The key to the biological passport lies not in what it tests, but how it tests, as Professor David Cowan<sup>51</sup> commented:

“This new [program] will compare the athlete with himself or herself rather than against the population at large. The effect of this will make it far easier to catch the doped athlete. We believe that this will act as a powerful deterrent for the good of all healthy athletes and maintain the integrity of sport.”<sup>52</sup>

The notion of effectively measuring against the athlete’s own physiology rather than standard population norms is nothing new. A similar provision was explained in *Collins* as

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<sup>45</sup> *WADA Welcomes First Athlete Biological Passport Sanction*, WADA, (May 28, 2010), <http://www.wada-ama.org/en/News-Center/Articles/WADA-Welcomes-First-Athlete-Biological-Passport-Sanction/>.

<sup>46</sup> *See generally* *Caucchioli v. Comitato Olimpico Nazionale Italiano & Union Cycliste Internationale*, CAS 2010/A/2178 (Mar. 8, 2011) (unofficial translation of original French text).

<sup>47</sup> *See generally* *Pellizotti v. Comitato Olimpico Nazionale Italiano & Union Cycliste Internationale*, TAS 2010/A/2308 & *Union Cycliste Internationale v. Pellizotti*, Federazione Ciclistica Italiana, & Comitato Olimpico Nazionale Italiano, TAS 2011, 2011/A/2335 (June 14, 2011).

<sup>48</sup> *See generally* *Union Cycliste Internationale v. Valjavec*, CAS 2010/A/2235 (Apr. 21, 2011).

<sup>49</sup> *Athlete Biological Passport*, *supra* note 39.

<sup>50</sup> *See U.K. Anti-Doping Introduces Athlete Biological Passport*, U.K. ANTI-DOPING, <http://www.ukad.org.uk/news/athlete-biological-passport> (last visited June 28, 2010).

<sup>51</sup> Director of the King’s College London Drug Control Centre, the only accredited anti-doping laboratory in the United Kingdom.

<sup>52</sup> *U.K. Anti-Doping Introduces Athlete Biological Passport*, *supra* note 50.

being critical in the finding of guilt, with reference to levels of testosterone and epitestosterone.<sup>53</sup> The USADA Panel stated,

A normal T/E ratio is 1/1, although the specific ratio will vary from person to person. The [Code] sets an abnormal T/E ratio at 6/1, which is above what one would expect normally to occur. Regardless of a person's own baseline ratio, his or her ratio will generally stay consistent, with a normal variation in women of up to 60%. The variation in Collins's T/E ratio in 2003 alone, on the other hand, was more than 1000%.<sup>54</sup>

Despite the obvious benefits that may be derived from focusing testing on athletes against themselves, which were explained in *Collins* and are very much a feature of the biological passport, the administration of the passport scheme itself has not been universally welcomed by all of those involved in the fight against doping. In what may be seen as more of an attack on the UCI rather than on the biological passport, Pierre Bordry,<sup>55</sup> at a recent anti-doping symposium, stated, "I [do not] think the biological passport is useful . . . . What we need is neutral information on biological data. And we need a biological passport that is absolutely transparent to target riders. Everybody should deserve the same treatment."<sup>56</sup>

It is apparent, however, that the biological passport is here to stay. In *Pechstein*,<sup>57</sup> CAS confirmed its satisfaction with the technology and its practice, a decision that the SFT affirmed.<sup>58</sup>

### III. CAS 2009/A/1912 CLAUDIA PECHSTEIN V. INTERNATIONAL SKATING UNION

#### *A. Background*

Claudia Pechstein has been competing at the elite level of speed skating since 1988.<sup>59</sup> During that time, she has taken part in five Olympic Games, winning five gold, and numerous

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<sup>53</sup> See *Collins*, AM. ARBITRATION ASS'N No. 30 190 00658 04, ¶ 2.3.

<sup>54</sup> *Id.* ¶ 4.18.

<sup>55</sup> French Anti-Doping Agency President

<sup>56</sup> Samuel Petrequin, *French Anti-Doping Agency President Pierre Bordry Criticizes UCI's Biological Passport*, THE GAEA TIMES (June 10, 2010), <http://blog.taragana.com/business/2010/06/10/french-anti-doping-agency-president-pierre-bordry-criticizes-ucis-biological-passport-69294/>.

<sup>57</sup> See generally Arbitral Award, *Pechstein*, CAS 2009/A/1912 & *Deutsche Eisschnelllauf Gemeinschaft e.V.*, CAS 2009/A/1913.

<sup>58</sup> See generally Tribunal fédéral, 4A\_612/2009.

other, medals during her career.<sup>60</sup> As has already been stated, along with the UCI, the ISU has been at the forefront of developing the biological passport to combat doping in its respective sport. Both organizations adopted the biological passport measure before it received formal backing from WADA, and it was against this background that blood samples from Pechstein were analyzed and found to display evidence of a possible doping violation, which became the subject of first, a case brought to the CAS,<sup>61</sup> and then second, the final appeal to the SFT.<sup>62</sup>

For a period of just over nine years, running from February 2000 until April 2009, Pechstein, in common with many other skaters of her caliber, underwent numerous drug tests, and, during this time, she never once failed any such test.<sup>63</sup> Over ninety blood samples were collected from her to be used to aid development of her biological passport.<sup>64</sup> Collection of these samples accelerated between October 2007 and April 2009, with twenty-seven samples collected, including twelve in the final four months of that period.<sup>65</sup> The CAS explained the parameters that are measured from the samples:

The blood parameters [that] are measured and recorded within the scope of the [r]espondent's blood profiling program include *inter alia* hemoglobin, hematocrit[,] and percentage of reticulocytes, (“%retics”). Reticulocytes are immature red blood cells that are released from the bone marrow. The %retics is a sensitive hematological parameter[,] which provides a real-time assessment of the functional state of erythropoiesis<sup>66</sup> in a person's organism.<sup>67</sup>

It was on the percentage of reticulocytes that Pechstein's readings proved to be problematic. The CAS pointed out that the ISU considered that normal values fell between

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<sup>59</sup> Arbitral Award, *Pechstein*, CAS 2009/A/1912 & *Deutsche Eisschnelllauf Gemeinschaft e.V.v.*, CAS 2009/A/1913, ¶ 1.

<sup>60</sup> *Id.*

<sup>61</sup> *See generally id.*

<sup>62</sup> *See generally* Tribunal fédéral, 4A\_612/2009.

<sup>63</sup> Arbitral Award, *Pechstein*, CAS 2009/A/1912 & *Deutsche Eisschnelllauf Gemeinschaft e.V.v.*, CAS 2009/A/1913, ¶ 5.

<sup>64</sup> *Id.* ¶ 6.

<sup>65</sup> *Id.*

<sup>66</sup> Red blood cell production—a very important feature for endurance athletes in particular.

<sup>67</sup> Arbitral Award, *Pechstein*, CAS 2009/A/1912 & *Deutsche Eisschnelllauf Gemeinschaft e.V.v.*, CAS 2009/A/1913, ¶ 7.

0.4 and 2.4.<sup>68</sup> Although Pechstein's profile, which resulted from her blood samples in isolation, may not have been particularly serious, it was the pattern produced that proved to be damning. Just one day before a major championship, a sample taken on February 6, 2009 showed a %retic reading of 3.49.<sup>69</sup> Two more readings were taken on the first day of the championship, and those readings were 3.54 and 3.38, respectively.<sup>70</sup> Just over a week later, another sample was taken, which showed that her reading had dropped to 1.37.<sup>71</sup> By that time, Pechstein was an athlete approaching the veteran stage of her career, a time when a natural decline may be expected in her performance. Further concerns were also raised about the frequency with which Pechstein had changed her "whereabouts"<sup>72</sup> in January and February of 2009. Pechstein's movement made it very difficult to apply any "out-of-competition" testing on her.<sup>73</sup> Following a review of Pechstein's profile on March 5, 2009, the ISU accused her of violating Article 2.2 of its anti-doping code,<sup>74</sup> which conformed to the new WADA code that came into effect January 1, 2009.<sup>75</sup> The ISU Disciplinary Committee subsequently imposed a two-year ban on Pechstein, commencing February 9, 2009, which Pechstein then appealed to the CAS.<sup>76</sup>

Pechstein, unsurprisingly, denied the allegations, citing concerns about the timings involved in the procedure.<sup>77</sup> She pointed out that, despite being tested on numerous occasions, she had never failed a drug test.<sup>78</sup> She also suggested that she had not given her

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<sup>68</sup> *Id.* ¶ 8. This was disputed by Pechstein; however, Pechstein's criticism of this interpretation was rejected by the CAS.

<sup>69</sup> *Id.* ¶ 9.

<sup>70</sup> *Id.* ¶ 10.

<sup>71</sup> *Id.* ¶¶ 8-11.

<sup>72</sup> There is a requirement upon an elite sports participant to provide whereabouts for one hour each day, between 6 a.m. and 11 p.m. for the purposes of out-of-competition testing.

<sup>73</sup> See Arbitral Award, *Pechstein*, CAS 2009/A/1912 & *Deutsche Eisschnelllauf Gemeinschaft e.V.v.*, CAS 2009/A/1913 at ¶ 68.

<sup>74</sup> Namely using the prohibited method of blood doping in violation of article 2.2, (Use or attempted use by an athlete of a prohibited method or prohibited substance). *See id.* ¶ 12.

<sup>75</sup> Tribunal fédéral, 4A\_612/2009 at 3.

<sup>76</sup> *Id.* at 4.

<sup>77</sup> Arbitral Award, *Pechstein*, CAS 2009/A/1912 & *Deutsche Eisschnelllauf Gemeinschaft e.V.v.*, CAS 2009/A/1913, ¶ 48.

<sup>78</sup> *Id.* ¶ 46.

express written permission or consent to use any evidence of blood doping.<sup>79</sup> She stressed her position that the ISU had not complied with relevant WADA standards on testing, chain of custody, or documentation of results.<sup>80</sup> Perhaps her most significant defense, however, certainly from the perspective of the future use of the biological passport, was her assertion that the upper limit for %retics proscribed by the ISU (i.e., 2.4) was far too low, and that it was perfectly normal for a healthy woman to have a reading fluctuating between 0.8 and 4.1%retics.<sup>81</sup> Further, Pechstein asserted that her %retics readings had always remained above the 0.5 that should normally be expected following a period of erythropoietin abuse.<sup>82</sup> She also questioned the accuracy of the machine used to measure the %retics and the reliability of the sampling.<sup>83</sup> Moreover, Pechstein also cast doubt upon the accuracy of the %retics measurement when set in context of both her hemoglobin and hematocrit levels.<sup>84</sup> In short, she questioned the reliability and accuracy of the whole procedure around the samples taken for the longitudinal testing, which led to her violation of the ISU anti-doping code. Her final point related to the burden of proof to be expected of the ISU in proving a doping violation. She suggested, as the CAS pointed out, “that the ISU must convince the Panel to a level very close to ‘beyond reasonable doubt’ that all alternative causes for the increase of %retics can be excluded and that, additionally, the [a]thlete had an intention to use blood doping.”<sup>85</sup>

In contrast, it was the ISU’s contention that because Pechstein had been charged with use of a prohibited substance or method rather than attempted use, under Article 2.2 of the

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<sup>79</sup> *Id.* ¶ 47.

<sup>80</sup> *Id.* ¶ 48.

<sup>81</sup> *Id.* ¶ 49.

<sup>82</sup> *Id.* ¶ 50.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* ¶ 52.

<sup>85</sup> *Id.* ¶ 53.

ISU anti-doping regulations, it was unnecessary for ISU to prove any such intent to use blood doping.<sup>86</sup>

Following confirmation that the CAS had jurisdiction to hear and decide the dispute, pursuant to Article R47 of the CAS Code and Article 13.2.1 of the ISU anti-doping regulations,<sup>87</sup> the CAS went on to explain that in accordance with Article R57 of the CAS Code, “[t]he Panel shall have full power to review the facts and the law.”<sup>88</sup> This meant, of course, that the panel could look at the case in detail rather than just examine the correctness of the original decision, looking at both procedural and substantive issues.<sup>89</sup> This was especially important as new issues for the CAS were being examined with the reliability of the biological passport program. Pechstein, it should not be forgotten had not failed any drugs tests, neither in competition nor out of competition.<sup>90</sup> There was some relevant precedent from the United States,<sup>91</sup> as was pointed out by the Panel,<sup>92</sup> but nevertheless these were new issues for the CAS.

An interesting argument raised by Pechstein related to, as she saw it, her lack of consent to the use, by the ISU, of her blood samples as evidence of blood doping.<sup>93</sup> In raising this point, Pechstein seemed to be suggesting one of two possible arguments. The first being that the ISU rules were unclear as to whether her samples could be used to test for blood doping, and, therefore, any perceived ambiguity should be resolved in accordance with the decision in *Wilander v. Tobin*,<sup>94</sup> which is construed in favor of the athlete. This issue was not explored, as Pechstein instead concentrated on the argument that there was a clear lack of

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<sup>86</sup> See *id.* ¶ 69.

<sup>87</sup> See *id.* ¶¶ 71–72.

<sup>88</sup> COURT OF ARBITRATION FOR SPORT CODE R57 (2011) [hereinafter CAS CODE].

<sup>89</sup> Arbitral Award, *Pechstein*, CAS 2009/A/1912 & *Deutsche Eisschnelllauf Gemeinschaft e.V.v.*, CAS 2009/A/1913, ¶ 79.

<sup>90</sup> See *id.* ¶ 46.

<sup>91</sup> See generally *Collins*, AM. ARBITRATION ASS’N No. 30 190 00658 04.

<sup>92</sup> Arbitral Award, *Pechstein*, CAS 2009/A/1912 & *Deutsche Eisschnelllauf Gemeinschaft e.V.v.*, CAS 2009/A/1913, ¶ 78 (citing *Collins*, AM. ARBITRATION ASS’N No. 30 190 00658 04).

<sup>93</sup> See *id.* ¶ 95.

<sup>94</sup> See generally *Wilander v. Tobin & Jude*, [1997] 2 Lloyd’s Rep. 293 (Eng.).

agreement that her samples should be used in the manner that the ISU had used them. In Pechstein's case, the CAS concluded on this particular issue:

Ms[.] Pechstein has been participating in "international activities" for more than two decades. In willingly registering for international skating competitions sanctioned by the ISU, she obviously expressed her acceptance of ISU rules and regulations, including the ISU [Alternative Dispute Resolution (ADR)]. . . . When they accede to competition, athletes cannot pick and choose the rules they like; accordingly, the Panel finds that Ms. Pechstein has been at all times during her international career under an obligation to comply with all ISU regulations, including all applicable anti-doping rules.<sup>95</sup>

Additionally, Pechstein's agreement with the anti-doping rules was reinforced by the fact that she never objected to any sample collection, and, further, she actually signed each form or barcode used to identify her own particular blood samples.<sup>96</sup> The CAS could discern no ambiguity in ISU's anti-doping regulations and, to the contrary, stressed that

Article 6.2 of the ISU ADR expressly authorizes the ISU to use blood samples to "detect" a prohibited method[,] and[] more specifically, to create a profile from the relevant parameters in a skater's blood "for [a]nti-[d]oping purposes[.]"[] thus including a finding of "use" under Article 2.2 of the ISU ADR.<sup>97</sup>

The CAS' position was further reinforced by the WADA guidelines on blood sample collection, which state that such longitudinal profiling can be used for "anti[-]doping purposes in accordance with Article 2.2 of the Code."<sup>98</sup>

Pechstein also raised concerns about using blood profiling to prove an anti-doping violation, suggesting that it was only on January 1, 2009, that the new WADA and ISU anti-doping regulations came into force and that the use of longitudinal profiling for this purpose was expressly stated in the ISU ADR.<sup>99</sup> She therefore suggested that using any of her samples prior to that date would effectively amount to retroactive punishment,<sup>100</sup> which is

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<sup>95</sup> Arbitral Award, *Pechstein*, CAS 2009/A/1912 & *Deutsche Eisschnelllauf Gemeinschaft e.V.v.*, CAS 2009/A/1913, ¶¶ 98–99.

<sup>96</sup> *Id.* ¶ 137.

<sup>97</sup> *Id.* ¶ 101.

<sup>98</sup> *Id.* ¶ 102.

<sup>99</sup> *Id.* ¶ 104 (citing ISU ADR 5.3.1).

<sup>100</sup> *Id.* ¶ 47.

forbidden by the ISU ADR and also by Swiss law, under which the CAS and the ISU operate. The CAS, however, clearly stated that Pechstein's longitudinal profile (i.e., her biological passport) provided sufficient evidence for a breach of Article 2.2 of the ISU ADR, and that this interpretation was perfectly possible under both the old and the new ISU ADR.<sup>101</sup> The 2009 ISU ADR made it clear that an anti-doping violation under Article 2.2, "Use or Any Use," could always be demonstrated by "any reliable evidentiary means" under the old or the new regulations, and, therefore, there was no concern about any issues of retroactive punishment.<sup>102</sup>

Interestingly, the CAS further emphasized that the only concerns with regard to the use of old samples may be if the samples fall outside the appropriate eight-year limitation period. As the CAS stated, "[a]s long as the substantive rule sanctioning a given conduct as doping is in force prior to the conduct, the resort to a new evidentiary method does not constitute a case of retrospective application of the law."<sup>103</sup>

This rule has to be appropriate with the offense clearly defined and the samples collected. This in no way could be viewed as retroactive punishment, but merely a necessity for further scientific analysis using more complex and up-to-date methods on samples already collected. This approach was later confirmed in *Caucchioli v. CONI*, where the CAS reiterated that the biological passport

represents only a new method for screening of blood doping, already prohibited by other standards. New scientific methods . . . may be used at any time to prove that past abuses, with the only restrictions on the term of use samples for the fight against doping (set at eight years) and the beginning disciplinary procedures in a timely manner. . . . Therefore, the use of new methods do not constitute a case of retroactive application of standards . . .<sup>104</sup>

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<sup>101</sup> *Id.* ¶ 107.

<sup>102</sup> *Id.* It was also pointed out that her readings prior to January 1, 2009 were used only to assist in interpreting the samples from February 2009, which were the relevant samples in proving her anti-doping violation under Article 2.2. *Id.* ¶ 109.

<sup>103</sup> *Id.* ¶ 109.

<sup>104</sup> *Caucchioli*, 2010/A/2178, ¶¶ 33–34.

What was rightly of more concern to the CAS was the question of whether longitudinal blood profiling could be interpreted as a “reliable means” for testing. Was the scientific basis of longitudinal profiling sufficiently robust to enable a clear and categorical judgment of whether an anti-doping violation under Article 2.2 had taken place? This fundamental point, the CAS suggested, could be broken down into five distinct questions, each of which must be proven: (1) Were the relevant blood samples properly taken?; (2) Was there a reliable chain of custody of the samples from collection to the laboratory?; (3) Was the analysis machine accurate and reliable?; (4) Was the transmission of the samples to and from their storage in the ISU data base reliable?; and (5) Was it clear that “the hematological values of Ms[.] Pechstein are reliable evidence of her use of a prohibited method in violation of Article 2.2 of the ISU ADR?”<sup>105</sup>

It was made clear by the CAS that no presumption should be made about the reliability of the analysis machine;<sup>106</sup> that they were satisfied that the samples were properly collected;<sup>107</sup> that the number of tests analyzed was appropriate;<sup>108</sup> that the chain of custody was safe, secure, and scientifically sound;<sup>109</sup> and that the analysis machine and methods of analysis were reliable. It was made clear that all of the aforementioned questions had to be, and could be, established according to the appropriate standard of proof. It was confirmed by the CAS that this case involved an offense of strict liability, meaning that no fault or negligence in the commission of the anti-doping violation had to be proven by the ISU on the part of Pechstein.<sup>110</sup>

The more interesting question concerned the appropriate standard of proof that was required to demonstrate the doping violation. Pechstein asserted, bearing in mind the

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<sup>105</sup> Arbitral Award, *Pechstein*, CAS 2009/A/1912 & *Deutsche Eisschnelllauf Gemeinschaft e.V.v.*, CAS 2009/A/1913, ¶ 113.

<sup>106</sup> *Id.* ¶ 114.

<sup>107</sup> *Id.* ¶ 138.

<sup>108</sup> *Id.* ¶ 180.

<sup>109</sup> *Id.* ¶ 148.

<sup>110</sup> *Id.* ¶ 119 (citing ISU ADR 2.2.1, 2.2.2).

particular seriousness of the allegation against her, that the allegation needs to be proven beyond a reasonable doubt.<sup>111</sup> However, the CAS emphasized that the appropriate standard was that of “comfortable satisfaction . . . bearing in mind the seriousness of the allegation” as per the ISU ADR.<sup>112</sup>

This measure had been adopted by WADA in 2003 and has been examined in some detail in case law since. It was reported in *Collins*<sup>113</sup> that the standard originated from “court decisions in Australia and other Commonwealth countries that created a standard for cases involving personal reputation more stringent than [the] balance of probabilities but less burdensome than beyond a reasonable doubt.”<sup>114</sup>

Like the *Pechstein* case, the case of Michelle Collins also involved an athlete accused of doping but had not actually failed a drug test. Evidence from e-mail correspondence and analysis of blood and urine samples displayed tell-tale signs of doping by Collins.<sup>115</sup> In at least this respect, it can be suggested that the two cases bear striking similarities. However, in *Pechstein*, the comfortable satisfaction standard was breached without the benefit of a trail of damning e-mail evidence. Rather, in *Pechstein*, there was data from Pechstein’s blood samples to rely upon.<sup>116</sup> The link between the professional misconduct cases involving personal reputation, as alluded to above, is the forerunner to the imposed standard, and, thus, cases involving doping in sports, perhaps, invite some caution. Reputation lost through a professional misconduct case will invariably have consequences only at a local level and is unlikely to have significant impact beyond one’s own domestic and professional life. However, for a high-profile athlete to be found guilty of a doping offense, with or without the smoking gun of a failed test, has grave consequences at a domestic level and goes far beyond

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<sup>111</sup> *Id.* ¶ 53.

<sup>112</sup> *Id.* ¶ 123 (quoting ISU ADR 3.1).

<sup>113</sup> See generally *Collins*, AM. ARBITRATION ASS’N No. 30 190 00658 04.

<sup>114</sup> *Id.* ¶ 3.4.

<sup>115</sup> *Id.* ¶ 4.3.

<sup>116</sup> Arbitral Award, *Pechstein*, CAS 2009/A/1912 & *Deutsche Eisschnelllauf Gemeinschaft e.V.*, CAS 2009/A/1913, ¶ 210.

to a national and international level. This impact will also encroach beyond an athlete's immediate professional environment. A "drug cheat" will lose the chance to earn income in related industries, such as coaching or media work. Likewise, publicity surrounding his or her "conviction" is likely to be of national or international interest, and, therefore, the damage to his or her reputation may be that much more severe. Thus, it is crucial that the comfortable satisfaction test truly does reflect these circumstances. Just as negligence in sports is predicated on the importance of ordinary negligence taking into account all the circumstances,<sup>117</sup> it is important in the world of anti-doping that the circumstances remain fundamental. Where the consequences of a guilty verdict are potentially more severe, then the burden of proof should rise to reflect these more serious consequences. The fact that this notion has been expressly acknowledged in several cases<sup>118</sup> should reassure those who may be concerned that there is the potential to find an athlete guilty and to impose a significant penalty by merely overcoming a burden of proof, which may, at first glance, appear to be very low. This is not the case, particularly when the serious consequences and impact on the level of proof that any panel may require to demonstrate a doping violation are both taken into consideration. Significantly, the standard of comfortable satisfaction has also withstood scrutiny from the SFT.<sup>119</sup>

Therefore, the key issue is being able to define the limits of what may be meant by comfortable satisfaction. On paper, it appears to be at the midway point between the civil burden of balance of probabilities and the criminal standard of beyond a reasonable doubt. However, the reality may be somewhat different. This particular argument was rehearsed in

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<sup>117</sup> See *Caldwell v. MaGuire*, [2001] EWCA (Civ) 1054 (Eng.), ¶ 39.

<sup>118</sup> See generally *Arbitral Award, Pechstein*, CAS 2009/A/1912 & *Deutsche Eisschnelllauf Gemeinschaft e.V.v.*, CAS 2009/A/1913; *Arbitral Award, U.S. Anti-Doping Agency v. Gaines*, CAS 2004/O/649 (Dec. 13, 2005); *Arbitral Award, Edwards v. Int'l Ass'n of Athletics Fed'ns*, CAS OG 04/003 (Aug. 17, 2004); *Montgomery*, CAS 2004/O/645.

<sup>119</sup> Tribunal fédéral, 4A\_612/2009, ¶ 3 (It is the standard adopted by the WADA and is laid out clearly in Article 3 of the 2009 WADA Code).

the cases of *United States Anti-Doping Agency v. Gaines*<sup>120</sup> and in *United States Anti-Doping Agency v. Montgomery*.<sup>121</sup> In *Gaines*, CAS almost seemed to dismiss concern about the appropriate standard of proof to be applied, suggesting,

As often becomes evident when the question of standard of proof is debated, the debate looms larger in theory than practice. . . . In all cases[,] the degree of probability must be commensurate with and proportionate to those allegations; the more serious the allegation the higher the degree of probability, or “comfort[.]”[] required. That is because, in general, the more serious the allegation the less likely it is that the alleged event occurred and, hence, the stronger the evidence required before the occurrence of the event is demonstrated to be more probable than not.<sup>122</sup>

The CAS Panel made the point in *Gaines* that at times, allegations may be grave and have very harsh consequences, such as the loss of livelihood and reputation, and because these allegations would have very severe consequences if proven means that for the CAS to be comfortably satisfied, the evidence and proof must be very clear. Under such circumstances, the CAS suggested that the practical difference between beyond reasonable doubt and comfortable satisfaction was minimal. In *Gaines*, the CAS concluded on this matter:

From this perspective, and in view of the nature and gravity of the allegations at issue in these proceedings, there is no practical distinction between the standards of proof advocated by USADA and the Respondents. It makes little, if indeed any, difference whether a “beyond reasonable doubt” or “comfortable satisfaction” standard is applied to determine the claims against the Respondents.<sup>123</sup>

This argument bears the hallmarks presented in the English football hooliganism case of *Gough v. Chief Constable of Derbyshire*.<sup>124</sup> In *Gough*, the appellant argued that if a banning order<sup>125</sup> was a punishment then it must be predicated on a beyond reasonable doubt

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<sup>120</sup> See generally *Arbitral Award, Gaines*, CAS 2004/O/649.

<sup>121</sup> See generally *Montgomery*, CAS 2004/O/645.

<sup>122</sup> *Arbitral Award, Gaines*, CAS 2004/O/649, ¶36.

<sup>123</sup> *Id.*

<sup>124</sup> See generally *Gough v. Chief Constable of Derbyshire* [2002] EWCA (Civ) 351 (Eng.).

<sup>125</sup> A penalty imposed upon football fans that could prevent them from travelling abroad or from the vicinity of particular football grounds if the court was satisfied that there were reasonable grounds for believing that making a banning order would help prevent violence or disorder at a regulated football match. See *id.* ¶ 86.

burden of proof rather than reasonable belief as outlined in the legislation.<sup>126</sup> The English court dismissed this argument, suggesting that the standard to be applied, which would have been familiar to both Pechstein and Gaines, would be practically indistinguishable from the criminal, beyond reasonable doubt standard. Lord Phillips MR commented on such banning orders:

While technically the civil standard of proof applies, that standard is flexible and must reflect the consequences that will follow if the case for a banning order is made out. This should lead the [justices] to apply an exacting standard of proof that will, in practice, be hard to distinguish from the criminal standard . . . . In practice the “reasonable grounds” will almost inevitably consist of evidence of past conduct. . . . Those requirements, if properly applied in the manner described above, will provide a satisfactory threshold for the making of a banning order.<sup>127</sup>

One may question whether this reasonable satisfaction standard, albeit one that in the English court’s mind is apparently similar to the criminal standard, is sufficiently rigorous when set against the severity of any drug ban. A guilty verdict obtained through use of the biological passport will almost certainly be able to demonstrate a pattern of drug abuse, whereas a failed test merely demonstrates that the athlete was guilty on that particular occasion. Therefore, with this in mind, a pattern of abuse will clearly be viewed as more serious than any single transgression. It is also more likely that such a pattern of abuse will fall foul of aggravating circumstances outlined in Article 10.6 of the the Code.<sup>128</sup> Comment to Article 10.6 in the Code states,

Examples of aggravating circumstances [that] may justify the imposition of a period of [i]neligibility greater than the standard sanction are: the [a]thlete or other [p]erson committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; the [a]thlete or other [p]erson [u]sed or [p]ossessed multiple [p]rohibited [s]ubstances or [p]rohibited

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<sup>126</sup> See *id.* ¶ 41; see generally Football Spectators Act of 1989 (Eng. 2002).

<sup>127</sup> *Gough*, ¶¶ 90, 92–93.

<sup>128</sup> See generally WADA CODE art. 10.6.

[m]ethods or [u]sed or [p]ossessed a [p]rohibited [s]ubstance or [p]rohibited [m]ethod on multiple occasions . . . .<sup>129</sup>

This is, by no means, a definitive list of circumstances that may lead to a finding of aggravating circumstances. It is clear, however, that use of a prohibited method or substance on multiple occasions will be enough to satisfy Article 10.6 of the Code. It is also clear that the use of the biological passport is much more likely to detect multiple uses than in-competition or out-of-competition testing. Does this raise questions of equity in the Code, particularly when there has not been a universal adoption of the biological passport in all sports governed by the Code? Should the burden of proof remain, overtly at least, one of reasonable satisfaction when the consequences are potentially much more serious for the athlete running afoul through the biological passport standard than through more conventional testing?

In Claudia Pechstein's case, the CAS confirmed that she was guilty of a doping violation according to Article 2.2 of the ISU ADR, and, pursuant to Article 10.2 of the same regulations, she was declared ineligible from competition for two years.<sup>130</sup>

#### *B. The Appeal to the Swiss Federal Tribunal<sup>131</sup>*

Following Pechstein's defeat with the CAS, she launched her final appeal in the SFT.<sup>132</sup> In her submission, the major thrust of her appeal was that the CAS Secretary General and other unnamed third parties had unfairly influenced the CAS decision.<sup>133</sup> Pechstein was denied an extensive judicial review of the CAS decision in line with appropriate federal statutes, which restrict the scope of judicial review of international arbitration proceedings.<sup>134</sup>

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<sup>129</sup> WADA CODE art. 10.6 cmt.

<sup>130</sup> Arbitral Award, *Pechstein*, CAS 2009/A/1912 & *Deutsche Eisschnelllauf Gemeinschaft e.V.v.*, CAS 2009/A/1913, ¶¶ 211–214.

<sup>131</sup> See generally Tribunal fédéral, 4A\_612/2009.

<sup>132</sup> The CAS is based in Lausanne and the Swiss Federal Tribunal acts as the final Court of Appeal for decisions rendered by the CAS.

<sup>133</sup> Tribunal fédéral, 4A\_612/2009 at 7.

<sup>134</sup> *Id.* ¶ 2.4.1.

In a ruling that proved fairly damning to Pechstein’s appeal, the SFT resoundingly rejected her challenge of the factual findings by the CAS, reporting, “[a]t various points as in her further grounds for appeal, [Pechstein] deviates from the factual findings of the CAS or widens them without asserting any substantiated exceptions to the binding character of the factual findings. To that extent, her submissions must remain unheeded.”<sup>135</sup>

Pechstein’s attempts to introduce new evidence were also similarly rejected,<sup>136</sup> with the SFT stressing that this in no way violated her right to be heard.<sup>137</sup> “[I]n arbitration proceedings, as in civil proceedings, the parties cannot submit new allegations and evidence at any time and without restriction. This does not constitute a violation of the right to be heard but is in line with generally [recognized] procedural principles.”<sup>138</sup>

The main thrust of Pechstein’s appeal, however, concerned the CAS itself and its independence.<sup>139</sup> She based an interesting argument around the inevitable and, as she saw it, negative outcome of her CAS hearing. Pechstein suggested that there was clear pressure on the IOC to prove its opposition to doping to its major sponsors, and, in order to accomplish this goal, the CAS needed to demonstrate the accuracy and reliability of the doping passport.<sup>140</sup> Therefore, Pechstein suggested that being found guilty by the CAS was unsurprising and that her guilty verdict was greeted enthusiastically by the IOC Vice President, who stated, “the decision of the CAS shows that sports law is opening up more possibilities in the fight against doping in athletes than state law was ever able to.”<sup>141</sup>

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<sup>135</sup> *Id.* ¶ 2.4.2 (footnote omitted).

<sup>136</sup> *Id.* ¶ 5.2.

<sup>137</sup> See LOI FÉDÉRAL SUR LE DROIT INTERNATIONAL PRIVÉ [LDIP] [FED. CODE ON PRIVATE INT’L LAW] [CPIL] Dec. 18, 1987, art. 190(2)(d) (Switz.).

<sup>138</sup> Tribunal fédéral, 4A\_612/2009, ¶ 5.2.

<sup>139</sup> See *Caucchioli*, 2010/A/2178, ¶¶ 45–47 (Pietro Caucchioli attempted unsuccessfully to highlight the lack of impartiality of the experts used by the UCI to analyze data for the biological passport).

<sup>140</sup> See Tribunal fédéral, 4A\_612/2009, ¶ 3.1.1.

<sup>141</sup> *Id.*

The thrust of the appeal appears to have been an attempt to reignite a debate that had been settled as far back as 1992 in an appeal from a CAS decision,<sup>142</sup> which was subsequently appealed to the SFT in March 1993.<sup>143</sup> In that case, a horse jockey was initially suspended for three months and fined when his horse tested positive for a banned substance, which he then appealed to the CAS.<sup>144</sup> At arbitration, the CAS reduced the suspension to just one month.<sup>145</sup> However, despite the reduction, the jockey appealed the decision to the SFT, alleging that the CAS was not sufficiently impartial and independent due to its close relationship, including financing, with the IOC.<sup>146</sup> Although the SFT dismissed this case, it noted its concern that there were numerous links between the CAS and the IOC: the CAS was financed almost entirely by the IOC, the IOC had authority to modify the CAS statutes, and the IOC retained a large degree of influence in appointing the CAS arbitrators.<sup>147</sup> The SFT commented, in obiter,

[C]ertain objections with regard to the independence of the CAS could not be set aside without another form of process, in particular those based on the organic and economic ties existing between the CAS and the IOC. In fact[,] the latter is competent to modify the CAS Statute; it also bears the operating cost of this court and plays a considerable role in the appointment of its members.<sup>148</sup>

The CAS has taken to discuss its own history, noting,

In the view of the [SFT], such links would have been sufficient seriously to call into question the independence of the CAS in the event of the IOC's being a party to proceedings before it. The [SFT's] message was thus perfectly clear: the CAS had to be made more independent of the IOC both [organizationally] and financially.<sup>149</sup>

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<sup>142</sup> See generally *Gundel v. Int'l Equestrian Fed'n*, CAS 92/A/63 (Sept. 10, 1992).

<sup>143</sup> See generally *Gundel v. Int'l Equestrian Fed'n*, FT 1993 RECUEIL DES SENTENCES DU TAS [DIGEST OF COURT OF ARBITRATION FOR SPORT AWARDS] (1986–1998), at 561.

<sup>144</sup> *Id.* at 563.

<sup>145</sup> *Id.* at 564.

<sup>146</sup> See *id.* at 569–70.

<sup>147</sup> See *id.*

<sup>148</sup> *Id.*

<sup>149</sup> *History of the CAS*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/en/infogenerales.asp/4-3-236-1011-4-1-1/5-0-1011-3-0-0/> (last visited Nov. 2, 2010).

Following this criticism of the relationship between the CAS and IOC, the CAS made changes to its constitution with the aim of remedying the obiter comments of the SFT.<sup>150</sup>

It was not until May 2003 that the issue of the impartiality of the CAS was examined in detail by the SFT and these changes were tested.<sup>151</sup> The case involved two Russian cross-country skiers<sup>152</sup> who finished first and second, respectively, in the five-kilometer pursuit event at the 2002 Winter Olympics.<sup>153</sup> Although they passed their doping tests immediately after the event, both subsequently failed a later test following another cross-country event at the same Olympic Games.<sup>154</sup> The athlete who finished third in the pursuit event appealed to CAS and was awarded the gold medal.<sup>155</sup> The Russian skiers took their case to the SFT, and the SFT proceeded to dissect the relationship between the IOC and the CAS and examine the impartiality of the CAS, concluding that the CAS was not

the vassal of the IOC . . . .

. . . .

. . . There appears to be no viable alternative to this institution, which can resolve international sports-related disputes quickly and inexpensively. Certainly, the plaintiffs have not suggested one. The CAS, with its current structure, can undoubtedly be improved. . . . Having gradually built up the trust of the sporting world, this institution[,] which is now widely [recognized] and which will soon celebrate its twentieth birthday, remains one of the principal mainstays of [organized] sport.<sup>156</sup>

The merit of Pechstein's impartiality claim seemed questionable and it was almost doomed before it started. As was made clear by the SFT, a basic principle of Swiss Law is good faith, which naturally applies to arbitration awards before the CAS and appealed to the SFT.<sup>157</sup> All the CAS awards and SFT rulings are based on Swiss contract law, which has the requirement of good faith as one of its guiding principles.

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<sup>150</sup> See Tribunal fédéral [TF] [Federal Tribunal] May 27, 2003, 4P\_267-70/2002, ¶ 3.3.1. (Switz.).

<sup>151</sup> See generally *id.*

<sup>152</sup> Olga Danilova and Larissa Lazutina

<sup>153</sup> See Tribunal fédéral, 4P\_267-70/2002, ¶ 2.2.

<sup>154</sup> *Id.* at A.b.

<sup>155</sup> This was the first time an Olympic gold medal had changed hands following a decision by the CAS.

<sup>156</sup> Tribunal fédéral, 4P\_267-70/2002, ¶ 3.3.3.3.

<sup>157</sup> See SWISS RULES OF INTERNATIONAL ARBITRATION § III, art. 15(6) (2006).

The duty to act in good faith is a universally [recognized] principle of law that applies also in the framework of arbitral proceedings and is part of both substantive and procedural public policy . . . . The bona fides principle encompasses the duty to act in good faith and the prohibition of abuse of rights . . . . The duty to act in accordance with the requirements of good faith applies to both the arbitral tribunal and the parties . . . .<sup>158</sup>

These rules can be excluded of course by agreement of the parties, and, further, if they wish to object to non-compliance with those rules, then they must do so immediately “otherwise they shall be deemed to have waived their right to object.”<sup>159</sup> The fact that Pechstein failed to raise the issue of lack of impartiality at the time the CAS heard her case proved to have serious consequences for her appeal. The SFT commented:

The Appellant herself appealed to the CAS and signed the Procedural Order of September 29, 2009 without raising objections with respect to independence or impartiality. Under these circumstances it is not compatible with the principle of good faith to raise the issue of impartiality of the Arbitral Tribunal applied for the first time before the [Swiss] Federal Tribunal in the framework of an appeal. The grievance of lack of independence of the arbitral tribunal asserted by the Appellant is therefore not capable of appeal. . . . [H]er submissions of a general nature do not give rise to reasonable doubts as to the independence of the CAS. The grievance of lack of independence of the CAS would thus be unsubstantiated anyway.<sup>160</sup>

Pechstein also tried to suggest that the President of the Arbitral Tribunal was partial, seemingly basing her accusation on a comment that he made in 2007 suggesting his “hard line on doping issues,” his close ties with the IOC, and its prominence in sports governance in Italy.<sup>161</sup> Once more, these concerns were given short shrift by the SFT, as they were dismissed on the grounds of being too vague and lacking connection to the case at hand.<sup>162</sup>

The SFT raised an interesting point in relation to the CAS’ refusal to allow Pechstein’s manager to attend the hearing. Although, the SFT confirmed the CAS Rule Article R44.2, which held that “[u]nless the parties agree otherwise, the hearings are not

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<sup>158</sup> TOBIAS ZUBERBÜHLER ET AL. (Eds.), SWISS RULES OF INTERNATIONAL ARBITRATION: COMMENTARY 149 (2005) (citations omitted).

<sup>159</sup> *Id.* at 149–50.

<sup>160</sup> Tribunal fédéral, 4A\_612/2009, ¶¶ 3.1.2–3.1.3.

<sup>161</sup> *Id.* ¶ 3.2.

<sup>162</sup> *Id.*

public,”<sup>163</sup> and that Pechstein failed to demonstrate to what extent Swiss Law governing international arbitration enabled such proceedings to take place in public,<sup>164</sup> the SFT nevertheless had some unease about this issue, suggesting that where the athlete requests it, such hearings should be held in public. Specifically, the SFT stated,

Be this as it may, in view of the outstanding significance of the CAS in the field of sport, it would be desirable for a public hearing to be held on request by the athlete concerned with a view to the trust in the independence and fairness of the decision making process.<sup>165</sup>

It will be interesting to see whether the CAS introduces such a provision into its code, in much the same way that it moved to accommodate the implied criticisms made of its relationship with the IOC in *Gundel*.<sup>166</sup>

In comprehensively dismissing the appeal, the SFT reiterated the very clear lines with regard to public policy,<sup>167</sup> which Pechstein had suggested had been violated by the award against her.

The material adjudication of a dispute violates public policy only when it ignores some fundamental legal principles and is therefore plainly inconsistent with the fundamental, widely recognized system of values, which according to the prevailing opinions in Switzerland, should be the basis of any legal order. Among such principles are: the fidelity to contracts (*pacta sunt servanda*), the prohibition of abuse of rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of incapables.<sup>168</sup>

Although these particular principles, upon which the central pillars of Swiss Law are founded, are perhaps fairly obvious, the notion of public policy detailed in the Swiss Private International Law Act<sup>169</sup> (PILA) is clearly capable of wider interpretation. Pechstein suggested that one such interpretation should include the notion of human dignity and that

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<sup>163</sup> CAS CODE R44.2.

<sup>164</sup> Tribunal fédéral, 4A\_612/2009, ¶ 4.1.

<sup>165</sup> *Id.*

<sup>166</sup> See *Gundel*, 1 DIGEST OF COURT OF ARBITRATION FOR SPORT AWARDS at 569–70.

<sup>167</sup> An award will be deemed to be against public policy if it disregards certain principles in both the considerations and also in the findings of the award. Tribunal fédéral, 4A\_612/2009, ¶ 6.1.

<sup>168</sup> *Id.*

<sup>169</sup> See LOI FÉDÉRAL SUR LE DROIT INTERNATIONAL PRIVÉ, art. 190(e).

submitting her samples to a veterinarian violated her own human dignity,<sup>170</sup> essentially treating her as an animal, and, therefore, the interpretation should be deemed to be against public policy which should, according to Article 190(e) of PILA, annul the award.<sup>171</sup> The SFT, in rejecting Pechstein's submission, pointed out the weakness in her very narrow interpretation of the realities of expert scientific testimony. "The fact that the principle of human dignity would prohibit a university based scientist, who is *inter alia* a qualified veterinarian, from acting as an expert in the framework of doping proceedings is not demonstrated."<sup>172</sup>

Had the SFT accepted Pechstein's appeal on this point, then taken to its logical, albeit extended conclusion, there would appear to have been a real danger that the utility of scientific evidence produced before tribunals and the analysis of samples in the first place would be severely compromised, with only scientists with a very narrow range of expertise authorized to examine samples. It is clear from the SFT that the pedigree of the scientist is irrelevant as long as the scientist has relevant expertise.

In roundly rejecting Pechstein's appeal the SFT concluded that

she makes criticisms of an appellate nature of the award and presents her own views of the facts . . . . [S]he refers to numerous findings by the CAS as arbitrary, contradictory, incorrect or contrary to the file, but does not demonstrate to what extent it was impossible for her as a result to put forward and prove her point . . . in the proceedings. She merely claims sweepingly at various points a violation of the principle of the right to be heard or of public policy without meeting the statutory requirements for reasons.<sup>173</sup>

### *C. Request to the Swiss Federal Tribunal for Revision*<sup>174</sup>

In a request for revision dated March 4, 2010, Pechstein submitted to the SFT that it should annul the previous award of the CAS and send the matter back to the CAS for a new

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<sup>170</sup> Tribunal fédéral, 4A\_612/2009, ¶ 6.5; BUNDESVERFASSUNG [BV] [CONSTITUTION] Feb. 8, 2011, art. 7 (Switz), available at [http://www.servat.unibe.ch/icl/sz00000\\_.html](http://www.servat.unibe.ch/icl/sz00000_.html).

<sup>171</sup> LOI FÉDÉRAL SUR LE DROIT INTERNATIONAL PRIVÉ, art. 190(e).

<sup>172</sup> Tribunal fédéral, 4A\_612/2009, ¶ 6.5.

<sup>173</sup> *Id.* ¶ 6.6 (citation omitted).

<sup>174</sup> See generally Tribunal fédéral [TF] [Federal Tribunal] Sept. 28, 2010, 4A\_144/2010 (Switz.).

award.<sup>175</sup> Concerning the role of revision by the SFT in international arbitration awards, the SFT commented:

The Federal Private International Law of December 18, 1997 contains no provisions as to the revision of arbitral awards within the meaning of Art 176 ff PILA. According to case law of the Federal Tribunal, which filled the lacuna, the parties to an international arbitration have the extraordinary legal recourse of revision available, for which the Federal tribunal has jurisdiction. If the Federal Tribunal upholds a request it does not decide the matter itself but sends it back to the arbitral tribunal that decided it or to a new arbitral tribunal to be constituted.<sup>176</sup>

The grounds for revision are very restrictive:

[R]evision may be sought when the petitioner subsequently discovers significant facts or decisive evidence which he could not adduce in the previous proceedings to the exclusion of facts and evidence which emerged only after the award. The new facts must be significant, *i.e.*, they must be suitable to change the factual basis of the award so that an accurate legal evaluation could lead to another decision. . . . Should the new evidence prove factual allegations already made previously, the petitioner must show that he could not bring the evidence in the earlier proceedings.<sup>177</sup>

The SFT was scathing of Pechstein's request for revision, pointing out that she brought no new evidence forward and instead relied on evidence that dealt extensively with the original CAS award, namely with the issue of her hereditary spherocytosis, the inherited disorder that she alleged caused the anomalies in her blood parameters, which eventually led to her two-year ban.<sup>178</sup> Further, the SFT made it clear that Pechstein failed to cross the substantial threshold of demonstrating exactly why she had been unable to previously bring this evidence.<sup>179</sup> It dismissed her allegations as vague, relying on scientifically unsubstantiated methods over and above a more established analysis.<sup>180</sup> Based on such damning criticism, it is hardly surprising that the application for revision was rejected, with the SFT concluding,

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<sup>175</sup> *Id.* ¶ C.

<sup>176</sup> *Id.* ¶ 2.

<sup>177</sup> *Id.* ¶ 2.1.2.

<sup>178</sup> *Id.* ¶ 2.3.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

The Petitioner’s arguments in this respect merely seek a new assessment of the evidence. Yet there is no ground for revision simply because the Arbitral Tribunal would have wrongly assessed some facts already known in the arbitral proceedings. . . . The request for revision is to be rejected to the extent that the matter is capable of revision.<sup>181</sup>

#### IV. CONCLUSION

It seems that the biological passport has arrived to add a considerable weapon to the armory of the anti-doping industry. It has received welcome backing from both the CAS and the SFT and appears to be firmly established to now sit alongside those other pillars of anti-doping control, such as the principle of strict liability, the whereabouts rule, WADA’s Anti-Doping Administration and Management System, and non-analytical positives. What this development does for the first time, though, is to give the hint of a new dawn in anti-doping control. The biological passport raises the possibility of shifting the emphasis away from the doping athlete and instead toward prioritizing the “clean” athlete.

Up to this point in time—quite naturally and due to the limitations imposed by the culture of testing, subsequent failed tests, and consequent bans—the emphasis throughout sports has usually been on exposing athletes who are cheating. It is without a doubt that the biological passport will continue to do this. Although it is also the case that, periodically, participants have been caught up unwittingly in the system following either the unknowing or blameless ingestion of a banned substance, and it is the possible injustices created by this problem and the accompanying principle of strict liability that Article 10.5 (exceptional circumstances) of the Code sought to ameliorate. However, the use of non-analytical positives highlighted throughout the BALCO scandal began to shift the emphasis away from the simple equation of failed test plus strict liability equals guilt and a ban. For the first time, we had the notion of guilt without the failure of a test or indeed the manipulation of a doping sample. What the passport does is raise the possibility of athletes being able to demonstrate

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<sup>181</sup> *Id.* ¶¶ 2.4, 3.

their innocence rather than having to disprove their guilt through the production of a passport, which contains a profile that is indisputably consistent with a non-doping athlete. Possession of a clean and unblemished passport may come to be viewed as the gateway into sporting events, as opposed to the current regime, which seeks to exclude athletes from such events in the shape of bans following positive tests. If this shift in emphasis can lead to a consequent change in culture and attitude, then the impact of the passport may be felt far beyond the simple notion of making it harder to cheat in sports.